

Speaker 1: [\(00:03\)](#)

Welcome to the Vandenack Weaver legal visionaries podcast brought to you by interactive legal here's your host Mary Vandenack

Speaker 2: [\(00:12\)](#)

Welcome to today's episode of Vandenack Weaver, legal visionaries, a weekly podcast discussing updated legal news, evolving methods of providing legal service and law practice issues. My name is Mary Vandenack founder and managing partner at Vandenack Weaver, LLC. I'll be your host. As we talk to experts from around the country about closely held business tax trusts and estates, legal technology, law firm, leadership, and wellbeing. Before we start today's episode, I want to thank our sponsor. Here's the message from interactive legal.

Speaker 3: [\(00:51\)](#)

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Speaker 2: [\(01:40\)](#)

On today's episode. I have Rachel Truhlsen. Rachel is the founder of Truhlsen elder law and life care planning services. I don't know if I have the name right, but you can correct me on that. Rachel, and then Emily Patterson, who's an elder law and estate planning attorney with Vandenack Weaver today. We're going to talk about the importance of planning for incapacity. Thanks for being here today, Rachel. Yeah, thanks for inviting me and thanks to you as well. I want to kind of want to start today. Emily, maybe you can explain just generally, what are we talking about when we say incapacity planning?

Speaker 4: [\(02:18\)](#)

So incapacity planning is important because it comes up when somebody is at a stage in life when they may or may not be able to make decisions regarding their medical and financial affairs, um, that can be a temporary moment of incapacity or it can be permanent. And really the focus on that in elder law specifically in estate planning generally is just, what do we do when that comes up? How do we manage those situations?

Speaker 2: [\(02:42\)](#)

So what are the practical aspects, Rachel of incapacity planning? What are the, what are we thinking about having done? Right. Well, when

Speaker 4: [\(02:50\)](#)

With a client who has, has beginning to have some incapacity issues, um, and most of the time, of course, they're in their own home. Um, and we want to try to put a plan

Speaker 5: [\(02:59\)](#)

Together. That's gonna make them successful, um, staying at home for as long as possible. And if that is a, process then of putting a plan in place for how they get their bills paid, who's going to do the grocery shopping for them. How are they going to get to medical appointments? Do they need to have someone go with them to the medical appointments? Um, because oftentimes then there's a lot of information at a medical appointment information that's being shared that the patient may not even understand. Um, and the patient may not even be able to provide accurate information to the doctor. So, it's important that there's someone there that can be the communication there. Um, so just really keeping them at home, whether it's plugging in resources, outside the home for helping them with, like I said, the groceries, the housekeeping, even yard work anything that could help them just be successful within their home.

Speaker 2: [\(03:55\)](#)

And that's what I've recently had a real life situation in my practice. And you deal with a lot more of them probably than I do, because you have a very elder law focus practice. I think that the, you know, I had to mom and dad both became incapacitated at the same time and it's like, oh, okay. How do you get the bills paid? How do you get the groceries delivered? How, how does any of that happen? And I think sometimes people think in capacity planning is just a matter of legal documents. When what you're saying is there's practical aspects. So, you talk to those with you talk about those with clients as you're doing the documents, right? I think that's one of the things that stands out. I think sometimes people come in and they're trying to keep the cost down and it's like, we're going to keep the fellow on the power of attorney. And we didn't really have the conversations about these things that, that matter.

Speaker 5: [\(04:42\)](#)

I do that because that's one of the, we want to identify what their goals are. So, when the family comes in, one of the first things that we do is identify what their concerns are. So, what are they seeing within the family? What are they seeing within that home with what's going on with mom and dad? So, what, what brought them to the office? There was some concern. So that's the different avenue of the life care planning side of it. It's not just putting together the legal documents. It's how do we identify what the concerns are? And then how do we address those and what are the worries going forward? What worries do they have and how can we address those?

