It's a Yeti! It's a Sasquatch! No, it's a…

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"Standard" power of attorney???? You all know "those" closings. The ones where everything seems to be on track and then you receive a telephone call or an email from a realtor, client or loan officer in which you learn that some portion of your closing documents will be executed pursuant to a power of attorney. The next few sentences usually sound something like this: "This should be an easy one. It's a standard power of attorney." I have to wonder if this mythical creature, the "standard power of attorney," really exists? Maybe it did at one time but is now extinct? Maybe the caller is just reading off the title of the document? Or, perhaps, all powers of attorney start off "standard" until you add the specific facts of the transaction? In the end, I think we can all agree that the only way to find an acceptable answer is by asking the right questions.

There truly are some closings where the power of attorney that crosses your desk, whether drafted by you or a third party, is statutorily compliant and raises no red flags. Then there are some closings where the proposed power of attorney has a defect, but one that can be easily identified and remedied (e.g. you just need to record the original). Then there are all the other closings where you start the analysis and end up with more questions than answers. So, what are the proper questions to ask?

NCGS Chapter 32A is the starting point. This Chapter addresses the Statutory Short Form Power of Attorney as well as the Durable Power of Attorney. In its most basic form, a power of attorney (POA) is a written document which evidences a grant of authority from a principal to another party or parties, the attorney(s)-in-fact, so that the second party may act on behalf of the principal. The primary focus of this article is North Carolina powers of attorney, but the beginning analysis is the same for those drafted out-of-state, as well.

What does your POA tell you? Your first step is to determine if this is a North Carolina short form or durable (also referred to as a general) power of attorney. Next, who are your parties? A principal may designate more than one attorney-in-fact ("AIF") under a single POA. If there are multiple AIFs, you must determine how many AIFs must sign to bind the principal. Is one sufficient? Or must they reach a consensus and all sign the document? Once you are comfortable with the required signatories, you need to determine if your AIF is available. You should refer to the specific terms of your POA for guidance. Frequently, there is a definition or means to determine if an AIF is "unavailable" and who may act in that party's absence. There are occasions when you will find that the AIF is no longer willing or able to act for the principal. If that is the case, then the POA may also provide the name of a successor AIF. The key is to gather as much information as you can about your parties as early in the process as possible.

One of the most important components of your analysis is to ascertain the specific authority the

principal granted to the AIF, whether through the terms of the POA or by reference to the North Carolina General Statutes. Specifically, does your POA authorize the action the AIF purports to undertake on behalf of the principal? A closing attorney must be acutely aware of "specific" or "limited" powers of attorney which restrict the AIF's authority in some manner. Some examples of common restrictions are limiting the authority to a specific property, mortgage transaction, time period or role in a transaction. If a short form POA is being used, then the closing attorney must verify that the proper line(s) are selected to grant the AIF the authority required to complete the transaction.

Is your POA effective? POAs may be limited in scope and duration by the principal and, therefore, the closing attorney should determine whether the POA is actually effective. In my experience, most POAs are effective upon execution. However, there are exceptions. For example, does your POA state that it only takes effect when the principal becomes incompetent? In general, if one does determine that the principal is incompetent, or incapacitated, then the POA must contain the statutorily proscribed language that allows the powers granted by the POA to survive the principal's incompetency and/or incapacity, as applicable. If you find yourself in this position, how do you go about determining if the principal is incompetent? Chapter 32 will get you started in your analysis, but your specific facts will dictate the required supplementary information and verification. We recommend consulting with your title company's legal counsel early in the process so you can work together to create a mutually agreeable course of action.

Two other common scenarios impacting the effectiveness of your POA involve the death of the principal and expiration dates. Since a POA ceases to be effective upon the death of the principal, it is imperative that you exercise sufficient due diligence to determine that the principal is indeed alive. Additionally, by their terms, some POAs cease to be effective after a certain date. You should review your POA to determine whether it contains an expiration date. This is especially common in POAs drafted to cover a single transaction.

Another consideration for the closing attorney is whether the POA continues to be in full force and effect. A POA can be revoked, in whole or in part, through a written, recorded instrument. However, a principal can also rescind the authority granted under a POA, at any time, without a written instrument. It is the principal's intent that controls in these situations and that is why our recommendation is that if your analysis uncovers any facts which may constitute a rescission or revocation, that you immediately contact your title insurer's legal counsel.

Is your POA recorded? Pursuant to NCGS 47-28, a POA must be recorded before a transfer of real property, as executed by an AIF, can be effective. This statute outlines the requirements for determining the proper place for recording the POA. In order to be recorded, the POA must be properly executed and acknowledged. NCGS 47-43.1 provides a starting point for the AIF's signatory requirements while NCGS 32A, 10B-41, and 47-43 provide acceptable acknowledgment formats for the notary public. Additionally, if an attorney is utilizing the e-recording system, the attorney should ensure that the POA comports with the applicable statutes and guidelines. It is also important to note that some POAs (e.g. military and foreign) require special review as they may be governed by special laws and statutes.

Does your POA contemplate gifts or transfers to the AIF? As a general rule, if a transfer to a third party may be deemed a gift, the POA must specifically authorize gift transactions. NCGS 32A-14.1 provides some additional information and examples related to gift transactions. As you will find, many times the most difficult component of your analysis is determining whether a gift occurred. Another type of situation to be wary of arises when the AIF conveys the principal's property to the AIF (whether for consideration or as a gift). Again, this authority must be specifically granted by the terms of the POA; otherwise, it may be considered self-dealing. It is advisable to consult with your title insurer's legal counsel if a possible gift conveyance or transfer to the AIF is present in your chain of title or your current transaction.

Who is your principal? In general, the principal under a POA will be an individual. Of course, there are some exceptions to this statement and some common examples include an officer or authorized party for a lender, company, corporation or partnership or a trustee for a business/mortgage trust or personal trust. Your first step is to determine the capacity in which the principal executed the POA. Individually? On behalf of a business entity? As a trustee? Or in some other capacity entirely?

If it is a business entity, is the action to be taken one that would occur in the ordinary course of business? And, if so, is it permissible for this type of action to be completed by an AIF on behalf of the entity? The required business formalities must be followed in appointing the AIF as well as in completing the transaction. If the trustee of a personal trust is the principal, the closing attorney must review the applicable trust documents to ensure that the duties to be performed by the AIF are in fact able to be delegated. It is also important to verify that the AIF is executing the documents in the proper capacity. For example, a POA executed in an individual capacity cannot be used for the AIF to perform business duties, and vice versa. These scenarios can be very fact specific and many times come with limited documentation. You should consult with your title insurer's legal counsel should you have any questions or concerns.

Just like there is no “standard” power of attorney, there is no “standard” closing. Many closings involving powers of attorney produce more questions than answers. And that is where we at Attorneys Title can help. This article is far from exhaustive, but it is intended to highlight some of the common challenges associated with closings involving powers of attorney and give you some practical questions to start your analysis. Sometimes there is no clear answer, but together, we can work to find a solution!