


Powers of Attorney and Real Estate


What, when, why, and where can a power of attorney be used.

Philip Savich, Vice President
 Old Republic National Title Insurance Company
 3890 Charlevoix Avenue, Suite 260
 Petoskey, MI 49770
 231.347.8310





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- The stories you are about to hear are true. The names were changed to protect the innocent.



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- Total premiums written nationwide in 2018: \$2.28 billion.
- 15.70% market share in Michigan
- Old Republic offers title insurance products and other real estate related services through many different divisions.
- Since 1992, Old Republic has received the highest overall financial ratings in the industry



Underwriters in Edward Lloyd's "Coffee House", London, England

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Underwriting slip for the Titanic

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Power of Attorney

Blah blah heretofore,
blah blah therein, blah
blah notwithstanding
the foregoing, blah blah
blah blah blah blah



Has nothing to do with
being a lawyer.

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A lawyer is a person licensed to practice law.

Attorney is another word for AGENT.

An attorney at law is your agent for legal matters.

When someone acts for another in a business or property setting, they are called an.....




Not this type of agent

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attorney-in-fact

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The person making and signing the power of attorney is called the **"Principal"**.



Not this principal

A power of attorney is a written document.

It defines the powers and duties of the attorney-in-fact. It can be as broad or narrow.


It can cover a specific transaction, or give the attorney-in-fact complete power over the Principal's property.

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A very simple power of attorney might state:



I, John Smith, appoint Paul Jones as my attorney-in-fact for the purpose of selling my X-Box to Mary Jane for \$200.00.

Paul Jones is authorized to sign a bill of sale and to deposit the proceeds of the sale into my bank account.





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A power of attorney can be used for many, many things....

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But we will just concentrate on their use in real estate transactions.


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Why do we care about powers of attorney?

They add additional risk:

- Is the POA valid?
- Has the POA been revoked?
- Is the attorney-in-fact cheating the principal?
- Was the principal competent when the POA was signed?

So, when using a POA, be prepared to answer this question.....



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WHY ??

Some reasons just set off alarm bells:

“Mr. Smith can’t come to the closing and pick up his million dollar check because he decided that his massage appointment was more important”.

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What is Difference Between Power of Attorney and Conservatorship

	Conservator	POA
Appointed by court	✓	
Privately appointed		✓
Powers by statute or judge	✓	
Powers chosen by creator		✓

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A standard power of attorney is automatically revoked if the Principal becomes incapacitated.



A **durable** power of attorney continues in effect notwithstanding the incapacity of the Principal.

By statute, a power of attorney is durable if it contains certain magic language:



"This power of attorney is not affected by the principal's subsequent disability or incapacity, or by the lapse of time."

or

"This power of attorney is effective upon the disability or incapacity of the principal."

MCL 700.5501



Practical matters

We will accept a power of attorney as durable if it states: "This power of attorney is durable".



Why should it be durable?




A power of attorney that is not durable expires if the principal becomes mentally incompetent.

The title company (or anyone else for that matter) has no way of knowing the current competency of the principal.

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Durable powers of attorney are often used:



When the principal cannot attend the closing personally.

When the principal is no longer mentally able to understand a transaction.



When the principal is serving out of the country in the military.

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A valid durable power of attorney must be:

1. Signed by the principal, and
2. Signed in presence of two witness, or

Signature acknowledged before a notary public.





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TIP


It is best to have the power of attorney acknowledged before a notary public so that it is recordable at the register of deeds.



Many members of the military, by law, have the ability to notarize a power of attorney.


10 U.S.C. §1044a grants general powers of a notary public and of a consul of the United States to the individuals below:


- All judge advocates, including reserve judge advocates when not in a duty status
- All civilian legal assistance attorneys
- All adjutants, assistant adjutants, and personnel adjutants, including reserve members when not in a duty status
- For the performance of notarial acts at locations outside the U.S., all employees of a military Department or the Coast Guard who are designated by regulations of the Secretary concerned or by statute to have those powers for exercise outside the U.S. [See next page.](#)
- All other members of the armed forces, including reserve members when not in a duty status, designated by regulations of the armed forces or by statute to have those powers



In addition to the list in 10 U.S.C. §1044a, by regulation the following persons are added to those authorized to perform notarial acts:

- For performance of notarial acts outside the U.S., all DoN civilians supporting legal assistance offices
- All officers in the grade of O-4 and above
- All COs, XO's and admin officers
- All legal and assistant legal officers
- All Marine Corps officers with an MOS of 4430 while assigned as legal administrative officers
- All Limited Duty Officers (law)
- All (Navy) legalmen upon completing training, signing a duties and responsibilities form, registering with Code 16 – linked to relevant duty assignment
- All Marine Corps legal services specialists E-4 and above, while serving in legal assistance billets, when authorized by the cognizant OIC.

