A Matter of Principals

Problems and Pitfalls of Using a Power of Attorney

Presented by:
LEGAL EDUCATION DEPARTMENT
of
Attorneys' Title Fund Services, Inc.

Please contact the Education Registrar at (888) 407-7775 regarding this seminar or to register for any other Fund seminars

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Problems and Pitfalls of Using a Power of Attorney

John B. "Jay St. Lawrence
Fund Education Attorney
jst.lawrence@thefund.com

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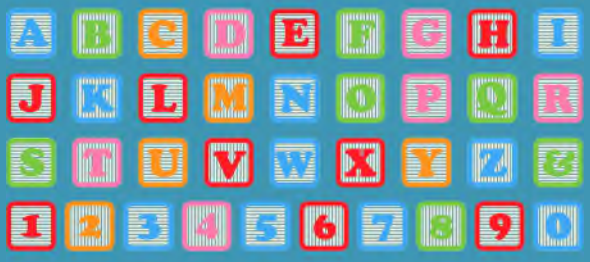
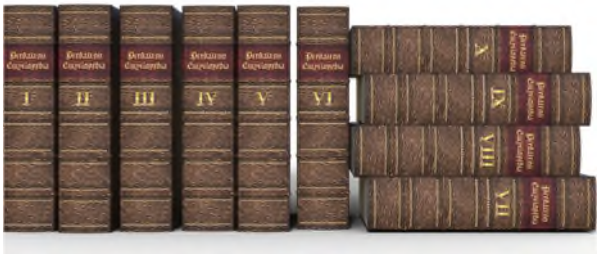
The Basics



Definition

Power of Attorney:
Instrument authorizing a person to act as the agent or attorney of the person granting it

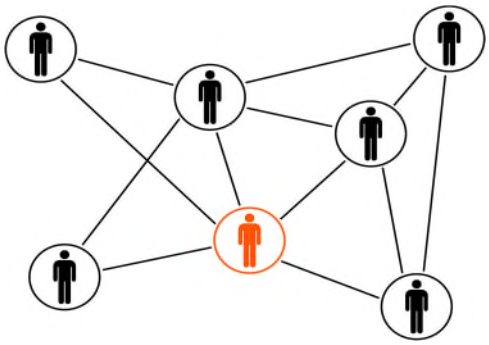
Durable Power of Attorney:
Allows the agent to act on the principal's behalf beyond the incapacity of the principal



Parties

Principal:
Someone who authorizes another to act in his or her place

Attorney-in-Fact
An agent authorized to act on behalf of another person



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Types

- Limited – Agent can act only
  - For certain purposes or
  - Under certain conditions or
  - For a limited time

- General – Agent has power to act in all of principal's financial matters
  - Does not survive incompetence or incapacity of principal
- Durable – Survives incompetence of principal or
  - May only become effective on incompetence of principal ("springing")
- Medical – Agent can make healthcare decisions for principal
  - In FL, known a "designation of health care surrogate"
    - Sec. 785.201 F.S.

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Creating a Durable Power of Attorney

Sec. 709.2104, F.S. Durable power of attorney (emphasis provided)

Except as otherwise provided under this part, a power of attorney is durable if it contains the words: "This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes," or similar words that show the principal's intent that the authority conferred is exercisable notwithstanding the principal's subsequent incapacity.

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Construction and Use of a POA

- Signed by a principal and 2 witnesses, acknowledged before a notary
- Effective as soon as principal executes
- May give the power to do almost any legal act the principal could do
  - Access funds
  - Sign contracts
  - Make health care decisions
  - Create trusts
  - Make gifts
- May give the power to do almost any legal act the principal could do

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Revoking a POA

Sec. 709.2110, F.S. Revocation of power of attorney (emphasis provided)

(1) A principal may revoke a power of attorney by expressing the revocation in a subsequently executed power of attorney or other writing signed by the principal. The principal may give notice of the revocation to an agent who has accepted authority under the revoked power of attorney

(2) Except as provided in subsection (1), the execution of a power of attorney does not revoke a power of attorney previously executed by the principal.

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Some Limitations

Limitations of a POA

Sec. 709.2201, F.S. Authority of agent (condensed)(emphasis provided)

(3) Notwithstanding the provisions of this section, an agent may not:

(a) Perform duties under a contract that requires exercise of personal services of principal;
(b) Make any affidavit as to the personal knowledge of the principal;
(c) Vote in any public election on behalf of the principal;
(d) Execute or revoke any will or codicil for the principal; or
(e) Exercise powers/authority granted to principal as trustee or court-appointed fiduciary

Limitations of a POA

Sec. 709.2201, F.S. Authority that requires separate signed enumeration (condensed)

(1) Notwithstanding s. 709.2201, an agent may exercise the following authority only if the principal signed or initialed next to each specific enumeration of the authority, the exercise of the authority is consistent with the agent's duties under s. 709.2114, and the exercise is not otherwise prohibited by another agreement or instrument:

(a) Create an inter vivos trust;
(b) With respect to a trust created by/on behalf of principal, amend, modify, revoke, or terminate trust, but only if trust instrument explicitly provides for amendment, modification, revocation, or termination by settlor's agent;
(c) Make a gift, subject to subsection (4);
(d) Create or change rights of survivorship;
(e) Create or change a beneficiary designation;
(f) Waive principal's right to be a beneficiary of joint and survivor annuity, including a survivor benefit under a retirement plan; or
(g) Disclaim property and powers of appointment

How to Sign as Agent Under a Power of Attorney

Signing Under a Power of Attorney

Pop Quiz: According to the Fund, which method is the best way to sign as attorney-in-fact?

- *Allen Agent, attorney-in-fact*

  Allen Agent, attorney-in-fact

- *Peter Principal, by Allen Agent, his attorney-in-fact*

  Peter Principal, by Allen Agent, his attorney-in fact

- *Allen Agent, attorney-in-fact for Peter Principal*

  Allen agent, as attorney-in-fact for Peter Principal

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Signing Under a Power of Attorney

TN 4.02.02 (paraphrased and condensed)

- Where property of principal conveyed by deed signed by attorney-in-fact:
  - Deed must name principal as grantor
  - Agent's name does not appear in the grantor section at the top of the deed

- Recommended format for typing or printing the name below the signature line is:
  - **"Peter Principal, by Allen Agent, his attorney-in-fact."**
  - Adopt habit of inserting/typing proper clause underneath the signature line

- Agent may write, print, or type the name of the principal
  - See Title Standard 1.2 and See FLORIDA REAL PROPERTY SALES TRANSACTIONS (CLE 7th ed. 2013), Sec. 7.65; and 3 AM.JUR.2D, Agency, Sec. 166

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Signing Under a Power of Attorney (cont'd)

TN 4.02.02 (paraphrased and condensed)

- Agent is person appearing before the notary
  - Acknowledgment should indicate agent acknowledged deed on behalf of principal
  - The word "acknowledged" should appear to differentiate from a jurat

- Other methods can cause title problems
  - If attorney signs own name as attorney-in-fact
    - **"Allen Agent, attorney-in-fact"**
    - Words "attorney-in-fact" could be held as *descriptio personae*
      - In other words, might be agent's deed rather than deed of the principal

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Signing Under a Power of Attorney (cont'd)

TN 4.02.02 (paraphrased and condensed)

- Another method is for agent to sign as attorney-in-fact for named principal
  - **"Allen Agent as attorney-in-fact for Peter Principal"**
  - FL Bar recommends this method

  - If this method used and principal is the only person named as grantor
    - Deed might be effective to convey the principal's property
    - Consult Fund Underwriting if execution requires interpretation to determine whether it is the principal's act

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Formalities of Execution

Formalities of Execution

TN 4.02.01 (paraphrased and condensed)
For Transactions **Occurring Prior to Oct 1, 2011**

- For transactions occurring prior to Oct 1, 2011, POAs for conveying real property or agreements to sell real property need 2 witnesses to comply with the formalities per Sec. 689.01, F.S.
  - Exception for military powers of attorney
    - Must be executed in accord with 10 U.S.C. Sec. 1044b (as amended)
      - See former Sec. 709.015(2), F.S.
      - For durable powers of attorney, see former Sec. 709.08(1), F.S.

