Powers of Attorney - to accept or not to accept, that is the question!

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One of the most common questions that we receive on a daily basis is whether a power of attorney can be used for a party in a transaction. There are different types of powers of attorney. A General Power of Attorney grants to the attorney-in-fact powers regarding any property which the principal owns at the time of the grant of the power of attorney. A Special Power of Attorney grants to the attorney-in-fact not to accept, that is the question! powers regarding any property which the principal owns at the time of the grant of the power of attorney. A General Power of Attorney can be used for a party that we receive on a daily basis whether the principal owns at the time of the grant of the power of attorney. A Special Power of Attorney grants to the attorney-in-fact powers for a particular transaction. A Durable Power of Attorney can be a general or special power of attorney and allows the attorney-in-fact to act on behalf of the principal even if the principal is incapacitated. A Military Power of attorney can be a general or special power of attorney and is used for military personnel only.

Many of the power of attorney forms that you receive from your customers and clients are from online sources, office supply companies, or prepared out-of-state. Regardless of where the power of attorney was prepared, executed, or its source, the general rule of law is that the location of the real property governs the validity of the power of attorney to convey an interest in real property. See Callwood v. The Virgin Islands Nat’l Bank, 221 F.2d 770 (3rd Cir. Ct. App. 1955). Thus, in order for the power of attorney to be used to convey or mortgage Florida real property the power of attorney must comply with Florida law. The authority granted to the attorney-in-fact must be clearly and plainly stated in the power of attorney. See Title Standard 1.3. In order to be used for the sale of real property and the execution of a deed, the power of attorney must contain the power to “sell and convey” the real property; the power “to sell” alone is not sufficient since courts have interpreted that phrase to mean that the attorney-in-fact only has the power to negotiate and execute a contract to sell the real property. The power of attorney does not have to specifically describe the land unless it is a Special Power of Attorney. In order to rely on a power of attorney to mortgage real property, the power of attorney must authorize the attorney-in-fact to mortgage real property.

One of the most common problems which renders powers of attorney unacceptable is the manner in which the power of attorney is executed. Florida law requires that a power of attorney to convey real property must be executed with the same formality as a deed – two witnesses and a notary acknowledgment are required. Fla. Stat. Sec. 709.015(2). To mortgage real property, the power of attorney must be executed with the same formality as a mortgage – a notary is required, but not two witnesses. However, under Florida Statutes Section 689.111, a power of attorney used for a mortgage of homestead property must be executed with the same formality as a deed; two witnesses and a notary are required. A Durable Power of Attorney must always be executed with the same formality as a deed – two witnesses and a notary acknowledgment, even if the Durable Power of Attorney is being used for a mortgage of non-homestead real property. Fla. Stat. Sec. 709.08(1). These requirements apply regardless of where the power of attorney was executed or prepared – if the real property is in Florida, Florida law governs the conveyance or encumbrance of the real property. A Military Power of Attorney is a special exception since it is governed by Federal law which exempts a proper Military Power of Attorney from certain requirements under State law. However, a Military Power of Attorney must contain the same clear authority to sell and convey or mortgage the real property and must be recorded with the deed or mortgage to be insured. Just because the principal who executed a power of attorney is in the military does not make it a Military Power of Attorney. In order to be a Military Power of Attorney, the document and its execution and acknowledgment must comply with 10 U.S.C., Sec. 1044. Please contact underwriting if you are asked to accept a document presented as a military power of attorney.

To execute a deed or mortgage, the attorney-in-fact must write the name of the principal and then sign his or her name as attorney-in-fact. Under Title Standard 1.2, the name of the principal can be written, printed, or typed. The original power of attorney must be recorded with the deed or mortgage executed by the attorney-in-fact. Because a power of attorney can be revoked, may terminate in accordance with its terms, or the principal may die or be deemed incompetent, you must obtain an affidavit from the attorney-in-fact stating that the principal is not deceased, has not been adjudicated incompetent or incapacitated, that the power of attorney has not been revoked, and a petition to determine the incapacity of or to appoint a guardian for the principal is not pending.

Personal execution of documents by the proper parties is preferred: the use of a power of attorney should be an exception and not the general rule. A power of attorney should not be used to close a transaction simply because it is inconvenient for the individual to sign the documents or attend the closing. A power of attorney cannot be used to convey or mortgage property to or in favor of the attorney-in-fact. Please contact underwriting if you have any questions regarding the use or acceptance of a power of attorney.