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PREVENTING POA ABUSES

Risha Gotlieb / October 15, 2012

When presented with a POA document, Harold Geller, a civil litigator with Ottawa-based Doucet McBride LLP, says advisors should focus on a few basics.

"These include taking steps to verify its validity and that it complies with minimum requirements of provincial POA legislation, and ensuring that the person presenting it is who they say they are."

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There is still no specific law or industry rule requiring advisors perform this rudimentary investigation.

And, Geller says, advisors should be doing more, including maintaining detailed records of all client interactions with clients, and taking steps to verify their client's incompetency.

"Advisors should always stand their ground on behalf of their clients' best interests," he adds.

Rona Birenbaum, a CFP with Caring for Clients in Toronto, says when someone presents her with a POA, she tries to reach the client. If she can't, she asks the designated POA to provide written instructions from the client, or request confirmation from a physician or lawyer saying the client is legally incapable of managing his or her own property.

It's important to plan for incapacity, and advisable to broach the topic early so it becomes a dialogue about life and choices, rather than death and old age. If you wait until a client shows signs of diminished capacities, he might not be legally capable of drafting a POA.

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Lynne Butler, senior will and estate planner at Scotia Private Client Group, says it's essential to use a customized POA and not rely on boilerplate versions available on provincial web sites or through lawyers.

These custom versions should include checks and balances such as:

- naming more than one person as the POA;
- including a clause specifying financial statements be periodically sent to the client's accountant or lawyer for review and to ensure the attorney lives up to his duties; and
- limiting the attorney's ability to make gifts or changes to interest in the grantor's property.

Butler suggests two additional safeguards: "The person you've named as your POA should not have the power to activate your POA document; nor should he or she have the power to ask for a capacity assessment."

Rather, the client should specify two doctors to evaluate his mental capacity. This can prevent an opportunistic POA from influencing the outcome of that assessment.

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Sue Foley, a CFP and retirement specialist with Hartry Foley Financial, Ltd. in Oakville, Ont., says she often spots the signs of dementia before her clients' own kids do.

"I get a pretty good indication that my client is struggling by inconsistencies in how they handle their paperwork," she says.

Foley says a good means of tracking mental competence is having older clients to fill out a questionnaire every six months, or once a year prior to review meetings.

Comparing answers with previous questionnaires can reveal tell-tale signs, such as whether they know what assets they own; their telephone numbers; and the names and birth dates of their children.

There are virtually no limits as to what can be added to a POA document. It can even name a financial advisor and state he or she must remain as the advisor of record in the event a client is deemed mentally incompetent.

And, it can give the right to choose a succeeding advisor—in the event of illness or death—to an accountant or lawyer, rather than to a family member who might engage in abuse.

Butler says her clients love this clause, because it gives them control in knowing someone will be watching their assets.

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Without such a stipulation, nothing prevents a rogue POA—or a foolish one—from walking into your office, firing you and taking the portfolio to an advisor who's never had a relationship with the client and is unsure to whom he owes his fiduciary duty.

"How are mom and dad's wishes being honored if at the moment they can't speak for themselves, their adult child acting as POA fires advisors who have been serving them for years if not decades and with whom they've developed a personal bond?" asks Dan McCormick, a retired CPCA and CFP, formerly with Investors Group. The protection, he adds, forces POAs to act honorably and carry through on their parents' wishes.

This professional-continuation clause could also easily pertain to the client's other professionals, including accountants, lawyers, family doctors, and even realtors.

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Alan Atkins, a CFP and CPCA, president of NetWealth Consulting in Barrie, Ont., suggests asking clients for written permission to communicate with these other professionals.

Individually, these service providers are only exposed to a piece of the overall financial abuse puzzle, he says. But working together, they could challenge the suspected abuser, or inform the authorities or other family members. Having the clause in the POA, he adds, can prevent abusive family members from invoking privacy laws and staunching the information flow.

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