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Formalities of Execution (cont'd)

TN 4.02.01 (paraphrased and condensed)
For Transactions **Occurring Prior to Oct 1, 2011**

- Prior to Oct 1, 2011, the law required a nondurable POA be executed with same formality required for the instrument to be executed using the POA, e.g., a mortgage

- Therefore, a POA to execute a mortgage in FL prior to Oct 1, 2011 is not required to be witnessed unless
  - It is a durable POA or
  - A POA to mortgage homestead property
    - See former Sec. 709.08(1), F.S. and Sec. 689.111, F.S.

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Formalities of Execution (cont'd)

TN 4.02.01 (paraphrased and condensed)
For Transactions **Occurring On or After Oct 1, 2011**

- Powers of Attorney Executed in Florida to Sell, Convey or Mortgage Real Property
- "Florida Power of Attorney Act" ("Act"), consisting of Secs. 709.2101-.2402, F.S
- Effective Oct 1, 2011
- Act applies to
  - All POAs created by an individual; durable or nondurable
  - POAs created by individuals involving certain proxies,
  - Gov't prescribed POAs for gov't purposes and
  - POAs coupled with an interest not subject to the Act
  - NOT to business entities

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Formalities of Execution (cont'd)

TN 4.02.01 (paraphrased and condensed)
For Transactions **Occurring On or After Oct 1, 2011**

- POAs executed on/after Oct 1, 2011, must be
  - **Signed by principal + 2 witnesses and**
  - **Acknowledged before notary** or as otherwise provided in
    - Sec. 695.03, F.S. Sec. 709.2105(2), F.S.
  - Includes durable/nondurable POAs to convey or mortgage real property
    - Sec. 709.2106(1), F.S.
- POA executed in FL before Oct 1, 2011 valid if
  - Execution complied with FL law at time of execution
    - See Sec. 709.2106(2), F.S.

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Formalities of Execution (cont'd)

TN 4.02.01 (paraphrased and condensed)
For Transactions **Occurring On or After Oct 1, 2011**

- POAs Executed Outside of Florida to Sell, Convey or Mortgage Real Property
- POA executed outside FL to convey or mortgage real property which does not comply with FL law valid if
  - When executed POA and execution complied with state law where executed
    - See Sec. 709.2106(3), F.S.
- Homestead property:
  - Execution to convey or mortgage must comply with FL law
    - Exception for military POAs

Formalities of Execution (cont'd)

TN 4.02.01 (paraphrased and condensed)
For Transactions Occurring On or After Oct 1, 2011

Homestead

- Sec. 689.111, F.S. requires POAs to convey or mortgage homestead property be executed like a deed
- Deed or mortgage may be executed by POA executed by 1 spouse to the other, or solely by 1 spouse or both spouses to a 3d party, provided POA executed in the same manner as a deed
- POA to convey or mortgage homestead property whenever executed must include
  - 2 witnesses and
  - Notary acknowledgement

Sample POA Notary Acknowledgement

FLORIDA NOTARY ACKNOWLEDGEMENT
(ATTORNEY IN FACT)

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me by means of ☐ physical presence ☐ online notarization, this ___ day of _____, 20___, by _____ **(Name of Attorney In Fact) as attorney in fact**, who is personally known to me or who has produced _____ (Type of Identification) as identification on behalf of _____ (Name of Principal Signer).

_____ (Seal)
Signature of Notary Public

_____
Print, Type or Stamp Name of Notary

_____
Title or Rank

_____
Serial Number, if any

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Formalities of Execution (cont'd)

TN 4.02.01 (paraphrased and condensed)
For Transactions **Occurring On or After Oct 1, 2011**

Military Powers of Attorney

- Military POA that is not witnessed may be acceptable to convey title, including
  - Title to homestead property, even if not executed in compliance w/Sec. 709.2105 F.S.

- Florida Power of Attorney Act, specifically Sec. 709.2106 (4), F.S., provides military POA executed in accordance with 10 U.S.C. Sec. 1044b (as amended), is valid
  - See also TN 4.02.06

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Formalities of Execution (cont'd)

TN 4.02.01 (paraphrased and condensed)
For Transactions **Occurring On or After Oct 1, 2011**

- 3rd persons asked to rely on a POA executed in another state may request opinion of counsel as to
  - Execution and validity of the POA
    - Sec. 709.2106(3), F.S.
  - Effective May 30, 2013, 3rd person may reject POA executed in another state if
    - Such opinion of counsel is not provided
      - Sec. 709.2106(3), F.S.
  - Unless well-acquainted with the law of the foreign state, Fund Members must obtain a reliable opinion from an attorney licensed in state of execution

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Formalities of Execution (cont'd)

TN 4.02.01 (paraphrased and condensed)

- Due to risk of fraud with absentee owners should:
  - Be cautious when relying on a POA executed in a foreign country and
  - Consult Underwriting when execution requirements set forth above are not met

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Corporate Powers of Attorney

Powers of Attorney by and to Corporations

TN 11.03.01 (paraphrased and condensed)
Powers of Attorney to Corporations

- Absent statutory prohibition, corporation may act as attorney-in-fact for
  - An individual
  - A partnership or
  - Another corporation

- Prior to accepting POA naming a corporation as attorney-in-fact
  - Must appear corporation was, at time POA given, and is presently
    - Duly organized
    - Validly existing and
    - In good standing under the laws of the state or country of its domicile

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Powers of Attorney by and to Corporations (cont'd)

TN 11.03.01 (paraphrased and condensed)
Powers of Attorney to Corporations

- Articles of incorporation or charter and bylaws must be examined to ascertain:
  - No prohibition against acting as agent for another and
  - No provision which might prohibit the corporation from performing contemplated action itself

- Financial institutions with trust powers are qualified to serve as agent under a POA for an individual if:
  - Have a place of business in FL and
  - Are authorized to conduct trust business in this state
    - See Sec. 709.2105, F.S.

