

Powers of Attorney in Real Estate Transactions

A Power of Attorney (POA) is a legal written document by which a person (principal) authorizes another individual (the “Attorney-in-Fact”) to make legal decisions and execute documents. A POA may be used in the event of illness, disability or situation when the principal cannot be present to sign legal forms.

POAs are frequently used in sale, purchase or refinance transactions. There is a growing concern of their abuse by title, mortgage, and real estate professionals. The volume of claims and litigation has increased as a result of such concern. Unfortunately, POAs are commonly presented by those trying to commit real estate or mortgage fraud thus increasing concerns in the marketplace.

Here are some tips to troubleshoot use of a Power of Attorney:

- Ask the question - why is a POA is being used. It’s legal purpose is not merely for convenience.
- A POA should be specific to the transaction and contain the legal description of the property. Underwriters may have other requirements for approval, and the original must be presented and commonly recorded for closing. If a POA is needed, discuss it as early as possible with the title company and lender.
- Verbiage in a POA is critical. Terminology such as sell, convey, transfer, mortgage, exchange, encumber, negotiate, execute, lease, or other terminology may be applicable and necessary in a sale. Purchase, encumber, mortgage and more may be needed in a purchase transaction.
- It is important to note that many underwriters limit approval of a Power of Attorney to those authorized within the last 12 months.
- Personal Representatives and guardians cannot delegate legal powers with a POA. Trustees, partners, and members of a corporation for example, typically also cannot grant such authority unless detailed in their operating agreement.
- Whenever possible, avoid using a POA by forwarding closing documents to the client for signatures by mail, overnight delivery or electronically. Military installations and embassies have the ability to notarize documents overseas.
- Remember that a POA is invalid when the principal is deceased. State probate rules apply upon their death.
- State law and specific language on the POA will determine whether the authorization remains in effect should the grantor be mentally incapacitated, commonly referred to as a Durable Power of Attorney.



Whether drafted by legal counsel or other source, there are limitations to powers granted in a POA. State regulations may also limit acts of an Attorney-in-Fact, such as:

- Making a deed, mortgage or release without receiving valuable consideration (Note: full consideration should be stated in the instrument).
- Dealing with the principal's property to benefit the Attorney-in-Fact
- Making a gift deed.
- Further delegating the Attorney-in-Fact authority.
- Deeding the principal's property to himself or herself.
- Releasing his or her own debt to the principal
- Mortgaging the principal's property to himself or herself.
- Conveying or encumbering homestead property (in some states).

Given the legal implications of acts performed by an Attorney-in-Fact, one can understand why questions are raised as to the validity and necessity of such document by lenders and title underwriters. Common questions may be asked, such as:

- Why is a POA being used?
- Where is the principal currently residing?
- Why doesn't the principal execute the transaction himself/herself?
- Has a determination been made as to the death, competence or sanity of the principal?
- Does the verbiage stated in the POA authorize the Attorney-in-Fact to legally execute the transaction as necessary? Is there any ambiguity in powers?
- Is the POA completely and accurately acknowledged and proved?
- Has the POA been recorded in the county wherein the property lies?
- Has the POA been revoked or could it be revoked prior to closing?
- Is the Attorney-in-Fact exceeding any limitation imposed by the POA, rules of agency or local statutes?
- Is the property involved "homestead" property?
- Are there any circumstances, evidence or information questioning the validity of the POA or good faith of the parties in the transaction?
- Is the principal affected by current bankruptcy proceedings?
- Are there any statutory limitations?
- Is there any possibility that the POA was forged?
- How long ago was the POA executed?
- Can you confirm with the principal that the POA is current, valid, and necessary to be used to complete the transaction?

Careful consideration should be used when granting powers to another party through a POA, and real estate professionals should not take lightly the potential use of a POA in a legal transaction.

Clients are advised to consult legal counsel as necessary, and discuss your options with the title company and lender in your specific situation.



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