#L-3044

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10/23/92

First Supplement to Memorandum 92-50

Subject: Study L-3044 - Comprehensive Power of Attorney Statute (Agent v. Attorney-in-Fact)

Attached to this memorandum is a brief article from the November 1992 issue of *The National Notary,* published by the National Notary Association. The article, entitled "Attorneys-In-Fact Are Not, In Fact, Attorneys," relates to the question of terminology that resurfaces from time to time. Should the person delegated powers under a power of attorney be called an "agent" or an "attorney-in-fact" -- otherwise known as "the issue that wouldn't die." Of course, the staff is not suggesting that the Commission reverse its earlier reversal of its resolution of the issue. The article is forwarded for information purposes. It is also instructive on several other practical matters, such as how acknowledgment requirements may be dealt with in the trenches, and the notary approach to the issue of certifying the competence of a person executing a durable power of attorney for health care.

The Commission should also be aware that we have received another package of comments from Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, totalling 124 pages. The staff has not had time to review this material and we are unlikely to have sufficient time to consider what has already been distributed with Memorandum 92-50. Consequently, we are holding this additional commentary until a later time. The staff appreciates the great efforts that Team 4 has exerted in considering the staff drafts of the comprehensive power of attorney statute and in producing valuable written commentary. If the Commission issued commendations, the staff would nominate the members of Team 4 as worthy recipients.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

Attorneys-In-Fact, Are

For many Notaries, the term power of attorney is synonymous with difficulty and confusion. Mention that term and questions immediately arise.

What is a power of attorney? Who gets one? Does it make one an attorney?

When a person is authorized to sign or otherwise act on behalf of another, this is a power of attorney. Generally, this is a precautionary procedure should the person granting the powers become incapacitated or absent for a period of time.

The person giving the power to sign is called the principal. The person receiving the power is called the attorney-in-fact, and he or she does not have to be an attorney. Nor, does he or she receive attorneylike powers.

Usually, a principal assigns power of attorney to a spouse, relative or business associate.

There are two times when a Notary may get involved with a power of attorney — when asked to notarize it and when asked to notarize for an attorney-in-fact signing for a principal.

The attorney-in-fact also raises questions. Does a Notary need proof that the attorney-in-fact actually has the right to sign on another's behalf? Is the attorney-in-fact acknowledgment used in notarizing the power of attorney? Does the attorney-in-fact have to sign the power of attorney?

Despite its reputation, neither the power of attorney or the attorney-in-fact acknowledgment is as difficult to execute as some might think.

First, the Notary does not need to use an attorney-in-fact acknowledgment when someone wants a power of attorney notarized.

At this stage, the principal is designating another to handle his or her affairs. The attorney-in-fact is not yet signing on the principal's behalf. Therefore, a general acknowledgment is required.

Many states provide statutory forms for a power of attorney, but these needn't necessarily be used. It is possible that a handwritten document in the principal's own words would be adequate.

Notaries, as with other documents, may not help draft a power of attorney. Nor should Notaries suggest that a certain form available in a stationery store is appropriate.

In all circumstances, a person requesting help in drafting a power of attorney should be referred to an attorney.

There are several types of power of attorney: special, also known as limited, and general; and durable and nondurable.

A special power of attorney authorizes specific acts or transactions, such as drawing funds from a bank account.

A general power of attorney gives broader powers to handle the legal and financial affairs of the principal.

One power that a power of attorney can never give is authority to take an oath on the principal's behalf. An oath is a personal commitment of conscience that must be orally expressed by the principal face to face before a Notary or other oath-administering official. This is why an affidavit, deposition or other sworn document requiring a Notary's execution of a jurat can never be signed by an attorney-in-fact on a principal's behalf. There is no attorney-in-fact jurat, only attorney-in-fact acknowledgments.

A durable power of attorney stays valid even if the principal becomes incompetent. For example, a durable power of attorney for health care designates another person to make certain life sustaining decisions on behalf of the principal in the event the principal can no longer speak for himself or herself.

A nondurable power of attorney becomes null and void when a court adjudges a person incompetent.

Does a power of attorney have to be recorded? Not necessarily. Most states, however, require that they be recorded when they involve real estate transactions. For example, if the document is used as authority to sign a deed, then it typically should be recorded in the county where the transaction took place.

A written revocation of a power of attorney may also have to be recorded.

For Notaries asked to execute a power of attorney in a hospital setting, caution is preeminent. The Notary must try to determine competence by having a conversation with the person. If the person can't respond intelligibly, the notarization may be refused.

If the person's competency is in question, the Notary may consult the signer's physician or attorney. If either of these professionals indicates the person is competent, it's probably safe to perform the notarization. In any case, common sense should rule: if there is doubt about competence, don't notarize.

Notaries may also encounter a power of attorney when someone acting as an attorney-in-fact wants to sign for another person who isn't

Not, In Fact, Attorneys

present.