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Powers of Attorney by and to Corporations (cont'd)

TN 11.03.01 (paraphrased and condensed)
Powers of Attorney to Corporations

- If POA silent on who should sign instrument being executed pursuant to POA
  - Any properly authorized officer of the corporation is empowered to sign
    - Ex) Where the execution of a deed involved
      - Certified copy of a resolution of the board should be recorded along with
        - Deed setting forth name of person(s) authorized to sign deed, unless
          - Proposed signatory is the president or other officer who is actually CEO
            - See generally TN 11.05.03

- Sec. 692.01, F.S. (Conveyances executed by corporations) would not apply to a conveyance executed by a corporation as agent for another, as the statute applies only to corporate property
  - See also Sec. 689.01 F.S. (How real estate conveyed); TN 11.05.03

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Powers of Attorney by and to Corporations (cont'd)

TN 11.03.01 (paraphrased and condensed)
Powers of Attorney by Corporations

- Corporations may appoint agents
  - See 607.0302(10), F.S.; 3 AM. JUR. 2d, Agency, Sec. 9

- In what form and manner does a corporation grant authority to agents?
  - Board must pass resolution; POA not the proper method
  - POA given by a corporation may be relied on only if reasonably construed Board resolution
    - Ex) POA based on a recorded corporate resolution
    - Exception: institutional lenders and instrumentalities or agencies of gov't bodies such as
      - Resolution Trust Corporation (RTC)
      - Federal Deposit Insurance Corporation (FDIC)
      - Federal National Mortgage Association (Fannie Mae) and
      - Federal Home Loan Mortgage Corporation (Freddie Mac)

Powers of Attorney by and to Corporations (cont'd)

TN 11.03.01 (paraphrased and condensed)
Powers of Attorney by Officer or Agent

- Generally not acceptable for corp. officer/agent to grant POA for performing act or acts which would otherwise be performed by the officer or agent on behalf of the corporation

- Officer/agent may not delegate performance of acts involving judgment or discretion unless
  - Expressly authorized to do so, or
  - The authority is necessarily implied from the circumstances

Powers of Attorney by and to Corporations (cont'd)

TN 11.03.01 (paraphrased and condensed)
Powers of Attorney by Officer or Agent

- Officer/agent may delegate perf. of ministerial acts not requiring exercise of judgment
  - Record will usually not reveal discretionary or ministerial nature of the agent's acts
  - Only items usually recorded are POA and deed
  - Thus, unless record clearly indicates ministerial nature of agent's act:
    - Conveyance/mortgage under POA given by corp. officer not acceptable for title policies
    - In any case, officer granting POA must himself be authorized to convey corporate property
      - See TN 11.05.03

LLCs and Powers of Attorney

TN 11.10.01 (paraphrased and condensed)

- **G.** Use of Powers of Attorney and Resolutions By LLC
  - Insuring an instrument executed by an agent of an LLC under a power of attorney
    - Requires Underwriting approval

- Sec. 605.0109 (14), F.S. allows an LLC to grant a POA, including irrevocable POA
  - Unless Articles of Organization and Operating Agreement disallow

- Where POA used, all other provisions regarding conveyance/mortgage must be met
  - Ex) If OA requires consent by all members for subject transaction:
    - Consents required even though attorney-in-fact is authorized signatory

Trusts

Trusts and Powers of Attorney

Pop Quiz: Can an agent use a POA executed by the principal individually to sign for the principal <u>in their capacity as trustee of a trust</u>?

- Generally NO

- Sec. 709.2201(3), F.S. provides:
  - An agent "may not… (4) exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary."
  - Therefore, if POA executed by principal only in their individual capacity
    - Agent cannot use that POA to execute documents on behalf of a trust
      - Including deeds and mortgages, where the principal serves as trustee
  - True regardless of powers contained in the POA

Trusts and Powers of Attorney (cont'd)

- Sec. 709.2201(5), F.S. provides a POA is exercisable with respect to
  - Property principal owns when the POA is executed and
  - Property principal acquires later
  - But property held by trustee as trustee of a specific trust is an asset of the trust
    - Therefore, powers granted by the POA do not apply

- If POA not yet executed
  - Best option is to have the principal execute a deed
    - Both individually and as trustee
    - At the time they are executing the POA

- Both deed and the POA have the same formalities for execution, so no extra burden on the principal
  - See "Can You Trust Your POA," 85 Fund Concept 54 (August 2022)

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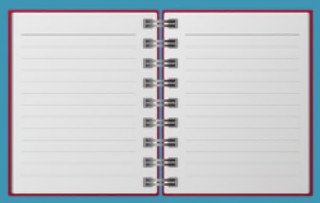
Recording a Power of Attorney



Recording Requirement (cont'd)

TN 4.02.07 (paraphrased and condensed; emphasis provided)

- Sec. 695.01(1), F.S., provides a conveyance, transfer, mortgage or lease of real property under an unrecorded POA shall not be valid against creditors or certain purchasers for a valuable consideration and without notice
  - Applicable unless POA recorded before the accruing of such persons' rights.

- A general rule of agency law is that for a conveyance (executed by one purporting to act under a POA) to be effective, there must exist a previously executed power authorizing it

- Therefore, a POA should be recorded immediately prior to the instrument executed under it so that the record will show the instrument's execution is effective

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Recording Requirement

695.01 Conveyances and liens to be recorded.—

(1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

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Recording Requirement (cont'd)

TN 4.02.07 (paraphrased and condensed)

- For a POA to be recorded, it must conform to the requirements of Sec. 695.03, F.S., requiring an acknowledgment for recording purposes
- Sec. 695.01, F.S., requires a POA be recorded to protect all creditors and subsequent bona fide purchasers
- But in the absence of intervening equities, failure to record POA until after an instrument is executed by an attorney-in-fact under POA does not invalidate the conveyance or mortgage
  - See FLORIDA REAL PROPERTY SALES TRANSACTIONS (Fla. Bar CLE 7th ed. 2013), Sec. 7.65; and Title Standard 16.4

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Recording Requirement (cont'd)

TN 4.02.07 (paraphrased and condensed; emphasis provided)

- In addition to recordation of the original POA, for insuring purposes
  - Fund Members must record an affidavit from the agent affirming the following:
    - Principal not deceased
    - If nondurable POA, agent is w/o knowledge of incapacity of principal; and
    - Either nondurable/durable POA, principal has not filed for bankruptcy and
    - No proceedings to determine incapacity or for appointment of a guardian
      - See Sec. 709.2119(2), F.S., and TN 4.02.09.
    - Affidavit should also confirm POA not revoked or otherwise terminated
      - See Sec. 709.2109, F.S., for events that terminate or suspend a POA

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Recording Requirement (cont'd)

TN 4.02.07 (paraphrased and condensed)

- Except as otherwise provided in the POA, pursuant to Sec. 709.2106(5) F.S., copy of a POA has same effect as original
- Fund Members may rely on a true and correct or certified copy of POA
  - Original may be required for recording in the public records
    - Tip: Copy may be attached to an affidavit for recording if Clerk refuses to record the copy

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Fannie Mae Requirements

Fannie Mae Selling Guide (for Lenders)

B8-5-05 Requirements for Use of a Power of Attorney (paraphrased and condensed)

Loans with docs signed under POA eligible for delivery to Fannie Mae if:

