

USING POWER OF ATTORNEYS IN REAL ESTATE TRANSACTIONS: TIPS & PITFALLS

Description

No one wants to be the reason a closing is delayed. Yet, issues with the power of attorney is one of the most prevalent closing hiccups and sources of delay. The purpose of this article is to provide a basic understanding of the power of attorney and give you some practice tips to help you get to closing day without delay.

THE BASICS

How is a Power of Attorney Created? A power of attorney is a written instrument in which one individual, known as the "principal", authorizes another individual, known as the "agent" or "attorney-in-fact", to perform certain acts on behalf of the principal. The power of attorney gives the agent the power to legal bind the principal.

What are the Types of Powers of Attorney? There are two types of power of attorneys: general and special. A general power of attorney gives broad authority to the agent to carry out all acts that the principal could make at any time as the need arises. A principal may empower his agent to take any act that the principal make take himself, unless public policy or a contract with another requires personal performance of the principal. A special power of attorney (also known as a limited power of attorney) gives the agent authority limited to specific transactions or purposes.

How Long Is a Power of Attorney Effective? A power of attorney is effective until it is revoked, its purpose no longer exists, or the principal becomes incapacitated or dies. In addition, if the power of attorney states that it will not terminate upon the principal's incapacitated, it is known as a "durable" power of attorney and remains in effect even after the principal becomes incapacitated.

What Can Agents Do for Principals? Through a general power of attorney, a principal may empower his agent to take any act that the principal make take himself, unless public policy or a legal obligation requires the personal performance of the principal (such as contracting to marry, making a will, or voting). Specific power of attorneys is limited to those activities that are itemized by the power of attorney.

What Can't Agents Do? Powers of attorney are limited by what is contained and authorized by the document. An agent cannot take acts that are in conflict with the interest of the principal and cannot engage in acts of self-dealing (unless the document expressly states that the agent may engage in transactions that benefit him or her).

ADDITIONAL UNDERWRITER REQUIREMENTS

Since underwriters insure the property involved in real estate transactions, they may, and usually do have more stringent requirements for powers of attorney. Many underwriters require the power of attorney to be executed no more than one to two years before the transaction and require the power of attorney to expressly reference the transaction. What this means is the power of attorney should

expressly give the agent the authority to purchase, convey, or encumber a specific property that is identified by the document.

10 USEFUL TIPS

When you are presented with a situation in which a consumer wants you to rely on a power of attorney, there are a number of things that you should do to reduce your risk.

- **Give Yourself Time.** Ask the consumer early in the transaction if he or she intends to use a power of attorney. This will give you time to examine the power of attorney to ensure it contains what you need to rely on it and to send it to the buyer's lender for approval (if the buyer intends to use it). If necessary, you can have a new power of attorney drafted and approved before the closing.
- **Obtain the Original Power of Attorney.** Powers of attorney used to execute deeds should follow the same recordation guidelines that are used for deeds. The reason for this is a legal principle commonly known as the equal dignities doctrine. The equal dignities doctrine states that the document that gives the authority someone other than the seller to execute the deed (i.e., the power of attorney) must be executed with the same solemnity as a deed. (See *Hotchkiss v. Middlekauf*, 96 Va. 649 (1899).) In other words, since it is the source of authority for the deed, it should be executed in the same manner as the deed.
- **Examine the Power of Attorney.** What authority does the Agent have? Is the property specifically referenced in the power of attorney? Does the power of attorney state whether the Agent can sign only specific documents, or all closing documents? Can the Agent buy and encumber the property, or only buy? You want the power of attorney to be very specific about exactly what the Agent can do because if there is an issue down the line, courts will narrowly interpret the language.

You also want to examine the document to make sure it has not been altered. Check that there are their page numbers on each page of the document and that they are sequential. Does the font appear uniform on all pages of the document? Are the initials of the principal on each page of the document?

If the power of attorney was signed more than one year ago, you may want to ask the principal to sign a new power of attorney. You may also want to check with your underwriter to see if it has any specific requirements on the age of the document.

- **Verbally Verify Authority.** Call the principal to verify the authenticity of the power of attorney and the agent's authority. Even if the document was sent to you through the email account of the principal, you want to verify that it is authentic. For the same reasons you verify wire information that comes into your office, you should incorporate a practice to verify powers of attorney.
- **Divorces & Death.** If the Agent is the spouse of the consumer, make sure you check the public record to ensure that the parties are not divorced. If you have not had any recent in person communication with the Principal, you will want to check to ensure the Principal is still alive when the documents are executed, and, if the power of attorney is not durable, that the Principal is not incapacitated.

- **Notary Issues.** Ensure that the notary block contains an accurate acknowledgment. The acknowledgment should identify whose act and deed is being acknowledged. When a power of attorney is used, it should state that the agent's name, the capacity in which the agent signs, and the name of the principal. For example, "On this date, Arthur Agent personally appeared on behalf of Peter Principal, and acknowledged it to be his act and deed authorized by power of attorney dated September 20, 2021." Further ensure that the document contains the notary's seal showing an unexpired commission for the county in which document was signed.
- **Format.** Ensure that the font, font size, page size, and margins comply with the requirements for deeds in the county in which the document will be recorded. Are the surnames of the parties capitalized or underlined, and is the drafter's name on the first page? Some land records clerks will refuse to accept documents that do not comply with the county recordation formalities.
- **Ensure the Agent Signs His or Her Name Properly.** The signature lines on documents executed pursuant to authority vested by power of attorney should always reflect that the Agent is signing in the capacity of agent (as opposed to his or her individual capacity). For example, the agent should sign the name of the Principal, and then the Agent's name: "Peter Principal, by his attorney in fact, Arthur Agent."
- **Record the Power of Attorney with the Deed.** The executed power of attorney should be recorded with the deed so that it becomes a part of the public record.
- **Do Not Accept a Power of Attorney Under Certain Circumstances.** There are some situations that an underwriter will not insure. (For example, if the Agent conveys or mortgages the Principal's property to himself or herself; partitions the Principal's property; conveys the Principal's homestead property; or gifts the Principal's property.) If you encounter one of these situations, you should talk to your underwriter to determine whether the underwriter is willing to insure the transaction. If not, explain to the consumer that you cannot accept the power of attorney and will require the Principal to sign the documents.

When in doubt, always reach out to underwriting counsel for help. Settlement agents are not required to accept a power of attorney if it does not comply with their requirements, simply because they are not required to close the transaction. But if you are knowledgeable about what and why you need it, you can usually easily avoid issues that may have arisen during the process.

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