
Planning in the Time of Covid

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When was the last time you had a conversation about incapacity docs that was startling? Marty Shenkman's keynote address at the NAEPC conference this week was just that. Mr. Shenkman is an attorney practicing in New Jersey and New York. Here is a summary of the issues that need to be addressed with clients regarding their incapacity documents:

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Which Clients Would Benefit from a Review?

- All Clients. Clients who have elderly parents, adult children, or friends or relatives that may need immediate advice, whether you assist them yourself or merely encourage them to contact their lawyer
- College-age children (legally adults) should have at least a health care proxy and power of attorney

Power of Attorney

- Having a POA in place now is particularly important so that the agent can transact business for a client who might fall ill to Covid, or merely to help a well client avoid unnecessarily having to go to a bank or other business location.
- If your client has existing documents, they should review:
 - Who they named as agent and successor agent. Are they still the people they rely on? Does the agent know they have been named? Are they close geographically?
 - How old is the document? Will banks or others be concerned about its validity?
 - What gift provisions are provided for? Is it limited to the annual exemption amount, or is there additional flexibility?
 - Does the agent have authority to change beneficiary designations, and able to deal with decision making post Secure-Act?

- What forms of communication are allowed? Consider updating to permit the agent to communicate via email, electronically sign documents, perhaps even Skype, Facetime, and similar services.
 - You may also wish to hold banks and other third parties harmless for relying on such electronic communications
- Does the client have a POA with "springing" powers that are effective only if the client becomes incapacitated and cannot manage their affairs?
 - If so, the agent cannot act until the client is disabled, which might make the form useless in the current environment
 - During a pandemic, can you get access to the medical professionals who will certify that the client is disabled so that the agent can act? Will they be willing to do that without examining the client in person?

Living Wills/DNRs

- Do these document reflect the client's current wishes?
 - Who have they named as agent and successor agent? Are they still the people they can rely on? Does the agent know they have been named? Are they geographically close?
 - Have the client's religious considerations been addressed? Have funeral and burial decisions been communicated? Do they reflect what the client currently wishes?
- ***DO THE DOCUMENTS EXPRESSLY PROHIBIT INTUBATION?***
 - For Covid, intubation may be necessary for the client to survive a bout with the virus.
 - Many standard documents and forms include an absolute prohibition of intubation
 - The client may wish to distinguish treatment for Covid and similar conditions from being in a persistent vegetative state or terminally ill with a short time to live.
- ***DO THE DOCUMENTS EXPRESSLY PROHIBIT EXPERIMENTAL MEDICAL TREATMENTS?***
 - Covid treatments include Remdesivir, which is still considered an experimental treatment.

Health Care Proxies and HIPAA Releases

- The Health Care Proxy or medical Power of Attorney allows the person to name an agent to assist if the client is unable to act for themselves. The agent is designated to make medical decisions.
- The HIPAA release authorizes a named agent to access private health information and communicate with medical providers, but not make medical decisions for the client.
- Be certain that the person named as agent and successor agent is able and willing to assist. Being geographically close may be important.
- Typically documents suggest that the agent should be in the hospital when making medical decisions, and signing documents.
 - Consider modifying documents to expressly authorize electronic communication of decisions by the agent:

- Sample Clause: ***“I expressly authorize my Agent to communicate decisions to any medical provider verbally, in person, by telephone, via email, via web conference including but not limited such services as Skype, FaceTime, or in any other manner appropriate to the circumstances. Further, I expressly hold harmless any medical provider for relying on such communications of decisions and directions by my Agent. The express purpose of this provision is to foster decision making by my Agent in remote or indirect manners that may be necessary or advisable given whatever circumstances accompany such decision making.”***

Why is This Important?

- What will happen if your client is hospitalized and the medical facility has to make decisions about which patients get treatment?
 - Review the language in existing health care documents generally. Too often documents are signed when clients view issues as theoretical and do not put a lot of thought into it.
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