- When title to mortgaged property held by trustee of inter vivos revocable trust, loan docs may not be executed using a POA granted by such trustee unless
  - Trust instrument authorizes trustee to use POA to delegate to agent, or
  - Agent under POA is borrower creating such inter vivos revocable trust

Fannie Mae

The Fund

Fannie Mae Selling Guide (for Lenders) (cont'd)

B8-5-05 Requirements for Use of a Power of Attorney (paraphrased and condensed)

Eligible Transactions

- Purchase or Limited cash-out refinance

Documentation Requirements

- Agent under POA may sign note and/or security instrument on behalf of a borrower if:
  - Lender obtains a copy of the POA
  - Name(s) on POA match the name(s) of the person on loan document
  - POA date reflects was valid at time relevant loan document executed
  - POA is notarized
  - POA must reference address of subject property

Fannie Mae

The Fund

Fannie Mae Selling Guide (for Lenders) (cont'd)

B8-5-05 Requirements for Use of a Power of Attorney (paraphrased and condensed)

Eligibility of Agents:

- **Only eligible if transaction meets additional conditions**
  - Affiliate of lender
  - Loan originator
  - Affiliate of the loan originator
  - Employee/affiliate of title insurance company

- **Never eligible**
  - Lender or employee of lender
  - Property seller or their relatives and affiliates
  - Real estate agent with financial interest in transaction or their affiliates

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What Can Go Wrong?

General Concerns

- Conflict of interest arises where agent benefits from POA
  - Fund Member should give the transaction careful scrutiny
    - Ex) Attorney-in-fact signing mortgage for other co-tenants
      - See TN 4.01.01

- Fund Member should always want to know why a POA is being used
  - Why is grantor unavailable?
    - If grantor is in another state/country
      - May be better to have docs signed there and
      - Notarized by an out-of-state notary or at a U.S. Embassy or
      - Can use Remote Online Notary (RON) but
        - Note foreign nationals hard to verify for RON purposes

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General Concerns (cont'd)

- If reason given for POA is that the grantor is sick or incapacitated
  - Member should look to see whether POA is "durable" and
  - Title examiner should confirm grantor competent when POA signed
    - See TN 4.02.09

- If grantor deceased, POA should not be relied upon
  - Real property in grantor's estate after death should pass through probate
    - See TN 4.02.08

- See "Care in Relying on Powers of Attorney," 58 Fund Concept 38 (May 2006)

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Common POA-Related Claims Issues

- Deceased principal
  - Principal must be alive when POA is used
    - "Durable" POA (good despite principal's incapacity) does not survive principal's demise
- Revoked POA
- Forged POA
- Improper distribution of funds
  - Ex) Funds go to attorney-in-fact instead of principal
- Lack of capacity of principal (if nondurable POA)
- Self-dealing
  - Ex) Attorney in fact deeds to themselves
  - Not invalid per se, but calls for additional investigation

Title Note on Self-Dealing

TN 4.01.01 (paraphrased and condensed)

- An agent, authorized to sell his principal's property, cannot purchase such property for himself without consent of the principal.
  - See 3 AM. JUR. 2d, Agency, Sec. 208; 2A C.J.S., Agency, Sec. 291
- Rule applicable regardless of whether there was any actual fraud or unfairness by agent
  - See Secs. 709.2114(1) and (2), F.S.
- However, an agent may sell or gift real property to himself pursuant to a power of attorney provided the power of attorney specifically authorizes the act
  - See *James v. James*, 843 So.2d 304 (Fla. 5th DCA 2003)
- Such conveyance is not per se void, but voidable at the will of the principal
  - Accordingly, the principal may ratify the act either expressly or impliedly
    - Ex) Possible that long acquiescence would suffice

Resources

- Florida Statutes Sec. 695.01, F.S.; Ch. 709
- Florida Bar
  - Consumer Pamphlet: Florida Power of Attorney
- Fund Concept
  - "Can You Trust Your POA," 85 Fund Concept 54 (August 2022)
  - "Care in Relying on Powers of Attorney," 58 Fund Concept 38 (May 2006)
- Fund Title Notes
  - TN 4.01.01 Purchase by Agent of Property of Principal
  - TN 4.02.01 Formalities of Execution
  - TN 4.02.02 Execution of Instruments Under Power of Attorney
  - TN 4.02.12 Property Acquired After Execution
  - TN 11.03.01 Powers of Attorney to Corporations
  - TN 11.04.01 Powers of Attorney by and to Corporations
  - TN 11.10.01 Florida Limited Liability Companies
- Fannie Mae Selling Guide B8-5-05 (10/05/22)

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Questions?

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A Matter of Principals:

Problems and Pitfalls of Using a Power of Attorney

Thank You!
for coming

John B. "Jay St. Lawrence
Fund Education Attorney
jst.lawrence@thefund.com

The Fund®

benefit. Highlights of this year's survey results will be posted on *http://www.thefund.com* in the News and Announcements section in early June. We will use the survey findings to secure additional opportunities to inform media and consumers of the value of a real estate attorney when buying a home—whether it is the consumer's first or 50th time buying a home.

Look for an article in *The Fund Concept* this fall reporting on the results from this month's efforts to leverage National Homeownership month. And, consider how you can also capitalize on this designation to further bolster your marketing and communication efforts. □

On The Commercial Front

By Mindy B. Schlosberg, Fund Senior Underwriting Attorney – Commercial Services

Fund Member Agent Richard Wood, a partner in the law firm of Fowler, White, Burnett, P.A. in downtown Miami, has issued an $80,000,000 Fund mortgagee policy in connection with the closing of a construction loan. The planned project, to be known as "Museum Park," will be a 50+ story condominium building in Miami-Dade County.

On Dec. 2, 2005, Fund Corporate Agent LSL Title, LLC issued a Fund mortgagee policy in the amount of $82,176,066 insuring Bank of America. The policy was for development of Esperia at Bonita Bay, a luxury high rise condominium located in Lee County. The condominium development will overlook Estero Bay and the Gulf of Mexico and features a choice of five residential floor plans ranging in size from 2327 - 3050 square feet, including three penthouse units and luxury amenities for all residents.

AVOID THE CLAIMS WEB

Care in Relying on Powers of Attorney

Fund Member Agents should be very cautious in relying on a power of attorney for the execution of documents.

- If the attorney-in-fact is benefitted by use of the power, it is a built-in conflict of interest — enough to cause the Fund Member Agent to give the transaction careful scrutiny. An example is an attorney-in-fact signing a mortgage for other co-tenants. See TN 4.01.01.

- The Fund Member Agent should always want to know why a power of attorney is being used. Why is the grantor unavailable? If the grantor is in another state or a foreign country, it may be better to have documents signed there and notarized by an out-of-state notary or at a U.S. Embassy.

- If the reason given for the power of attorney is that the grantor is sick or incapacitated, the Fund Member Agent should look to see whether the power of attorney is of the "durable" type — that is, whether it authorizes the attorney-in-fact to act while the grantor is incapacitated. And, the title examiner should also be satisfied that the grantor was mentally competent at the time the power of attorney was signed. See TN 4.02.09.

- Of course, if the grantor is deceased, the power of attorney should not be relied on. Any real property in a grantor's estate after death should pass through probate. See TN 4.02.08.