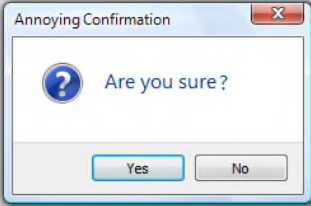




Now, back to civilian law.....

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The attorney-in-fact is supposed to sign a document agreeing to become the attorney-in fact. The document gives the attorney-in-fact numerous warnings.



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I, _____, have been appointed as attorney-in-fact for _____ the principal, under a durable power of attorney dated _____. By signing this document, I acknowledge that if and when I act as attorney-in-fact, all of the following apply:

(a) Except as provided in the durable power of attorney, I must act in accordance with the standards of care applicable to fiduciaries acting under durable powers of attorney.

(b) I must take reasonable steps to follow the instructions of the principal.

(c) Upon request of the principal, I must keep the principal informed of my actions. I must provide an accounting to the principal upon request of the principal, to a guardian or conservator appointed on behalf of the principal upon the request of that guardian or conservator, or pursuant to judicial order.

(d) I cannot make a gift from the principal's property, unless provided for in the durable power of attorney or by judicial order.

(e) Unless provided in the durable power of attorney or by judicial order, I, while acting as attorney-in-fact, shall not create an account or other asset in joint tenancy between the principal and me.

(f) I must maintain records of my transactions as attorney-in-fact, including receipts, disbursements, and investments.

(g) I may be liable for any damage or loss to the principal, and may be subject to any other available remedy, for breach of fiduciary duty owed to the principal. In the durable power of attorney, the principal may exonerate me of any liability to the principal for breach of fiduciary duty except for actions committed by me in bad faith or with reckless indifference. An exoneration clause is not enforceable if inserted as the result of my abuse of a fiduciary or confidential relationship to the principal.

(h) I may be subject to civil or criminal penalties if I violate my duties to the principal.

Signature: _____ Date: _____

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IT DOESN'T MATTER

There are no adverse consequences if the attorney-in-fact does not sign the acknowledgement form.

The power of attorney is still valid. It simply does not matter.

But whether or not the attorney-in-fact signs the acknowledgement, they can still be liable to the principal.

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DURABLE POWER OF ATTORNEY FOR FINANCES
POA #1

I, _____, am of sound mind, and I voluntarily make this designation.

APPOINTMENT OF AGENT I designate _____, my _____, living at _____, to act for me as my agent, with the powers set forth in this document. If my first choice cannot serve or cannot continue to serve, I designate _____, living at _____, to act for me as my agent.

EFFECTIVE DATE (You must choose one paragraph by writing your initials on the line)
 _____ My agent has the powers set forth in this document immediately upon my signing it. These powers shall not be affected by any mental or physical disability I may have in the future. or
 _____ My agent shall only have the powers set forth in this document when it is determined I am unable to manage my property and financial affairs effectively. That determination shall be made by my attending physician, who shall put it in writing.

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POA #1 Continued

POWERS

My agent shall exercise powers in my best interests and for my welfare, as a fiduciary. My agent shall have the following powers:

1. **BANKING** - To receive funds, deposit funds in any financial institution, and make withdrawals by check or otherwise to pay for goods, services, and any other personal and business expenses for my benefit. To effect her or his powers, my agent has power to sign a power of attorney drafted by the institution, and shall have access to my safe deposit box.

2. **GOVERNMENT BENEFITS** - To apply for and receive any government benefits for which I may be eligible or become eligible, including but not limited to, Social Security, Medicare and Medicaid.

3. **INVESTMENTS** - To invest and reinvest my funds, and to withdraw funds to the extent needed to pay for my needs.

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POA #1 Continued

4. RETIREMENT PLAN - To contribute to, select payment option of, roll-over, and receive benefits of any retirement plan or IRA, except my agent shall not have power to change the beneficiary of any plan or IRA.

