

# Primer on Powers of Attorney

*from the desk of David M. Touchstone*

The term “power of attorney” is actually a common law term and as we all know, Louisiana is a civil law jurisdiction. In Louisiana, the correct terms are “mandate” and “procuration.” A mandate is an authorization for the agent to perform certain specific acts or a limited range of acts. A procuration is a more wide ranging authorization and is often referred to as a “general power of attorney.”

No matter what we call them, powers of attorney are a pretty big deal to real estate attorneys. Why? Because powers of attorney are a crucial link in the chain of documents which make up the real estate transaction. If the power of attorney contains a fatal flaw, the whole chain breaks and the transaction collapses. For this reason, it is very important that the closing agent is informed prior to the closing that a power of attorney will be used at closing. Many real estate agents prudently choose to have the closing agent prepare the power of attorney and thereby obviate any questions about the power of attorney.

When powers of attorney are to be used by buyers in third party financing transactions, it is even more important to notify the closing agent prior to closing. There are three reasons for this. First, while most lenders will permit the use of Buyer powers of attorney, there are some that will not. The earlier the closing agent is aware of this, the sooner it can be determined whether and un-



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der what circumstances the proposed lender will allow the use of a power of attorney. Second, most lenders require certain “magic words” on their documents; that is to say, each lender has its own rules about how the documents are to be signed. By notifying the closing agent early enough, the closing agent will have adequate time to prepare the closing documents in a manner that complies with the lender’s requirements. Third, experience has shown that buyer powers of attorney are more often defective inasmuch as they are more demanding in their content specifications.

While it may sometimes seem that real estate attorneys are arbitrary in their acceptance or rejection of powers of attorney, generally, there is a consistency. There are two kinds of concerns. The first is form. In virtually all real estate transactions, Louisi-

ana real estate attorneys draft their documents to be “authentic acts.” The words “authentic act” is a legal term; it means the document was signed by the party or parties in the presence of two witnesses and in the presence of a notary public. Authentic acts are self proving in court. Most documents (e.g. a check or a letter) which are offered into evidence in a trial have to first be identified by a witness and have limited evidentiary value. By contrast, authentic acts can be offered into evidence without any witness to identify them and; furthermore, they are quasi conclusory as to their content, i.e., they have very powerful evidentiary value. Lawyers love authentic acts and just as in the case of deeds and mortgages, lawyers want powers of attorney to be authentic acts.

The second area of concern to a real estate attorney is content. What does the power of attorney actually say? In order to buy, sell, lease, or mortgage property, the power of attorney must “expressly” state that the agent has such authority. For instance, it is not enough for a power of attorney to state that the agent is authorized to “manage” the property; it is not enough for the power of attorney to say that the agent can “deal with my property” or “transact.” If the power of attorney is to sell, it should contain the word “sell.” If it is to mortgage, it should contain the word “mortgage.” Further, it should state what the agent is authorized to buy, sell, lease, or mortgage. This can be done by describing specific parcels of property or it can be done by using such words as “all of my immovable property” or “all of my real estate.” Finally, if the power of attorney is to borrow money, it must explicitly state that the agent is empowered to sign a promissory note.

Every once in a while, neither the principal nor the agent can come to the clos-

ing. If the power of attorney contains language such as “full power of substitution,” the agent can sign a document delegating his agency powers to a third person. Like the power of attorney, this act should be in authentic form.

Powers of attorney, just as deeds and mortgages, must be recorded with the clerk of court in the parish where the property is located. If, for instance, an otherwise acceptable power of attorney has been recorded in Caddo Parish and the agent wishes to sell property in Bossier Parish, a certified copy can be obtained from the Caddo Clerk and recorded in Bossier Parish. If the power of attorney has never been recorded, the ORIGINAL must be presented to the closing agent at closing. Otherwise, the NO MOOLA rule will be invoked. No original, no moola.

Being located near to a major military facility in a time of active foreign policy initiatives means that we often see military powers of attorney. In 1991, Louisiana enacted a set of statutes to facilitate federal legislation, the purpose of which was to overcome the different states’ rules as to powers of attorney. A military power of attorney, no matter its form will receive authentic act treatment and, thereby overcome objections to form. However, military powers of attorney, like all powers of attorney must adequately empower the agent to do the desired act. Therefore, like all powers of attorney, military powers of attorney should be presented to the closing agent for review prior to the closing.

When this attorney was in law school, powers of attorney terminated 1.) if revoked, 2.) by the expiration of a stated term, 3.) by the loss of the principal’s mental awareness, and 4.) by the principal’s death. Items 1, 2, and 4 are still the law, but item 3 has

changed twice. In the first change, the law was amended such that a principal could include language in the power of attorney that the agent's authority would continue beyond the loss of the principal's awareness. For instance, should the principal become extremely debilitated due to Alzheimer's, the power of attorney would, nevertheless, remain effective. This was the advent of what became known as the "Durable Power of Attorney." A few years later, the law was amended again—this time to say that no such special language was necessary. Nowadays, all powers of attorney are durable.

Third persons can rely upon a power

of attorney filed in the public records until such time as the principal revokes it or until the principal dies. Because a principal's death is often not a matter of public record, real estate attorneys sometimes require an affidavit from the agent (usually as a statement in the deed) that the principal is still living. This requirement is particularly invoked as to powers of attorney that are more than a year old.

Having a due regard for the importance of powers of attorney will, hopefully, help you keep your transaction moving forward smoothly. And, of course, we all have that goal.