Can you Trust your POA?

By Benjamin Jepson, Fund Sr. Underwriting Counsel

Can you trust your power of attorney (POA)? By now, we all have heard about the basic requirements for a POA: it must be witnessed by two people and be acknowledged before a notary public (Sec. 695.03, F.S., and Sec. 709.2105(2), F.S.); and it must grant the agent clear authority (*Bloom v. Weiser*, 348 So.2d 651 (Fla. 3d DCA 1977)). But what about using that POA when a trust is involved? Can an agent use a POA executed by the principal individually to sign for the principal in their capacity as trustee of a trust?

The simple answer is no. Pursuant to Sec. 709.2201(3), F.S., an agent "may not… (4) exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary." This means that, if the POA was executed by the principal only in their individual capacity, the agent cannot use that POA to execute documents on behalf of a trust, including deeds and mortgages, where the principal serves as trustee. This is true regardless of the powers contained in the POA.

Why would that be? Well, part of the explanation comes from Sec. 709.2201(5), F.S., which provides that the authority granted in a POA is exercisable with respect to property that the principal owns when the POA is executed and to property that the principal acquires later. When title to real property is held in the name of the trustee, as trustee of a specific trust, the property is an asset of the trust. As such, the powers granted by the POA do not apply to it.

The other part of the explanation focuses on the fact that the authority of a trustee to act on behalf of the trust is controlled by the terms of the trust. Sec. 736.0801, F.S., states that, "Upon acceptance of the trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes…." The terms of the trust grant the trustee, not the individual, authority over the trust assets. Only the trustee can delegate that authority and they can only delegate that authority if the terms of the trust authorize them to do so.

If the POA has not yet been executed, the best option is to have the principal execute a deed, both individually and as trustee, at the time they are executing the POA. Since both the deed and the POA have the same formalities for execution, this should not create any extra burden on the principal.

When drafting the POA, first, confirm that the terms of the trust authorize the trustee to sell, convey or encumber the trust property and that the terms of the trust authorize the trustee to delegate that authority. Assuming they do, then draft the POA with language clearly granting authority for the agent to act on behalf of the principal, both individually and in their capacity as trustee. When the actual trustee has signed the proposed-insured deed, the Fund does not object to the attorney-in-fact signing the other miscellaneous closing documents. Having the actual owner sign the original deed to be used for the transaction is always preferred by The Fund.

If the POA has already been executed, closely consider whether it purports to appoint the attorney-in-fact to act for the principal in the capacity of trustee and whether the trust authorizes the trustee to delegate that authority. If the POA is only for the individual or conflicts with the terms of the trust, insuring options will be made on a fact-specific basis, largely dependent on what the agent purports to do. If the trustee is incapacitated, the terms of the trust must be reviewed to determine what is required to demonstrate that the trustee is incapacitated. Typically, this involves a written statement from heirs of the settlor of the trust or from the trustee's primary care physician. Next a determination must be made as to whom the trust agreement names as the successor trustee. Once that person has accepted the trusteeship, confirm that the terms of the trust authorize said successor trustee to do the act that is being contemplated. For the purpose of insuring title, all this information should be recited in a Certification of Trust, pursuant to Sec. 736.1017(5), F.S., with excerpts attached, and the Certification of Trust should be recorded contemporaneously with the document to be insured.

If the trustee is not incapacitated, does not want to amend the POA, and does not intend to have the successor trustee appointed, but is simply unavailable to execute the documents in question, then the answer may be as simple as using a remote online notary to have the documents executed. If getting the trustee's signature is impossible, an insuring solution may be made after a fact-specific inquiry and a discussion with your friendly Fund Underwriting Counsel. The Underwriting Counsel will want to know who signed the contract and whether the trustee is the settlor with the power to amend or revoke the trust, and who the beneficiaries are. If the trustee signed the contract for sale, the act of signing the deed may be considered ministerial rather than a delegation of authority. If the trustee is also the settlor of the trust with the power to amend or revoke and is the sole lifetime beneficiary of the trust, and the principal has consented to the use of the POA to act for him individually and as trustee, then use of the POA may not present any genuine insuring risk, since the principal is the only interested party. The essential inquiry is, what authority does the POA grant

the attorney-in-fact, and what authority do the terms of the trust grant the trustee? In other words, is there something we can "hang our hat on" for the purposes of insuring title.

Even in cases of a successor trustee acting for the trust, when individual joiner of the trustee is required the POA can be used for the principal's individual joinder. Remember, The Fund Underwriting Department is here to help you get your transaction closed. We are always willing to work with you to come up with alternative solutions to insuring your transaction.

Team Education

RESIDENTIAL CONSTRUCTION AND PACE FINANCING ARE THIS MONTH'S FOCUS

Learn what Fund Members need to know about PACE financing by joining The Fund in August for a live webinar addressing this specialized and somewhat controversial form of financing. Also in August, The Fund presents a live webinar on residential construction issues, with a focus on the negotiation of the cost-plus construction agreement.

On Tuesday, Aug. 2, at noon, Jordana Sarrell, Esq. of Sarrell, Sarrell & Bender, P.L., joins Michael Rothman, Sr. Manager of The Fund's Legal Education Department, for presentation of ***Understanding the Cost-Plus Contract: Residential Construction in the Post-Pandemic Age***. Ms. Sarrell, whose practice is largely devoted to new residential construction and the representation of builders and developers, will explain how the cost-plus contract differs from the fixed price agreement and will provide insight into its benefits and detriments. Key provisions of the cost-plus residential agreement will be analyzed. In addition, the webinar will review financing considerations, including owner self-financed transactions, and the obligations imposed on those serving as title and escrow agent. This intermediate-level course builds on the concepts introduced in *Negotiating the New Home Construction Agreement*, available for viewing in The Fund Shop. This live webinar is approved for 1 general and 1 construction law and real estate certification credits with The Florida Bar, and 1 hour of continuing education credit with NALA. *Understanding the Cost-Plus Contract: Residential Construction in the Post-Pandemic Age (Webinar)* (course #117915) has been approved by the Florida Department of Financial Services for 1 hour of CE credit. ATFS, LLC Provider #367289.

Then, on **Aug. 23, at noon**, Fund Legal Education Attorney Linda Monaco presents ***The Good, The Bad & The Ugly of PACE Financing***. PACE financing provides a source of money to Florida property owners to make certain energy-efficient improvements to real property and is repaid over time as a non-ad valorem assessment on the owner's tax bill. Fund Members often tend to think of PACE financing in connection with residential transactions. Yet Florida is one of only three states that permits PACE lending on residential property. On the other hand, C-PACE financing on commercial property has long been widely available to commercial developers across much of the nation. Now, with its low-cost, long-term, fixed rates, C-PACE financing has become increasingly popular as an inflationary hedge against floating-rate debt, meaning that more Fund Members will likely encounter them in their commercial practices. This manner of financing, while attractive to some, can also present real concerns for consumers and real estate professionals guiding them on its use. Please join Linda as she reviews the many issues presented by PACE financing. This program is approved for 1 general credit and 1 business litigation and real estate certification credits with The Florida Bar, and 1 hour of continuing education credit with NALA. *The Good, The Bad & The Ugly of PACE Financing (Webinar)* (course #110966) has been approved by the Florida Department of Financial Services for 1 hour of CE-Title credit. ATFS, LLC Provider #367289.