5. TAXES - To complete and sign any local, state and federal tax returns, pay any taxes and assessments due and receive credits and refunds, to sign any IRS documents necessary to effectuate these powers.

6. INSURANCE - To purchase, pay premiums and make claims on life, health, automobile and homeowners' insurance, except my agent shall not have the power to cash in or change the beneficiary of any life insurance policy.

7. REAL ESTATE - To purchase, sell, lease, repair, improve, mortgage, and make mortgage and utility payments upon real property. A legal description is attached.

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POA #1 Continued

8. PERSONAL PROPERTY - To hold personal property for safekeeping, and to buy and sell personal property, including motor vehicles.

9. LEGAL ADVICE AND PROCEEDINGS - To obtain and pay for legal advice, to initiate or defend legal and administrative proceedings on my behalf, including actions against third parties who refuse without cause to honor this document.

10. ESTATE PLAN - My agent has no authority to make or amend a will on my behalf, and has no power to make gifts on my behalf except to my spouse. My agent has access to my will; in exercising powers, my agent shall take into account my estate plan as known to the agent.

SPECIAL INSTRUCTIONS On the following lines are any special instructions limiting or extending the powers I give to my agent.

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POA #1 Continued

OTHER PROVISIONS

No person in Michigan or in any other state who relies upon representations of my agent under this durable power of attorney shall be liable to me or my estate without actual knowledge my agent did not have power to act.


My agent shall not incur any liability to me under this power except for a breach of fiduciary duty.

My agent is entitled to reimbursement for reasonable expenses incurred in exercising powers, and to reasonable compensation for services as agent.

I can amend or revoke this power of attorney through a writing delivered to my agent.

Revocation is not effective as to a third party until the third party learns of it.

Photocopies of this document can be relied upon as though they were originals.

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POA #1 Continued

SIGNATURE OF PRINCIPAL

I sign this document voluntarily, and I understand its purpose.


Dated: _____

Signed: _____

SIGNATURE OF NOTARY

This instrument was acknowledged before me
this _____ day of _____,
_____, by _____.


Notary Public _____ County, MI
My commission expires _____

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POA #2

This Power of Attorney is made on BETWEEN the Principal, whose address is
_____ individually referred to as "I" or "my," AND the Agent, whose address is
_____, referred to as "You."

1. Grant of Authority: I appoint You to act as my Agent (called an attorney-in-fact) to do each and every act which I could personally do for the following uses purposes:
2. a. to execute contracts, deeds, affidavits, survey affidavits, RESPA, IRS 1099 and all forms and documents required in connection with the sale by me of my real property located and **described as follows:**
 - b. To attend the closing of title and deliver the deed, affidavit of title, survey affidavit, and other closing forms and documents;
 - c. To represent me in all respects at the closing including but not limited to the negotiation, payment and settlement of all adjustments, liens, claims and encumbrances;

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POA #2 Continued

- d. To receive all proceeds from the sale of the property, including any refund of escrow funds or other mortgage payments;
- e. To forward to me all of the funds received from the sale of the property, after the payment of attorney fees to my attorney;
- f. To do all acts that I might or could have done in the sale of the property.

2. Takes Effect Regardless of Disability. This Power of Attorney is effective now and remains in effect even if I become disabled or incapacitated.

3. Signatures. By signing below, I acknowledge that I have received a copy of this Power of Attorney and I understand its terms.

[Date and Signatures omitted]

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Powers of Attorney and Real Estate

A legal description is a nice, it is not necessary for a power of attorney to be valid.

MCL 700.5502 states: "A durable power of attorney that authorizes the agent to convey or otherwise exercise power over real estate does not need to contain the real estate's legal description".

But a title company still might require it.



Now, time for some.....



An attorney-in-fact is a *FIDUCIARY* under the law.


MCL 700.1212 Fiduciary relationship.

(1) A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary. A fiduciary shall observe the standard of care described in section 7803 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity. With respect to investments, a fiduciary shall conform to the Michigan prudent investor rule.



700.7803 Impartiality; use of standards of Michigan prudent investor rule.

The trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills.




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Problem areas



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"Dad no longer understands what's going on. I think its time to have him sign a power of attorney".



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If the proposed principal is incompetent you are late.

Now it's time to go to probate court.



Springing Durable Powers of Attorney




It springs into effect when the principal becomes incompetent. Until then, the attorney-in-fact has no authority to act.