Is it necessary to find out if the person actually has the right to sign on another's behalf? Or can a Notary just take someone's word?

Each state has its own criteria to determine whether a Notary must know if one actually has the capacity to sign on another's behalf. The statutory atto rney-in-fact acknowledgment wording determines the extent of the responsibility.

New York, Hawaii and North Carolina, for example, require the Notary to know unequivocally that the person has the right to sign on another's behalf.

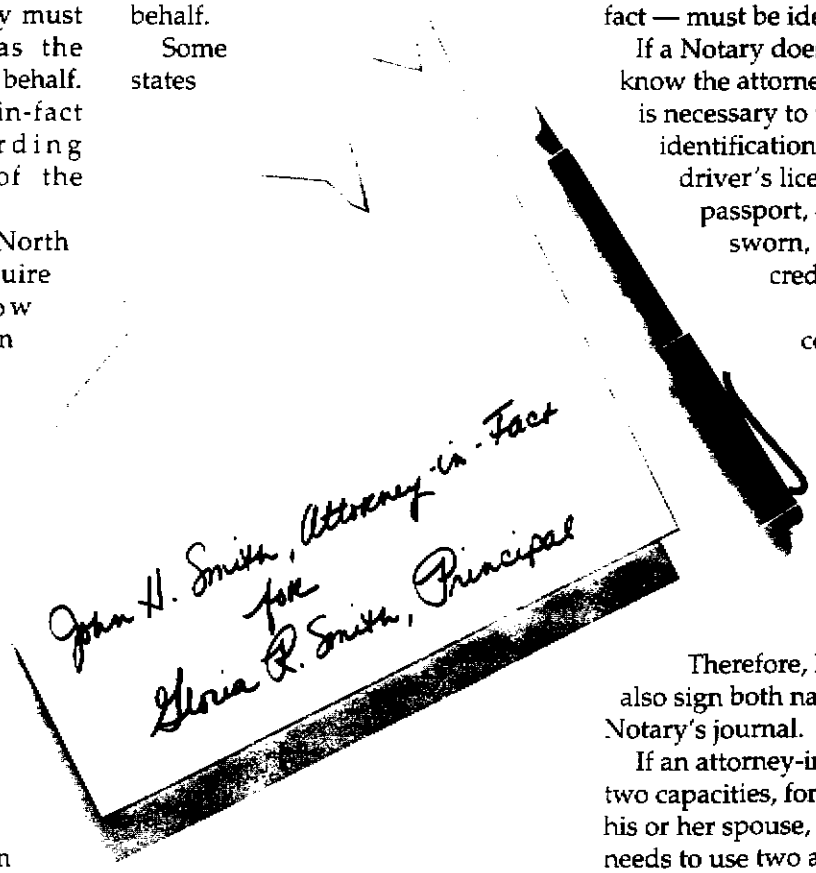
North Carolina, indeed, requires that the Notary note on the notarial certificate where the power of attorney was recorded.

The North Carolina attorney-in-fact acknowledgment wording says..."his or her authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of...on the day, month and year of recordation, and that this instrument was executed under and by virtue of the authority given by said instrument granting him or her power of attorney..."

While seeing the power of attorney is a good idea to determine if the person actually has the right to sign on another's behalf, it is not necessary in all cases. It depends on the state.

California, for example, does not require that the Notary know if the person has been granted the power of attorney. The Notary simply takes the word of the attorney-in-fact that he or she has the capacity to sign on another's behalf.

Some states don't require Notaries to examine the power of attorney because they feel that it would be unfathomable to anyone lacking legal training.



In most situations, signing someone else's name on a document would be considered a forgery. Such is not the case with a document executed by an attorney-in-fact. Typically, an attorney-in-fact signs both his or her own name on the document and then the principal's name — and it is not considered a forgery.

While the power of attorney and the real property deed are the two documents most often used in frauds, there are ways to reduce the likelihood of fraud. Even though a state may not require that the Notary know if the person actually has the right to sign on another's behalf, the signer — the attorney-in-fact — must be identified.

If a Notary does not personally know the attorney-in-fact, then it is necessary to use acceptable identification cards, such as a driver's license or a U.S. passport, or to depend on a sworn, personally known credible witness.

When the Notary completes the journal and the certificate, the attorney-in-fact signs his or her name on the document in addition to the principal. Therefore, he or she should also sign both names in the Notary's journal.

If an attorney-in-fact is signing in two capacities, for himself and for his or her spouse, then the Notary needs to use two acknowledgment certificates: a general form for the person signing as an individual and an attorney-in-fact form for the person signing as attorney-in-fact. In this situation, the Notary makes separate journal entries.

To be sure, an attorney-in-fact acknowledgment is a bit more complicated than other acknowledgments. But there's no reason to fearfully refuse to notarize just because the would-be signer is an attorney-in-fact. Notaries should dispel their preconceived notions and handle the request with confidence. It's easier than most think. ■