New in The Fund Shop: In June, The Fund presented newly-refreshed live webinars addressing the legal and ethical considerations relating to records retention and on certain critical commercial loan documents. These programs, *Record Retention & Disposal: Put it in Writing, and Tenant Estoppels and SNDAs*, are now available for viewing in The Fund Shop.

Consumer Pamphlet: Florida Power of Attorney

Table of Contents

Unless otherwise specified, the information in this pamphlet applies to powers of attorney signed on or after Nov. 1, 2014. Consult a lawyer regarding use and enforceability of powers of attorney executed before Oct. 1, 2011. Also, special rules for durable powers of attorney are noted.

About the Power of Attorney

WHAT IS A POWER OF ATTORNEY?

A power of attorney is a legal document delegating authority from one person to another. In the document, the maker of the power of attorney (the “principal”) grants the right to act on the maker’s behalf as that person’s agent. What authority is granted depends on the specific language of the power of attorney. A person giving a power of attorney may make it very broad or may limit it to certain specific acts.

WHAT ARE SOME USES OF A POWER OF ATTORNEY?

A power of attorney may be used to give another the right to sell a car, home or other property. A power of attorney might be used to allow another to access bank accounts, sign a contract, make health care decisions, handle financial transactions or sign legal

documents for the principal. A power of attorney may give others the right to do almost any legal act that the maker of the power of attorney could do, including the ability to create trusts and make gifts.

WHERE MAY A PERSON OBTAIN A POWER OF ATTORNEY?

A power of attorney is an important and powerful legal document, as it is authority for someone to act in someone else's legal capacity. It should be drawn by a lawyer to meet the person's specific circumstances. Pre-printed forms may fail to provide the protection or authority desired.

DOES A POWER OF ATTORNEY NEED WITNESSES OR A NOTARY?

A power of attorney must be signed by the principal, by two witnesses to the principal's signature, and a notary must acknowledge the principal's signature for the power of attorney to be properly executed and valid under Florida law. There are exceptions for military powers of attorney and for powers of attorney created under the laws of another state.

WHAT IS A "PRINCIPAL"?

The "principal" is the maker of the power of attorney – the person who is delegating authority to another. This is the person who is allowing someone else to act on his or her behalf.

WHAT IS AN "AGENT"?

The "agent" is the recipient of the power of attorney – the party who is given the power to act on behalf of the principal. The agent is sometimes referred to as an "attorney-in-fact." The term "attorney-in-fact" does not mean the person is a lawyer.

WHAT IS A "THIRD PARTY"?

As used in this pamphlet, a "third party" is a person or institution with whom the agent has dealings on behalf of the principal. Examples include a bank, a doctor, the buyer of property that the agent is selling for the principal, a broker, or anyone else with whom the agent must deal on behalf of the principal.

WHAT IS A "LIMITED POWER OF ATTORNEY"?

A "limited power of attorney" gives the agent authority to conduct a specific act. For example, a person might use a limited power of attorney to sell a home in another state by delegating authority to another person to handle the transaction locally. Such a

power could be "limited" to selling the home or to other specified acts.

WHAT IS A "GENERAL POWER OF ATTORNEY"?

A "general power of attorney" typically gives the agent very broad powers to perform any legal act on behalf of the principal. A specific list of the types of activities the agent is authorized to perform must be included in the document.

WHAT IS A "DURABLE POWER OF ATTORNEY"?

A power of attorney terminates if the principal becomes incapacitated, unless it is a special kind of power of attorney known as a "durable power of attorney." A durable power of attorney remains effective even if a person becomes incapacitated. However, there are certain exceptions specified in Florida law when a durable power of attorney may not be used for an incapacitated principal. A durable power of attorney must contain special wording that provides the power survives the incapacity of the principal. Most powers of attorney granted today are durable.

MUST A PERSON BE COMPETENT TO SIGN A POWER OF ATTORNEY?

Yes. The principal must understand what he or she is signing at the time the document is signed. The principal must understand the effect of a power of attorney, to whom the power of attorney is being given and what property may be affected by the power of attorney.

WHO MAY SERVE AS AN AGENT?

Any competent person 18 years of age or older may serve as an agent. Agents should be chosen for reliability and trustworthiness. Certain financial institutions with trust powers also may serve as agents.

WHAT HAPPENS IF THE POWER OF ATTORNEY WAS CREATED UNDER THE LAWS OF ANOTHER STATE?

If the power of attorney was properly executed under the other state's laws, then it may be used in Florida, but its use will be subject to Florida's Power of Attorney Act and other state laws. The agent may act only as authorized by Florida law and the terms of the power of attorney. There are additional requirements for real estate transactions in Florida, and if the power of attorney does not comply with those requirements its use may be limited to banking and other non-real estate transactions. The third party also may request an opinion of counsel or an affidavit that the power of attorney was properly executed in accordance with the laws of the other state.

Power and Duties of Agent

WHAT ACTIVITIES ARE PERMITTED BY AN AGENT?

An agent may perform only those acts specified in the power of attorney and any acts reasonably necessary to give effect to the specified acts. If an agent is unsure about authorization to do a particular act, the agent should consult the lawyer who prepared the document or other legal counsel.

Two types of acts may be incorporated by a simple reference to the statutes in the power of attorney – the "authority to conduct banking transactions as provided in Section 709.2208(1), Florida Statutes" and the "authority to conduct investment transactions as provided in Section 709.2208(2), Florida Statutes." When either of these phrases is included in the power of attorney, all of the acts authorized by the referenced statute may be performed by the agent even though the specific acts are not listed in the power of attorney itself.

MAY AN AGENT SELL THE PRINCIPAL'S HOME?

Yes. If the power of attorney has been executed with the formalities of a deed and authorizes the sale of the principal's homestead, the agent may sell it. If the principal is married, however, the agent also must obtain the authorization of the spouse.

WHAT MAY AN AGENT NOT DO ON BEHALF OF A PRINCIPAL?

There are a few actions that an agent is prohibited from doing even if the power of attorney states that the action is authorized. An agent, unless also a licensed member of The Florida Bar, may not practice law in Florida. An agent may not sign a document stating that the principal has knowledge of certain facts. For example, if the principal was a witness to a car accident, the agent may not sign an affidavit stating what the principal saw or heard. An agent may not vote in a public election on behalf of the principal. An agent may not create or revoke a will or codicil for the principal. If the principal was under contract to perform a personal service (i.e., to paint a portrait or provide care services), the agent is not authorized to do these things in the place of the principal. Likewise, if someone had appointed the principal to be trustee of a trust or if the court appointed the principal to be a guardian or conservator, the agent may not take over these responsibilities based solely on the authority of a power of attorney.

WHAT ARE THE RESPONSIBILITIES OF AN AGENT?