Speaker 2: [\(05:13\)](#)

And so that's where like the model you've evolved is takes life care planning, which is helping them plan for all these details along with what people think is traditional estate planning. And so, if you had to say from the estate planning sort of legal perspective, Emily, what is the difference between incapacity planning and estate planning? Is it a part of estate planning? How does that work?

Speaker 4: [\(05:37\)](#)

Yeah. Incapacity planning is a part of estate planning and a lot of times clients think that estate planning is just the distribution of your stuff. When you die, what happens to it? Who does it go to? But the, the issues that Rachel mentioned in terms of what happens if somebody is living, but they can't make those decisions for themselves and, and going to the grocery store or going to pay bills or manage their affairs,

then that's where that incapacity planning is very important. And it's, it's something that you focus on while your client is living still you know, it can become a sudden challenge when you've got those unforeseen health events that come up or maybe medical issues that you weren't planning for. So, having those documents in places of the utmost importance.

Speaker 2: [\(06:19\)](#)

So for looking at what legal documents do we actually need, what are the legal documents that are part of the incapacity planning process? Rachel?

Speaker 5: [\(06:28\)](#)

well, of course we want to make sure they have their power of attorney documents in place. And those look different as people age, I think because, um, as we start to age, um, we need authorities in our power of attorney documents that give people the right, their agents, the right to do Medicaid planning. so we must make sure that we have government benefit access in there. We want to make sure we have the power to change and update beneficiaries to change ownership on accounts, um, to do gifting. So, if we're going to do Medicaid planning, when we want to make sure those powers are in the documents. So, we've got our financial power of attorney documents, of course, any of our healthcare directive. So a healthcare power of attorney and then a living will directive, um, uh, will, if they don't have a will already, then we put one of those in place for them either update that if they already have one, um, if they have a trust in place, we want to make sure it's funded. I'm always still surprised 26 years after practicing law, how many people come into my office with trusts that aren't funded? so we want to make sure that the trusts are funded, um, titling, you know, just make sure those things are beneficiary, designations are updated and consistent with their estate plan.

Speaker 2: [\(07:35\)](#)

And I agree with you on the trust funding, I'm always surprised by the number of people who go to the trouble of creating a trust since, and that that's partly a difference among lawyers in the terms of the way they look at it. And I've come to respect that, but I'm an avid advocate of funding the trust and believe that if you really teach clients from the beginning, how to do that and give them the tools to make it easy, right? As opposed to trying to, you know, no attorney, in fact, who is often a family member wants to run around and fund a deal with funding, a trust and moving assets, when they're dealing with the incapacity of their clients, I'm dealing with that situation right now with somebody who has, you know, a very busy business of her own and a husband who's, you know, and all the issues with the pandemic and then the incapacitated parents and the assets being completely disorganized and nothing titled in the trust.

Speaker 2: [\(08:24\)](#)

So that's one of the examples I looked at recently. I go; yeah, therefore I believe in funding trust when you're, you know, 40 years old and healthy and starting the process of the estate planning. So, you know, Emily, a lot of times clients will think something like a healthcare power of attorney is just a template, right? And as a person who's done a lot of deathbed advocacy that document, and you know, how much time I spend going over our healthcare power of attorney document and during the pandemic, it was just, you know, I represented a lot of people, a lot of frontline workers and people in the medical system and went through the document line by line. And so, it's an important, you're really

creating a document that is dealing with what's going to happen. If you're one and people think it's only an end of life document, but the power of attorney for healthcare covers the moments when you can't make your own healthcare decisions. Even though you're not in a terminal condition, persistent vegetative state, right? So, what are the conversations that are important to have with clients about the health care power of attorney?

Speaker 4: [\(09:29\)](#)

It's interesting that you mentioned just being such an advocate for that because it changed dramatically on what people thought about healthcare powers of attorney. Once COVID came into full effect. I think that originally the documents were treated as important, but I don't think people focus nearly as much on what they meant. If they were in a situation where you're on a respirator or you come into the hospital and you're unresponsive. So that's been a conversation that's come up quite a bit more frequently with clients. Now, just talking about what would happen if you're in a situation where there's a medical scenario that you didn't plan on, what do you want to be the medical care, the treatment that you would anticipate in that situation? So, you can spell those things out in a healthcare power of attorney, which gives a lot more peace of mind for the client.

