THE BANKER'S MANUAL

How not to accept a power of attorney.

BY MICHAEL WALD

If you practice on your own or in a small firm, the last thing you need is to be fighting against a major investment company. You thought you had taken the proper steps with your client to avoid this. He insisted that all he needed was a "simple" estate plan. With that you included a standard statutory power of attorney. You know—the one set forth by Texas statute. Now, your client has had a fall and is in the rehabilitation center, unable to write or talk. But when the person who wants to act under the power of attorney goes to use it, no institution will accept it. What's up with that? The agent under the power of attorney is calling you. "Fix it!" she demands. And she isn't even your client.

Under Texas law, there is no requirement that any financial institution accept your power of attorney. In fact, many of them won't. The way they see it, they only buy a risk by accepting a power of attorney that may not be valid. Refusing to accept it carries no liability. This is especially true for larger financial institutions located out of state.

Here, we provide some information on what to expect and how to play defense against a banker's secret manual.

Rule 1. We accept only originals. This is an easy enough excuse for the financial institution not to accept the power of attorney. It both saves face and allows the financial institution to not look like the bad guy. Of course, when your client fell, he didn't have his power of attorney with him. He had placed it in a safe spot in his home. You can't get into the home because you don't have a key. And even if you did, you don't have any idea where the original might be.

Rule 2. Our policy is that we don't accept powers of attorney. Almost as easy as Rule 1. The bank doesn't look too bad having this across-the-board rule. It's nothing against you personally. They just don't do it.

Rule 3. You have to use our form. With this policy, even if the bank was inclined to accept your power of attorney, it has to have been done on the institution's form. Of course, with people having many accounts, this isn't exactly practical.

Rule 4. How do we know that's what the client wanted? Your client is their client. But, really, your client could have had a change of heart. Maybe the financial institution is right. The client may not want the agent to act in that capacity anymore. It is best to know your banker. Sit down with him or her long beforehand. Bring the agent along. Introduce the banker to the agent sitting next to you. Tell him or her you want that person to be able to act for you. Maybe the banker will make a note in the computer to help later. Chances are the banker won't be at the bank then, of course. But the banker should alert you at that time if there is a rule that could be an obstacle later on.

Rule 5. Staleness. "It's too old!" the banker could exclaim. Financial institutions won't generally accept a power of attorney that is presented long after it is signed. I call that staleness. Usually the time period is about two to three years. So you have to periodically re-state the power of attorney. Of course, your client will think you're just trying to make a buck when, in reality, you just want to save the client's agent a lot of grief down the road.

Rule 6. Recency. Here, a banker may also proclaim with excitement, "It's too new!"—a corollary to Rule 5. Just like the banker likely rejects a stale power of attorney, the banker is unlikely to accept one that is too fresh. The banker will think, *Why are you coming in here the day after you were appointed as agent to take money out of the principal's account?* Attorneys: if you re-state a power of attorney, leave the old one in place as well.

Rule 7. How do we know the principal is incapacitated? Most powers of attorney done by unknowing general practice attorneys and, often, ones done by clients themselves, as well as the forms that can be purchased from office supply stores, have the option to become effective only upon incapacity. This is what the client generally wants. Usually these forms say that incapacity occurs when two doctors certify in writing that the principal is incapacitated. In fact, that is what the statutory language provides.

There is a huge problem with this. Certainly, it is hard enough to get a common doctor's appointment today. Now add the urgency of the fact that your client is in the hospital, and you need a specialist in gerontology or psychiatry. The doctor will have to go to an out-of-office appointment. The doctor will have to write up his or her notes, and fast. Adding insult to injury, even if you get the doctor to go, the doctor will have to be in agreement with another doctor about the situation, a not too easily filled prescription.

Even though the statutory form allows the power to "spring" into effect upon incapacity, it is a terrible idea to use the two-doctor approach as the test of incapacity. I can't really think of a good alternative. If the agent is going to rob you, let the agent do it under your watchful eyes while you still have capacity to change your designation of agent. Otherwise, if the agent acts after your incapacity, you'll be in a position of saying you aren't incapacitated; and if you lose that argument, you'll also lose the ability to make any changes.

Rule 8. Stall. If all else fails, a banker may stall.

A good workaround for all these problems would have been a living trust instead of a will and power of attorney. That way, the trustee shouldn't face any challenge to his or her power to act. If the bank opens the trust account, it really isn't going to be in a position to deny access to it by anyone named as trustee. It's a strong argument for properly drafted living trusts, which will stop the bank in its tracks—even for "simple" estates. TBJ

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