While the power of attorney gives the agent authority to act on behalf of the principal, an agent is not required to serve. An agent may have a moral or other obligation to take on the responsibilities associated with the power of attorney, but the power of attorney does not create an obligation to assume the duties. However, once an agent takes on a responsibility, there is a duty to act prudently. (See "Financial Management and the Liability of an Agent.")

IS THERE A CERTAIN CODE OF CONDUCT FOR AGENTS?

Yes. Agents must meet certain standards of care when performing their duties. An agent is looked upon as a "fiduciary" under the law. A fiduciary relationship is one of trust. If the agent violates this trust, the law may punish the agent both civilly (by ordering the payment of restitution and punishment money) and criminally (probation or jail). The standards of care that apply to agents are discussed under "Financial Management and the Liability of an Agent."

Using the Power of Attorney

WHEN IS A POWER OF ATTORNEY EFFECTIVE?

The power of attorney is effective as soon as the principal signs it. However, a durable power of attorney executed before Oct. 1, 2011, that is contingent on the incapacity of the principal (sometimes called a "springing" power) remains valid but is not effective until the principal's incapacity has been certified by a physician.

MUST THE PRINCIPAL DELIVER THE POWER OF ATTORNEY TO THE AGENT RIGHT AFTER SIGNING OR MAY THE PRINCIPAL WAIT UNTIL SUCH TIME AS THE SERVICES OF THE AGENT ARE NEEDED?

The principal may hold the power of attorney document until such time as help is needed and then give it to the agent. Often, a lawyer may fulfill this important role. For example, the principal may leave the power of attorney with the lawyer who prepared it, asking the lawyer to deliver it to the agent under certain specific conditions. Because the lawyer may not know if and when the principal is incapacitated, the principal should let the agent know that the lawyer has retained the signed document and will deliver it as directed. If the principal does not want the agent to be able to use the power of attorney

until it is delivered, the power of attorney should clearly require the agent to possess the original, because copies of signed powers of attorney are sufficient for acceptance by third parties.

HOW DOES THE AGENT INITIATE DECISION-MAKING AUTHORITY UNDER THE POWER OF ATTORNEY?

The agent should review the power of attorney document carefully to determine what authority the principal granted. After being certain that the power of attorney gives the agent the authority to act, the power of attorney (or a copy) should be taken to the third party (the bank or other institution, or person with whom the principal needs to deal). Some third parties may ask the agent to sign a document such as an affidavit, stating that the agent is acting properly. (The agent may wish to consult with a lawyer before signing such a document.) The third party should accept the power of attorney and allow the agent to act for the principal. An agent should always make it clear that documents are being signed on behalf of the principal.

HOW SHOULD THE AGENT SIGN WHEN ACTING AS AN AGENT?

The agent will always want to add after his or her signature that the document is being signed "as agent for" the principal. If the agent signs only his or her own name, the agent may be held personally responsible for whatever was signed. As long as the signature clearly indicates that the document is being signed in a representative capacity and not personally, the agent is protected. Though lengthy, it is, therefore, best to sign as follows:

Howard Rourk, as agent for Ellsworth Toohey. (In this example, Howard Rourk is the agent, and Ellsworth Toohey is the principal.)

WHAT IF THE THIRD PARTY WILL NOT ACCEPT THE POWER OF ATTORNEY?

If the power of attorney was lawfully executed and it has not been revoked, suspended or terminated, third parties may be forced to honor the document. The third party is required to give the agent a written explanation of the refusal to accept the power of attorney within a reasonable time after it is presented to the third party.

Under some circumstances, if the third party's refusal to honor the power of attorney causes damage, the third party may be liable for those damages and even attorney's fees and court costs. Even a mere delay may cause damage, and this, too, may be actionable. It is reasonable, however, for the third party to have the time to consult with a

lawyer or an internal legal department about the power of attorney. Delay for more than a short period may be unreasonable. Upon refusal or unreasonable delay, consult an attorney.

WHY DO THIRD PARTIES SOMETIMES REFUSE POWERS OF ATTORNEY?

Third parties are often concerned whether the document is valid. They do not know if it was executed properly or forged. They do not know if it has been revoked. They do not know if the principal was competent at the time the power of attorney was signed. They do not know whether the principal has died. Third parties do not want liability for the improper use of the document. Some third parties refuse to honor powers of attorney because they believe they are protecting the principal from possible unscrupulous conduct. If your power of attorney is refused, talk to your attorney.

WHAT IF A THIRD PARTY REQUIRES THE AGENT TO SIGN AN AFFIDAVIT BEFORE HONORING THE POWER OF ATTORNEY?

A third party is authorized by Florida law to require the agent to sign an affidavit (a sworn or an affirmed written statement), stating that the agent is validly exercising the authority under the power of attorney. If the agent wants to use the power of attorney, the agent may need to sign the affidavit if so requested by the third party. The purpose of the affidavit is to relieve the third party of liability for accepting an invalid power of attorney. As long as the statements in the affidavit are true at that time, the agent may sign it. The agent may wish to consult with a lawyer before signing it.

WHAT ELSE MAY THE THIRD PARTY REQUIRE?

A third party also may make a reasonable request for an opinion of counsel as to any legal matter concerning the power of attorney, including its proper execution under the laws of another state. A third party may request a certified English translation if any part of the power of attorney is in a language other than English.

MAY THE AGENT EMPLOY OTHERS FOR ASSISTANCE?

Yes. The agent may hire accountants, lawyers, brokers or other professionals to help with the agent's duties but generally may not delegate the responsibilities as agent. The power of attorney was given by the principal to the agent, and the agent does not have the right to transfer that power to anyone else. It is important that the agent keep in mind the fiduciary duties when hiring professionals to help. The agent is allowed to delegate investment responsibility if the requirements of Florida Statutes Section 518.11 are followed by the agent, unless the power of attorney prohibits such a delegation.

Relationship of Power of Attorney to Other Legal Instruments

WHAT IS THE DIFFERENCE BETWEEN AN AGENT AND AN EXECUTOR OR PERSONAL REPRESENTATIVE?

An executor, termed a "personal representative" in Florida, is the person who takes care of another's probate estate after that person dies. An agent may take care of the principal's affairs only while the principal is alive. A personal representative may be named in a person's will and is appointed by the court to administer the estate.

WHAT IS THE DIFFERENCE BETWEEN A "TRUSTEE" AND AN "AGENT"?

Like a power of attorney, a trust may authorize an individual (the "trustee") to act for the maker of the trust during the maker's lifetime. Like an agent, the trustee may manage the financial affairs of the maker of the trust. A trustee has power only over an asset that is owned by the trust. In contrast, an agent may have authority over all of the principal's non-trust assets. Another important distinction is that a trustee may continue acting for the maker of the trust after the maker of the trust dies. In contrast, the power of attorney expires upon the death of the principal. Whether a trust or an agent is the most appropriate tool for a specific situation is a question that should be addressed to an attorney.

MAY A POWER OF ATTORNEY AVOID THE NEED FOR GUARDIANSHIP?

Yes. If the incapacitated person executed a valid durable power of attorney before the incapacity, it may not be necessary for the court to appoint a guardian, since the agent already has the authority to act for the principal. As long as the agent has all necessary powers, it may not be necessary to file guardianship proceedings and, even when filed, guardianship may be averted by showing the court that a durable power of attorney exists and that it is appropriate to allow the agent to act on the principal's behalf.