Speaker 4: [\(10:12\)](#)

But aside from those conversations, you always want to talk about who would be your agent, who do you trust to make those decisions for you? If you can no longer do that. Most of the time in the case of a married couple, they will name each other, but that's not always the case. I mean, you may have a marriage where one of the individuals is in a nursing home or they have diminished capacity. So, in that chat or in that opportunity, you use that to talk to the client about family members or children, or a trusted friend that they have. So that's incredibly important to just impose the nature of the document, but also knowing that the person that you name will be the one who makes those decisions for you.

Speaker 2: [\(10:52\)](#)

And recently we dealt with a client who literally has never been married, had no children has no siblings has no. And so, who does that person name as a power of attorney for health care? How do they get protection when they have some health issues

Speaker 4: [\(11:08\)](#)

When they don't have anybody that they can particularly name? I think there are services and particularly at Vandal Weaver where you can name, uh, an advisor or an entity that's been formed to serve as that power of attorney and that agent and advocate for the client. Um, that's becoming more, more common, but I think in the past, it wasn't nearly as much of an option for people. So, seeing those types of shifts in the opportunities and the availability of naming other individuals and advocates for a client has been really rewarding in that regard.

Speaker 2: [\(11:39\)](#)

And that's what I know that I've had several clients in those situations have actually acted as a power of attorney for health care only for long-term clients for my right, because you want to actually know them. It's one of the things that I talk about, but there's this other thing. And, um, Nebraska has some variation. I can't remember what it is, but a lot of states have a physician end of life sustaining order.

And I was recently helping somebody in Maryland and there, it's called a mole. So, it's a, uh, medical. Yeah. Right. And so, it has different names, but how is that different from the power of attorney? What does that do, how does it fit into this plan?

Speaker 4: [\(12:15\)](#)

So those physician orders for life sustaining treatment are important because those are documents that are created and signed off by a physician. They are, they collaborate with the client and the patient to decide what they would want to have happen with very specific medical orders in, in their healthcare decisions. Healthcare power of attorney is a little bit broader in that that vein because of healthcare, power of attorney just covers everything. So you are essentially stepping into the shoes of that client when you're acting on their behalf, but you get more specific with those physician orders for end of life treatment and for very specific medical treatments that, that the patient has weighed in on. And they've made clear directions on what they want to have happen.

Speaker 2: [\(13:01\)](#)

And a lot of times now knowing what they have versus if you're sitting in our office, you have no idea you're doing a healthcare power of attorney. You have no idea whether it's someday you might get cancer or get hit by a truck or what your condition might be. Exactly. What we found is the exact, what you exactly want to. And I, the COVID was a great example. In the example you gave earlier on, on, that was a good example. So, Rachel, I'm gonna transition to talking about financial powers and you've just got a little bit, is there anything you want to add on the healthcare directives before we switched back to financial powers of attorney?

Speaker 5: [\(13:35\)](#)

Well, I was just going to mention, you know, when, um, Emily was, was talking, the one thing I've learned after having a healthcare professional in the office, I never knew what a DNR really was. And so, I oftentimes, um, we'll get a client that says, I want to make sure that I have a DNR and I'm like, well, now I know that that's a doctor's order. And that isn't necessarily included in a health care power of attorney. It's an actual order from a doctor that must be included in the patient chart. And that's important for people to understand. So, the healthcare directive can name your power of attorney. It can give specific, which is with respect to your health care. But if you do want to DNR, you need to talk to your doctor about that and make sure it's noted in your patient chart.

