

POWER OF ME

Naturally, your man on the legal corner would like you to think that the term power of attorney refers to the author, but I recognize your first thought probably is of the document. To that thought we then turn.

A power of attorney is a written document authorizing a person to act on one's behalf. The person giving the power is known as the principal, and the person receiving the power and authority to act on behalf of the principal is known as the "attorney-in-fact." This is really an agency not too unlike the agency with which you are familiar.

An attorney-in-fact only has the power expressly granted to him or her by the written power of attorney, which in our context is the buying or selling of real estate. It goes without saying then that the power needs to convey and grant all of the powers necessary to do the intended act. A general power of attorney is one that authorizes the attorney-in-fact to do nearly everything the principal can do acting in his or her own right, and a special power of attorney is limited to a particular purpose. For example, a general power of attorney would likely grant the right to sell real estate, and among other things, also grant the attorney-in-fact the right to write checks to pay bills. A real estate special power of attorney, on the other hand, would strictly limit the attorney-in-fact's authority to sell and convey a particular piece of property.

Under Virginia law, a power of attorney will terminate upon its revocation or upon the death or disability (legal incompetence) of the principal. Since we do not want to be in the business of determining whether a principal is insane or incompetent as of the closing (or negotiation of the contract, etc.) we need for the power to survive that disabling act, and that is accomplished by having words to this effect: This power shall survive the disability of the principal. If that language is present then we call it a *durable* power of attorney.

Legal Corner

Settlement agents will need the original power of attorney to record along with the deed and deed of trust (I repeat we must have the original). As a general word of caution, you should notify both the settlement agent and the lender if the buyer is using a power of attorney well in advance of the closing so that both the settlement agent and the lender can review it.

In my office we have a checklist we go through to make sure the powers are acceptable. While I do not want agents making legal determinations regarding powers of attorney, it would not hurt for you to make a cursory review upon receiving one before you pass it on to your favorite, *powerful*, attorney of your choice for his review. Among the items to look for:

- Do we have the original or will we? We *must* have an original to record.
- Does the power actually give the power to do the thing it will be used for? For example, does it clearly and broadly authorize and empower a seller to sell, a buyer to buy and borrow, etc.
- Is the legal description accurate? Check the legal description very carefully; if it is a mailing address verify it; if it is a short legal description do the same. If there are discrepancies then the power is not acceptable, and you can not white it out and make changes!
- Are the names accurate? Make sure the names on the power match the names on the deed, deed of trust, etc.
- Fax to the lender. Send a buyer's power of attorney to the lender for them to review as they sometime have special requirements for a buyer power.
- Power for Veteran and VA loan? Powers for Veteran buyers may need special VA language. The lender can tell you if necessary on your deal and the power may need to be amended or re-done.
- Power limited in time? Check to see if the power has an expiration date – if so, has the date passed?

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Legal Corner

- Notary clause done and done completely and correctly? Was the notary clause properly executed and completed? Note that it does not need a seal but it does need a signature, identification and commission expiration date.
- Are there any conditions in the power that must be satisfied? Have they been?
- Is the power durable? This means does it have language like this: “This power shall survive the disability of the principal.” If not then the power is probably not going to be acceptable.

Lastly, company policy will dictate whether it is permissible for you or your company to act as the attorney-in-fact for one of your clients in the transaction, but I recommend that you not do so. I cannot and do not speak for other settlement agents, but generally I will serve as an attorney-in-fact in one of my closings.

Feel free to send a powerful email to the author at bdlytle@lytlelaw.com if you have any questions or comments regarding this article, or suggestions for future articles. You may send complaints to my friend and fellow affiliate Allen Tanner.