



THE LAW OFFICE OF
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To: Clients and Friends
From: Christopher J. Sullivan
Subject: The New Statutory Durable Power of Attorney

Power of attorney documents are a powerful tool that real estate agents and brokers can use to get their transactions closed in a timely manner when one or more parties cannot come to the table at the time of closing. A power of attorney is simply a document signed by one person (known as the “principal”) that gives authority to another person (known as their “agent”) to execute documents and make decisions on their behalf. There are many reasons that someone buying or selling a property might be unable to make it to a closing. Power of attorney documents are routinely used when a servicemember is going to be deployed or away for training on the date of a closing, when a spouse is going to be out of state for work, or an aging parent is going to be in surgery. These are simply a few examples of the myriad of circumstances under which a party to the transaction might need to use a “POA.”

What is a “Statutory Durable” Power of Attorney?

There are many types of power of attorney documents. For example, a medical power of attorney gives an agent the right to make medical decisions on behalf of an incapacitated principal. However, when real estate agents and brokers are speaking of powers of attorney, they are referring to financial ones that give the agent the power to make financial decisions and conduct transactions in the name of the principal. The Texas Legislature gives a sample form for this type of power of attorney, and when their example is used in practice it is referred to as statutory because it is found within a Texas statute. The “durable” portion of the name refers to the fact that the power of attorney can be drafted in such a way that the agent’s power does not end due to the principal’s incapacity.

Changes to the Texas Statutory Durable Power of Attorney

The 2017 Texas legislative session introduced a new form and significant changes to the use and acceptance of the Texas Statutory Durable Power of Attorney. These changes were introduced and enacted into law by House Bill 1974 and Senate Bills 39 and 1193, to become effective September 1, 2017. The new form of power of attorney has provisions more directly addressing whether and how an agent is entitled to reasonable compensation of expenses incurred on the principal’s behalf, as well as compensation for serving as agent. It also contains special instructions applicable to co-agents. However, the most important changes are to the guidance for mortgage lenders and other institutions as they decide whether or not to accept a particular power of attorney. This is the change that real estate agents and brokers should be most concerned about, since a rejection of the power of attorney by the mortgage lender can result in a delayed closing or, perhaps, even a breach of contract by the party unable to be at the closing table on time.



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Time Period to Accept or Reject Texas Statutory Durable Power of Attorney

Under the old law, mortgage lenders had very little guidance or duties to timely accept or reject a power of attorney submitted to them for review and approval. Now, under the newly enacted law, a mortgage lender must accept or reject a power of attorney within 10 business days. However, if within those 10 business days the lender requests an agent's certification regarding the validity of, and agent's authority under, the power of attorney, that can extend the timeline for approval even further. An agent's certification is a document signed by the agent, and notarized, attesting to their continued and active authority to act on behalf of the principal named in the power of attorney. When the lender requests such a document, the lender has 7 additional days from receipt of the certification to make a final decision on whether to accept a power of attorney. There are certain exceptions to this timeline, such as when a non-English power of attorney is being used or when the lender voluntarily agrees to a different timeline.

What Does This Mean for Real Estate Agents?

The changes to rules for acceptance and rejection of powers of attorney are a good thing, because it will provide greater accountability for lenders when a transaction involves a power of attorney. Real estate agents will now know that a lender has only so many days to approve or reject a document. Practically speaking, most lenders will now require that an agent's certification be submitted to them. Real estate agents would do well to anticipate this need, and make sure that the agent in the transaction has a signed and notarized certification ready to send immediately, instead of allowing the lender to wait ten days and then ask for this document, which needlessly extends the timeline for approval. If your client will be using a power of attorney document in their transaction and you want to be sure you are meeting all technical requirements and timelines, reach out to The Law Office of Christopher J. Sullivan, PLLC, where your power of attorney experts are waiting to advise you.

Sincerely,

Christopher J. Sullivan

Christopher J. Sullivan
Managing Member