WHAT IF THE PRINCIPAL HAS A "GUARDIAN" APPOINTED BY THE COURT?

If no less restrictive appropriate alternative is available, then a guardian may be appointed by the court for a person who no longer can care for his or her person or property. A person who has a guardian appointed by the court may not be able to lawfully execute a power of attorney. If an agent discovers that a guardian was appointed before the date the principal signed the power of attorney, the agent should advise a lawyer. If a guardianship court proceeding is begun after the power of attorney was signed by the principal, the authority of the agent of certain individuals is automatically

suspended until the petition is dismissed, withdrawn or otherwise acted upon. The law requires that an agent receive notice of the guardianship proceeding. A power to make health care decisions, however, is not suspended unless the court specifically suspends this power. If the agent learns that guardianship or incapacity proceedings have been initiated, the agent should immediately consult with a lawyer.

Termination of the Power of Attorney

WHEN DOES A POWER OF ATTORNEY TERMINATE?

The authority of any agent under a power of attorney automatically ends when one of the following things happens:

- The principal dies.
- The principal revokes the power of attorney.
- A court determines that the principal is totally or partially incapacitated and does not specifically provide that the power of attorney is to remain in force.
- The purpose of the power of attorney is completed.
- The term of the power of attorney expires.

In any of these instances, the power of attorney is terminated. If, after having knowledge of any of these events, a person continues to act as agent, he or she is acting without authority.

WHEN DOES A PARTICULAR AGENT'S AUTHORITY TERMINATE?

The authority of an agent under a power of attorney automatically ends when one of the following things happens:

- The agent dies.
- The agent resigns or is removed by a court.
- The agent becomes incapacitated.
- There is a filing of a petition for dissolution of marriage if the agent is the principal's spouse, unless the power of attorney provides otherwise.

WHAT IS THE PROCEDURE FOR A PRINCIPAL TO REVOKE A POWER OF ATTORNEY?

The revocation must be in writing and may be done by a subsequent power of attorney. Notice should be served on the agent and any other party who might rely on the power. The notice should be served either by any form of mail that requires a signed receipt or by certain approved methods of personal delivery. Special rules exist for serving notice of revocation on banks and other financial institutions. Consult with a lawyer to be sure proper procedures are followed.

COURT PROCEEDINGS WERE FILED TO APPOINT A GUARDIAN FOR THE PRINCIPAL OR TO DETERMINE WHETHER THE PRINCIPAL IS INCAPACITATED. HOW DOES THIS AFFECT THE POWER OF ATTORNEY?

If a court proceeding to determine the principal's incapacity has been filed or if someone is seeking to appoint a guardian for the principal, the power of attorney is automatically suspended for certain agents, and those agents must not continue to act. The power to make health care decisions, however, is not suspended unless the court specifically suspends this power.

AUTHORITY AS AGENT HAS BEEN SUSPENDED BECAUSE GUARDIANSHIP PROCEEDINGS ARE PENDING FOR THE PRINCIPAL. NOW THERE IS AN EMERGENCY, BUT NO GUARDIAN HAS BEEN APPOINTED YET. WHAT NOW?

The agent may ask the court for special permission to handle an emergency, even though the power of attorney remains otherwise suspended. Contact a lawyer.

Financial Management and the Liability of An Agent

WHAT IS "FIDUCIARY RESPONSIBILITY"?

An agent is a fiduciary and as such has multiple duties when acting for the principal. These include an overriding duty to do only those acts authorized by the power of attorney, and when performing those acts to act in accordance with the principal's reasonable expectations, to act in the principal's best interest and to attempt to preserve the principal's estate plan. The preservation of the estate plan is dependent on a number of factors, including the agent's knowledge of the plan and the needs and desires of the principal. If the agent assumes responsibility for the principal's investments, the agent has a duty to invest and manage the assets of the principal as a prudent investor. This standard requires the agent to exercise reasonable care and caution in managing the

assets of the principal. The agent must apply this standard to the overall investments and not to one specific asset. An agent possessing special financial skills or expertise has an obligation to use those skills. The agent is required to keep careful records and may be required to provide an accounting. Everything the agent does for the principal should be written down, and the agent should keep all receipts and copies of all correspondence and consider logging phone calls so if the agent is questioned, records are available. Agents should consult with lawyers to be sure they understand all of the duties applicable to them.

Where to Learn More

FLORIDA DEPARTMENT OF ELDER AFFAIRS

The DOEA is a helpful resource on a variety of issues relating to aging. The general jurisdiction, mission and purpose of the department are found in Chapter 430 of the Florida Statutes. The DOEA maintains the Elder Helpline, a statewide toll-free number 1-800-96ELDER, as well as a **website**. The department also co-sponsors publication of the "Older Floridians Handbook."

FLORIDA STATUTES

Chapter 709 of the Florida Statutes contains the full statutory law on powers of attorney. Chapter 765 deals with Health Care Surrogate Designation. Chapter 744 deals with guardianship law. Chapter 518 deals with investment of fiduciary funds. You may find a set of the Florida Statutes at your public library or at most courthouses or **online**.

The material in this pamphlet represents general legal advice. Since the law is continually changing, some provisions in this pamphlet may be out of date. It is always best to consult an attorney about your legal rights and responsibilities regarding your particular case.

[Updated February 2020]

NALA | THE PARALEGAL ASSOCIATION

CERTIFICATE OF ATTENDANCE

Certified Paralegals are required to record evidence of 50 hours of continuing legal education hours to renew the CP credential every 5 years. CLE hours are recorded in CPs' accounts through the NALA online portal. Of the 50 hours, 5 hours must be in legal ethics, and no more than 10 hours may be recorded in non-substantive areas. If attending a non-NALA sponsored educational event, this certificate may be used to obtain verification of attendance. Please be sure to obtain the required signatures for verification of attendance. The requirements to maintain the CP credential are available from NALA's web site at https://www.nala.org/certification/certtest2view. Please keep this certificate in the event of a CLE audit or further information is needed.

PLEASE COMPLETE THE SPACES BELOW AND ATTACH A PROGRAM

Session Length In Hours	Session Topics (Description and Speakers)	Validation of Attendance
1.0	A Matter of Principals: Problems and Pitfalls of Using a Power of Attorney / John St. Lawrence	*John St. Lawrence*

Name of CP (Please Print)	NALA Account Number (On Mailing Label)
	149113
Signature of CP	Name of Seminar/Program Sponsor
	A Matter of Principals: Problems & Pitfalls of Using a Power of Attorney / ATFS, LLC
Address	Authorized Signature of Sponsor Representative
	John St. Lawrence
	Date of Educational Event:
City: / State (XX):	
Preferred e-mail address	Location:
	Recorded Webinar

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Non-substantive hours	
Ethics	

FL BAR Reference Number: 2410196N

Title: A Matter of Principals: Problems and Pitfalls of Using a Power of Attorney

Level: Intermediate

Approval Period: 12/01/2024 - 06/30/2026

CLE Credits

General 1.0

Certification Credits

Real Estate 1.0

Wills, Trusts & Estates 1.0