Example:

My agent shall only have the powers set forth in this document when it is determined I am unable to manage my property and financial affairs effectively. That determination shall be made by my attending physician, who shall put it in writing.



Are you a doctor, or do you just play one on TV?





Competency to handle one's affairs is a legal conclusion.

Many doctors, fearing lawsuits, may refuse to provide a clear-cut opinion.

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Self Dealing and Gifts



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Self dealing is where the attorney-in-fact profits from the transaction where the power of attorney is used.

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Self dealing is prohibited—unless the power of attorney itself allows for it.

Similarly, gifts by the attorney-in-fact are prohibited—unless the power of attorney allows it.



What do you think?

Bob is attorney-in-fact for his father, John. The power of attorney authorized gifts, but not self dealing.

Bob's father goes into a nursing home. Bob deeds the property to himself and his two half-brothers, Sven and Lars. Is the transaction valid?



Probably yes as to Sven and Lars, but no as to Bob. While the power of attorney authorized gifts, as to Bob the transaction was both a gift and self dealing.

Next question.....same power of attorney.

Bob wants to buy his father's property, and deposit the money in his father's account to take care of his father. Bob has the property appraised by an independent appraiser and pays his father one dollar more than the appraised amount.



Maybe. But Bob is a fiduciary. Could he have done more? Could he get more money for the property by listing with a competent REALTOR®? If the transaction is challenged, Bob will have to prove that the best interests of the principal were served.

Last question.

The power of attorney specifically states that if John is still in a nursing home six months after going to live there, Bob is authorized to deed the property to himself for one dollar.


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Bob finally gets the house!



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Continuation and Termination

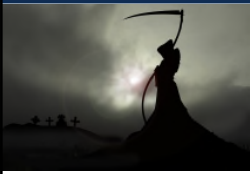


A power of attorney that is recorded in the office of the Register of Deeds may be relied upon unless a contrary document has been recorded (unless you have personal knowledge otherwise).

MCL 565.37 Power of attorney to convey lands; recording of revocation.

No letter of attorney or other instrument so recorded, shall be deemed to be revoked by any act of the party by whom it was executed, unless the instrument containing such revocation be also recorded in the same office in which the instrument containing the power was recorded.


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A non-durable power of attorney terminates on the death or incompetency of the principal.

But, in the case of incapacity a transaction will be valid if the attorney-in-fact and other party have no knowledge of the incapacity.

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A durable power of attorney does not expire on the death of the principal, until the attorney-in-fact learns that the principal has died.

But the power of attorney itself may override.
That is . . .

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If the power of attorney says that it expires on the happening of a certain event, then it so expires.



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Trustees and Powers of Attorney



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FIDUCI - WHAT?

Can an trustee (who is a fiduciary for the trust beneficiaries) appoint an attorney-in-fact (who is a fiduciary for the principal—who is a fiduciary for the beneficiaries).

Oh you get the point. Some lawyers say yes, some say no.

If you are dealing with a title company, be prepared to answer the following questions.


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1. Does the trust authorize the trustee to use a power of attorney? **If so, then he or she can.**
2. Does the power of attorney state that the power to act as trustee is being delegated? **If not, gray area.**
3. Is the trustee making the actual decision to sell/mortgage and the attorney-in-fact is merely carrying out the trustee's wishes? **If so, probably.**
4. Is the attorney-in-fact making the decisions? **If so, probably not.**

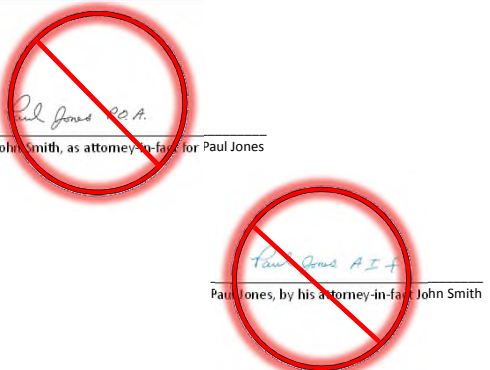
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An attorney-in-fact signs his or her own name. Signing the principal's name could be considered forgery.

Here are some examples of the wrong way, and then the right way:



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An attorney-in-fact signs his or her own name. Signing the principal's name could be considered forgery.

John Smith **YES!**
John Smith, as attorney-in-fact for Paul Jones

John Smith **YES!**
Paul Jones, by his attorney-in-fact John Smith

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