Speaker 2: [\(14:18\)](#)

And what I do know about DNRs, this is actually the different levels of DNRs. And so, having worked with some clients, I was telling anybody who is acting as a power of attorney for health care. What makes here at the hospital in the hospitalist is rounding and discuss the status of that DNR. Cause it goes in the chart and it stays there. And what you want is to be part of discussions about, should that be updated as the condition changes. And I think that most of the physician end of life, sustaining orders do includes, you know, the specifics of that related to certain situations. We are going to take a brief break from our episode for a word from one of our sponsors, Carson, private client

Speaker 6: [\(14:59\)](#)

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Speaker 2: [\(15:59\)](#)

Let's continue our episode. Let's see, you talked about some of the powers you like to see in financial powers of attorney. I just want to back up for a second and say exactly what is a financial power of attorney. Okay.

Speaker 5: [\(16:14\)](#)

the financial power of attorney is a document where you appoint another person or persons to handle financial matters for you. Um, and it, a lot of times people will think that's taking authority away from them, but it's just giving someone else authority to handle affairs, um, consistent with the way they would want their friend affairs handled, but it doesn't take any power away from the person who's granting it. Um, and it gives people authority for, um, paying bills. So, banking transactions, filing tax returns, managing insurance, um, investment accounts, um, annuities, life insurance, all those different types of things, even real estate. So, if the house needed to be sold, um, then your agent could do that if necessary. So, it's important to have those in place and I had an unfortunate situation with a client in Iowa who didn't have any power of attorney documents set up for his wife who had dementia. And she had had dementia for quite some years, but they never did put these power of attorney documents in place. Um, and when he needed to take her to the hospital, the hospital wouldn't even give him information on her care because he didn't have any power of attorney documents in place for her. So, you end up with a guardianship or conservatorship action, which is a very, you know, difficult thing when you're already in a difficult situation and an unnecessary cost.

Speaker 2: [\(17:30\)](#)

And that's what I think a lot of people don't realize. They just assume they're the spouse. So, they're going to be able to advocate for, and don't need the power of attorney, but they do. So, there's two basic types of powers of attorney, the durable and the springing, right. Can you explain the difference between those two?

Speaker 5: [\(17:45\)](#)

Right? The durable power of attorney comes into effect as soon as it's signed. And those are the power of attorneys that I generally work with most of the time,

Speaker 2: [\(17:51\)](#)

Let's say that I make you my attorney, in fact, and I sign a power of attorney saying, you have banking powers. Can you go to my bank and write a check on my account today? Yes. Yeah. And I think that's important for people to understand that right when they need.

Speaker 5: [\(18:04\)](#)

And I don't minimize that when, when clients ask, they said, well, can my, my son go right away and access my backup bank account? I said, absolutely he can. And so, I, it's a very powerful document and I don't diminish that fact at all when I'm visiting with them. And I, and I tell them, I said, you're picking this person. I hope because you trust them to use this when it's necessary and to use it for your benefit. And you want to give them all the powers that they can to handle your affairs when it comes into play. Um, so I've had clients in the past picking and choosing the powers that they want in there. And I, and we don't like doing that. We want to give them all the power that they need to handle their affairs and pick someone you trust. And the springing power of attorney only comes into effect if there's an incapacity issue. So, if the client either activates the power of attorney, document him or herself, um, or a doctor's certification of the factor, a letter saying that they're in, uh, can't manage their affairs will actually activate that power of attorney.

Speaker 2: [\(19:01\)](#)

And so what's the disadvantage say of the springing power of attorney

Speaker 5: [\(19:05\)](#)

From my practice, I noticed that, um, banks don't like springing power of attorneys, financial institutions, um, because they're worried about liability as they would so I discouraged people from springing power of attorneys in my practice.

Speaker 2: [\(19:18\)](#)

So the attorney in fact, walks in with two letters from doctors saying, mom can't handle her financial affairs, the bank, and the financial institutions are worried about whether they have some requirement to verify that. I mean, that's something we've taught. And so, at the end of the day, a lot of times what we've seen with the springing power of attorney is that you end up having to go to the conservatorship, right? And so, people get uncomfortable with the durable powers of attorney because of that. But one of the things I do with the durable powers of attorney, if they're, and they should pick somebody they trust, but you know, I've had situations where trust notwithstanding their agent has stolen from them. So one of the things I do is, okay, well put these powers of attorney, like in our vault, at our office, because they have to come get it from me, I'm going to need to know that they really need it.

