SELLER DISCLOSURE AND POWER OF ATTORNEY

By James Goldsmith

Judging by calls to the Hotline, many licensees are confused when it comes to working with powers of attorney and especially when it comes to the Seller's Property Disclosure Statement. "Does the what-do-you-callem who is acting for the owner merely have to sign the form or does he/she have to complete it or get it completed?"

First, let us get a name for what-do-you-callem. In Pennsylvania, there is a law that applies to all powers of attorney executed and used in the Commonwealth. That statute dictates the form of power of attorney and it defines the parties that participate in this special relationship that enables one person to act for another. The "principal" is the person who, by signing a power of attorney, confesr powers to act on his behalf to another. The "agent" (not to be confused with real estate agent) is the person who is authorized by the principal and named in the power of attorney to exercise the powers that are granted to act on behalf of the principal.

By law, an agent acting under a power of attorney has a "fiduciary" relationship to the principal to 1) exercise the powers for the benefit of the principal; 2) keep personal assets separate from those of the principal; 3) exercise reasonable caution and prudence; and 4) keep a full and accurate record.

Also, by law, a power of attorney is deemed to be "durable" unless otherwise noted. A durable power of attorney is one that survives the onset of disability of the principal. In other words, the agent can continue to act for the principal even after the principal becomes incompetent to act on his or her own behalf. No power of attorney, however, can be granted by an incompetent. The power has to be created when the principal is aware and fully understands what he or she is doing.

Generally, a power of attorney will confer upon the agent the right to "engage in real property transactions." This language is sufficient to allow the agent to buy or sell real estate for the principal; to manage, repair, improve and maintain real estate; to collect rent; to execute mortgages or other liens; to grant easements, partition of subdivide; and in general permits the agent to exercise "all powers with respect to real property that the principal could, if present."

Okay, now we know a little bit more about powers of attorney under Pennsylvania law. So how does the agent act in a transaction for the principal? We must begin by examining the power of attorney form to make sure that it satisfies Pennsylvania law and to assure that it grants the agent the power to "engage in real property transactions." If that language is found, then we know that the agent will be able to sign anything that the principal could have signed had he or she been present.

What will be more difficult is analyzing whether the form itself is proper. The best practice is to obtain a copy of the power of attorney form and provide it to the title agent who will be issuing a title policy. The title insurance company is adverse to risk and will assure that the form and its

execution is appropriate. Do not wait until the last minute to determine that you have a bad power of attorney form. Under those circumstances, you may not be going to closing, you are not collecting a commission, and you may be facing recrimination from a very unhappy buyer or seller!

Alright, the form is good and you know the original form will appear at settlement so that it can be recorded (a necessity, if not already of record in the recorder of deeds office for the county where the property is located). Great, everything will be ready for settlement when the time comes. But what about the seller disclosure statement, which is, after all, the subject of this article! **Yes, it has to be completed!!!** And it has to be signed. "And" is conjunctive. The agent has the right to sign the seller disclosure statement. And, the agent has the right to complete it. Note, the agent has the right (if not the obligation), but may not have the ability to complete the disclosure with any degree of accuracy. Let's break this down.

Signing. If you look at the last page of the Seller's Property Disclosure Statement you will see a box entitled **"EXECUTOR, ADMINISTRATOR, TRUSTEE SIGNATURE BLOCK."** This does not apply to a power of attorney or the agent who is signing under a power! That block relates to sellers who are deceased or whose property is in trust and does not apply to a principal owner who has granted power of attorney. Yes, the principal who has given power of attorney may still sign the Seller's Property Disclosure Statement, assuming that the principal is competent. An agent acting under power of attorney may sign a Seller's Property Disclosure Statement for the principal and may do so even if the principal is now incompetent, assuming that the power is durable.

So if an agent has the power to sign a Seller's Property Disclosure Statement, if not the fiduciary responsibility to do so, how will he or she do it if he or she never owned, lived in or does not really know the property? Very good question. Disclosure law requires any seller to disclose to the buyer any material defects known to the seller by completing all applicable items in the disclosure form. So, whether the form is completed by the owner/principal or the agent (I hope by now that you understand when the term "agent" is used in conjunction with power of attorney it means the person to whom the power was conferred and not the real estate agent. If you are not with me here, go back to the beginning!) The agent has a duty to act in the best interests of the principal. The agent can sign the form. The form requires the disclosure of defects known by the seller. The logical conclusion to take from this is that the agent acting under the power will have to contact the seller to find out whatever the seller knows. The agent will carefully put this information in the disclosure statement.

But what if the principal is no longer competent? After all, this will be the case in many occasions if not most. In that situation, the agent still has the responsibility to act in the best interest of the seller and will have to put as much information as can reasonably be determined into the form. There may be records of repairs or other conditions that lead to knowledge about the property. The agent may have special knowledge because of the special relationship between the agent and principal (usually, powers of attorney are conferred to next-of-kin or close friends). Finally, you can only put down what you know! Therefore, there will be a lot of "unknown" entries on the lines in the form. It is also appropriate for an agent, when acting for an owner under a power of attorney, to note on the form or on a separate page that the agent has very

limited knowledge about the property and is acting under power of attorney for a seller who is incompetent and therefore cannot be accurately questioned. The information should be understood to be of limited value and that the failure to indicate any material defects will be as a result of the limited knowledge of the agent. As with any seller disclosure, each section should be completed; though, as noted, in this case there will be many entries of "unknown" inserted.

By the way, I am sure there are some readers out there who remember when an agent acting under a power of attorney was referred to as a "attorney-in-fact." While the law has changed and the name is no longer applicable, an agent who signs the principal's name "by (agent's name), Attorney-in-Fact" will not invalidate the instrument signed. Obviously, referring to an attorney-in-fact as opposed to an agent helps to avoid the confusion between the real estate agent and the agent acting under power of attorney.

I hope this helps and that your principals and agents are all having a happy and profitable summer!

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