

From the June 2009 edition of Caring Times, NATALIE KAPLAN: THE LEGAL EAGLE ON OUR CARING COLLABORATIVE TEAM, answers questions on being prepared, health care proxies, health care power of attorney, and more.

Natalie Kaplan is a member of the Caring Collaborative Steering Committee and a founding member and fellow of the National Academy of Elder Law Attorneys. She is also a founder of Elder Law on Wheels and a former Adjunct Professor of Elder Law at New York Law School. She has a private practice in Westchester and New York City, where she kindly lends her midtown conference room for Caring Collaborative meetings.

Today, Natalie answers our questions to help Caring Collaborative members become prepared. She wants us to avoid the pitfalls that can come from lack of planning - particularly if we become incapacitated.

Q: What should women aged 50 or 60 - or more - be doing right now about their medical-legal affairs?

Natalie: Everyone 18 or over should have a Health Care Proxy. The Proxy is used to appoint a Health Care Agent - and, if possible, an alternate Agent - who can make medical decisions for a person who is unable to make them herself. Medical people will look to an Agent only if a person is unconscious or otherwise incompetent when a medical decision is needed. Treatment questions arise: Should they operate? Should they use feeding tubes? Should they withdraw a respirator? The Proxy document is not only for older people because anyone can be hit by a flying brick or caught in a car crash.

Any adult can name a Health Care Agent. Everyone is presumed competent. There's no law that says how alert or how competent a person has to be to sign a Health Care Proxy. I recommend using the New York State Department of Health form because it is familiar to all hospital personnel and is widely accepted without having to be reviewed by legal counsel.

[You can access this form, with accompanying instructions, FAQs and related information here.](#)

Q: How does it work?

Natalie: It says, "I, Natalie Kaplan, appoint Mary Jones to be my Health Care Agent." Other details, like address and telephone numbers are needed and it requires the signatures of two witnesses who affirm that the person wasn't coerced into signing.

Most Health Care Proxies now have a place that indicates that the Agent knows the person's wishes concerning artificial nutrition and hydration, that is, tube

feeding. This is important because New York requires an Agent to know - or be able to ascertain - the patient's wishes concerning tube feeding, in order to make decisions about its use. For all other medical decisions, the standard Health Care Proxy form is sufficient.

After a Health Care Proxy is signed, however, it's important to talk to your Agent so she knows your personal wishes, how you feel about quality of life issues. What makes life meaningful for you - and what doesn't. The Agent should know, for example, that being able to relate to relatives and friends is the most important thing to a person and even if she has to be wheelchair bound, she wants to live like that. For another person, the ability to walk makes life worth living and a wheelchair existence would be intolerable. An Agent would know that if a grandchild is going to be married the day after the person has a stroke, maybe the person *does* want to be resuscitated. And so on. Many people avoid talking to their Agents because it's hard to have a conversation like this. So their Agents aren't even aware of their preferences.

Q: Shouldn't we also indicate our wishes on one of those forms that says, I want this, I don't want that?

Natalie: The document that indicates specific wishes is usually called a "Living Will." Sometimes those kinds of wishes are included in Health Care Proxies, but I recommend against it. Specific directions in Proxies or in Living Wills, can cause problems. For example, they can be interpreted to limit an Agent's power if there's the slightest inconsistency between the written word and the Agent's directions, under evolving medical conditions.

For instance, say a person puts this standard sentence in a Living Will: "If I am terminally ill, with no hope of recovery, I wish to refuse all medical treatment." Then the patient becomes terminally ill and develops pneumonia, which would allow her a peaceful death. But because there is "hope of recovery" from pneumonia, the Living Will requires her to be treated. So she's given antibiotics and recovers, to face again her agonizing terminal condition. By contrast, without the rigid language of the Living Will, an Agent could authorize the withholding of the antibiotics and allow her to die.

I recommend a Living Will only to clients who have no Agent to appoint, or whose Agents may die before them. I use it in conjunction with a values questionnaire that people can leave with their doctors. It is designed to elicit feelings about a variety of medical situations. A document called "Five Wishes" is extremely useful in helping people - using Living Wills or not - to determine what their medical treatment wishes would be under various conditions of deterioration that they are unlikely to think up on their own. It's worth looking at and can be found at www.agingwithdignity.org.

Q: What is a Health Care Power of Attorney?

Natalie: That's the name used in other states for documents like our Health Care Proxy. New York law says no Health Care Agent may be appointed by a Power of Attorney form. New York will, however, recognize a properly signed Health Care Power of Attorney from a state that uses them.

Q: Why would someone have a Power of Attorney?

Natalie: A regular Durable Power of Attorney is a document that empowers an Agent to conduct business and financial transactions for another person, who could be incapacitated or merely unavailable. Powers of Attorney are used all the time for title closings when the buyer or seller can't be present. For a patient in a hospital, it can be invaluable to have someone who has the authority to withdraw money from the bank, pay rent, or sign a new lease. The Power of Attorney is a powerful document though, and should only be given to someone who's trustworthy.

The New York State Power of Attorney form is changing as of September 1, 2009. It's been modified from a 4-page form that lay people can figure out, to a 6-page form that virtually requires a lawyer. Those with signed forms of the old version will be entitled to have them honored, if they were signed before September 1, 2009. You can Google a New York State Power of Attorney form. Use *only* that form if you live in New York State.

Q: Suppose you want to have a Power of Attorney available, but you don't want to give it to the person right now. Could you sign one and put it in a drawer?

Natalie: Yes. Most Powers of Attorney become effective immediately upon signing, but it doesn't have to be given to your Agent. You can retain it and release it only when you want it to be used. Your agent should know where it is kept, however, and have access to it in case of emergency. It becomes void upon death.

Q: What are some possible legal pitfalls for our members to avoid?

- Don't take legal advice from lay people, which includes people in other professions. Lay people with partial understanding of the law offer free legal advice, often with great certainty. They are often wrong and their advice leads people to agonize unnecessarily and to forgo benefits they would otherwise receive. I can't tell you how often I've heard of people being incorrectly told that they can't get Medicaid because they own their home, or because their income is too high. Medicaid is particularly complex and rules vary widely from state to state. New York, for example,

allows Medicaid recipients to retain \$13,800. Many other states allow only \$2,000.

- Don't sign anything when you're overcome by emotion, as at the time of a relative's death or at the time of a frightening medical diagnosis. These are the times when concentration, attentiveness to detail and recognition of implications are lowest and distraction is highest. No one can fault a person who says, "I need some time to think about this."
- Don't sign medical papers you don't understand. Getting an informed consent to a medical procedure requires the person performing the procedure to explain, *in language the patient can understand*, the procedure, the risks, the benefits and the alternatives to the procedure. Sometimes it takes nerve to ask questions or to say no. Fight the urge to go along with "Anything you say, Doc." Instead, recognize that you are entitled to be treated as an adult and to understand your own treatment.
- If you are being treated improperly, report it to an oversight authority. If an insurance company is giving you weak excuses for refusing your claims, or if they are denying you a policy for which you are eligible, call the New York State Department of Insurance or the Attorney General's Consumer Complaint Bureau. Don't just give up and overlook it. Keep in mind that others may also be improperly treated.
- For long-distance care of elderly relatives, hire a local geriatric care manager. Local geriatric care managers can coordinate and supervise the care of a patient far distant from the responsible relative. They have banks of resources unknown to most lay people, and experience with Medicare and Medicaid. They can be invaluable.