Speaker 2: [\(20:05\)](#)

Right. So, what we do is say was like, well, okay, put those powers, sign them, let them know that they exist, but don't give them to them. Just tell them how they can find them if the time comes easily. And I will occasionally, if they really struggle with trust, limit the powers, but I've come to agree with you with more aging clients. There's one too many times that, oh, why didn't I put that power into the power of attorney? Now we can't fix this. And that's a really, I'm dealing with this situation right now where we're just trying to transfer to a direct transfer of some IRA accounts. The power must do that is not granted to, in the power of attorney documents. So that's when, so what about, you know, we talk a lot, Emily about co attorneys and facts. Cause trust is a huge issue, even with your own kids.

Speaker 2: [\(20:52\)](#)

Absolutely. There are some benefits to naming two attorneys. In fact, like a lot of times people named spouse, you know, I'm, I, I have an ex-spouse. I did not name him in any of my documents. I'm just going to tell you that. But, and he also, wasn't my healthcare power of attorney there. In fact, I had big, bold letter. This person she'll have no say, but anyways, so let's say you're in that situation, but a lot of, you know, hopefully if you're married, your spouse is the first right candidate. It's not always the case though. You know, it's like, I've had somebody in my life. They're like, oh my gosh, that person will keep me alive. When I want somebody to move me to an assisted, one of the assisted suicide states, if I get sick. Right. But so, what about the co agency and the financial power of attorney arena?

Speaker 4: [\(21:37\)](#)

I can certainly have co-agents and a financial power of attorney a lot of times people will name their spouse and then they can have their children come in as limited powers of attorney. You can have situations where you've got a temporary power of attorney. So, I've had clients who were traveling out of the country and they just wanted to have something in place for a short period of time. And then when they came back, they revoked it and they were able to go back to managing their affairs completely on their own and not needing to have that other person's input or oversight. So, you can have co attorneys. Um, in fact, if you have situations too, where you've got children who are in different parts of the country, and one of them may or may not be able to be assisting with your decisions for your finances on a daily basis, and the other one can kind of weigh in and just be a support system in that case.

Speaker 2: [\(22:23\)](#)

So you can have the co-agents if you want to, and one can delegate to the other, right. But it creates this crosscheck situation so that it's like, day-to-day can get managed, but that person can always say, Hey, no, I don't or delegate at least part of the powers, but you do create a check. Yes. And the other thing that happens, I think with both healthcare powers and the legal powers is historically we would name, oh, this kid, next kid, you know, or whatever the case might be. And sometimes the oldest kid is not the right kid to act, or sometimes they'll name the kid in the healthcare field as a healthcare power of attorney. And sometimes that's the one who has no ability to deal with life and death situations when it comes to their own parents or family members. Right. They might deal with life and death all day at a hospital and it's a different set of facts. So that's sometimes where I see co-agents in either the healthcare, financial power being at least something I always discuss with clients. So, any other thoughts on financial powers of attorney from either of you?

Speaker 4: [\(23:26\)](#)

No. Just, just reiterating what Rachel said that it's so important to make sure that the client understands what they're assigning to. Somebody that, that yes, they can in fact, sign a check in your name and they can go to the bank on your behalf. So always make sure that it's somebody that you trust. Okay.

Speaker 2: [\(23:41\)](#)

And in the healthcare arena, we've been hearing a little bit about supported decision-making oh, yes. Is that strictly in healthcare? Is that financial? What is, what is

Speaker 4: [\(23:51\)](#)



It can be in all realms of life. So, it, it primarily focuses and applies to the area of disability. Um, we see it come up a lot more now in instances of adult guardianships, where you've got elderly family members who may not need a full guardianship, but they can use some help and assistance of some advisers and some advocates on their behalf. So supported decision-making just utilizes a group of trusted people in that person's life who can help them make an informed decision on their finances and on their healthcare, or just on their activities of daily living. So, it focuses so much more on the autonomy and the independence and promoting that independence for the client so that they can feel like they're involved in the process as much as possible.

Speaker 2: [\(24:38\)](#)

And I think Rachel has something you've been doing with your life care services without necessarily putting the new trendy word on it called supported decision-making. But by having clients sit down and when you're doing estate planning and talking about, okay, if something happens to you, how do you get the bills paid? How are you going to get groceries into the house? Things like that. And that's part of that process. Really. Absolutely. Right.

Speaker 5: [\(25:00\)](#)

Right. Well, and we have clients when we go to see the doctors, the ISI elder care coordinator will come back and then email, then email out to all the family. So, they know. So, if there's a decision that needs to be made with respect to mom's health care or dad's health care, then you've got everybody on the same page.

Speaker 2: [\(25:17\)](#)

And so the supportive decision-making can be some family members that are participating or can involve a care manager, which is becoming more common because even with where we see families, we dealt with one last year, a family had four children, all loved parents, all wanted to be involved, but we're all in all for it just in life situations where at that moment wasn't possible for them to be there in the way that the parents needed. And so that's where the care manager can step in as part of that team keep communicate with them, talk to them. So then there's this concept of medical incapacity versus legal incapacity. What is, can you just explain that a little bit and where that matters?

Speaker 5: [\(26:00\)](#)

Yeah. And that's been interesting in our half office because we've got the lawyer and we've got the healthcare professional and they look at it very differently. Um, so I think in the healthcare realm, um, it's more, um, limiting in. And so, they view somebody in capacity. If they're not able to, um, you know, do certain medical things, or meet certain medical tests, they determine that that person is incapacitated and can't sign documents, for example. Um, and from a legal standpoint, um, if someone is understanding the nature of what they're doing, and they may not understand the actual document itself, legal documents are complicated. So, most people walking around that have full capacity, don't understand a lot of legal documents, um, but legal capacity, um, is determined, um, you know, by a court. So, if someone were to file for a guardianship conservatorship, that would be a court determination. But when you're sitting down with a client and trying to evaluate whether they're competent to sign documents, there's certain questions that you can ask. Um, and there's, um, you, uh, explain the documents to them and the general nature of the document, what it does, what it means,

how it functions, who's going to act in your best interest. Is this the person that you want to serve in this capacity to make these decisions for you? Um, and it's just a very different type of, of, of test with compared to the medical side.

Speaker 2: ([27:24](#))

So we've covered a lot of ground on different topics. Emily, can you just give us like the checklist of here's the steps you need to do for incapacity planning?

Speaker 4: ([27:32](#))

Absolutely. So the first thing you want to always do is make sure that your estate plan is up to date that you've got your documents in place and that they're in, in accordance with the local law and the, and the regulations that may be useful in your state. So, once you have your updated estate plan, you always also want to focus on funding, the trust. If you have one, make sure that your assets have beneficiary designations, that you've got, um, your titles appropriately listed with the people on them that you want to have, or that you have joint ownership, if that's necessary, um, for the thought of, you know, nursing home care in the future, anyone who's able to look into long-term care insurance, that's something that's also incredibly important that a lot of people don't realize they need to look at before it's too late. Um, then also just being organized, making a list of where documents are, who the advisors are that you would want to utilize if you're in a situation of incapacity, um, and, and where you can kind of look for answers when you've got, you know, your elder law attorney or your estate planning attorney or your financial advisor, make sure that all of that information is all in one place.

Speaker 2: ([28:38](#))

Well, I want to thank both of you for being here today to discuss this very important topic as we get to the end of our episode, I want to thank our sponsors, interactive, legal, and Carson, private client. That's all for now. Thanks for listening to this week's episode and stay tuned for our weekly releases,

Speaker 7: ([29:01](#))

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