



## Title Talk: Start the Conversation

Old Republic's Florida Learning Center (FLC) is excited to relaunch our periodical, "Title Talk," to provide our agents with valuable industry insights and practice pointers on how to resolve common title issues. With wide ranging topics from updates on state and national legislative changes that impact your business to in-depth looks at the latest fraud schemes facing the title industry, "Title Talk" will focus on providing informative articles on new and noteworthy industry developments when they arise.

To compliment the periodical, the FLC is also launching "Title Talk Tuesday," a short video clip designed to answer one frequently asked underwriting question the first Tuesday of each month. Help us start the Title Talk conversation by suggesting topics for either publication by contacting the FLC at [flearningcenter@oldrepublictitle.com](mailto:flearningcenter@oldrepublictitle.com).

# Title Talk Florida



## Legislative Update - 2019

Amber Ashton, Esq. and James C. Russick, Esq.

Each spring the population of Tallahassee swells with lawmakers and lobbyists alike working to shape the laws and policies of the State of Florida. Old Republic Title works alongside these legislators and activists to promote legislative initiatives that will benefit the title insurance industry and the public at large. The 2019 Legislative Session resulted in wide ranging beneficial legislation including the elimination of doc stamps on certain intraspousal property transfers, the implementation of a task force to investigate blockchain technology, and the adoption of a framework for remote electronic notarization. The following is a summary of six (6) new Florida laws that may impact you and your clients.

**Intraspousal Property Transfers:** What we commonly refer to as “doc stamps,” are a tax imposed on deeds and other instruments effecting real property. The obligation to pay this tax is historically triggered when the documents are submitted to the Clerk of Court for recording in the Official Records. Gifts between spouses of mortgaged property has traditionally been viewed as a taxable event. Amendments to §201.02(7)(b), F.S., last year provided for a one-year safe harbor after marriage where new spouses can transfer homestead property without paying doc stamps. Effective May 15, 2019, HB 7123 eliminates the one year limitation, thus allowing all intraspousal transfers of homestead property to be free from doc stamps regardless of when the transfer occurs.

**Lis Pendens:** Post-foreclosure real estate transactions can present many unique issues for title examiners. One such issue is the attachment of liens, particularly code enforcement and tax liens, during the pendency of the foreclosure process. As any litigator will tell you, the lis pendens is a document designed to protect property in foreclosure from intervening liens. But, when does the protection provided by the lis pendens end? Recent cases out of the lower courts identified a potential gap which may allow intervening liens to attach to property between the entry of the Final Judgment of Foreclosure and the recording of the Certificate of Title transferring title. To avoid the necessity of repeat re-foreclosure efforts to address intervening liens, effective June 7, 2019, HB 91 closes the gap by clarifying that the protections afforded by §48.23, F.S., remain effective through the recording of the Certificate of Title, nullifying the 4th DCA’s decision in *Ober v. Town of Lauderdale-by-the-Sea*, 218 So.3d 952 (Fla. 4th DCA 2017).

**Open/Expired Building Permits:** Open and expired building permits have long been a challenge for commercial and residential property owners due to standard FR/BAR contract requirements for disclosing and closing-out such permits. Effective July 1, 2019, HB 447 seeks to address many issues relating to open permits that are designed to assist meeting contractual sales obligations and facilitate closings. The legislation will allow residential property owners to complete the work required under an expired building permit when the contractor that originally pulled the permit “substantially completed the project,” without pulling a new permit and in accordance with the building code applicable at the time the original permit was pulled. For open building permits, HB 447 encourages new contractors to take over and finish projects by limiting their liability to the work they performed. It also allows local enforcement agencies to close open permits without a final inspection after six (6) years if there are no safety risks to doing so and limits the county to charging one fee per parcel identification number for building permit searches, thus eliminating duplicative costs when multiple permits are found. For new buyers, HB 447 prohibits the local enforcement agency from fining or otherwise penalizing a purchaser of property because the former owner did not close a building permit. Additionally, HB 447 provides that enforcement agencies may send notice to the property owner and contractor at least thirty (30) days prior to the expiration of a building permit which, hopefully, will cause them to act to close the permit before expiration. As open/expired permits can be an impediment to closing on a sale transaction and can cause issues in obtaining construction or permanent financing to complete a project, HB 447 facilitates the process of completing the work under a permit by empowering owners to complete construction themselves, easing the liability concerns of replacement contractors, and lowering costs to resolve building permit issues in accordance with contract requirements.

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# Title Talk Florida

## Legislative Update - 2019 (continued)

**Redaction of Official Records for Public Servants:** In addition to promoting positive legislative changes in Tallahassee, Old Republic also works to combat against, or otherwise amend and supplement legislation which may have negative consequences for the title industry. One such example is the approval of SB 248, a bill written to expand current law protecting certain public officials and law enforcement personnel from having their home addresses available to the public sector. While there is no question that the safety concerns of judges, police officers, and other public servants should be of the utmost concern, the title industry will face new challenges when searching the Official Records as SB 248 provides for the redaction of legal descriptions, parcel identification numbers, and other information which may be extrapolated out by a savvy criminal to find a home address for a public official or law enforcement officer. While SB 248 will certainly create new issues for title examiners, thanks to title industry input, the bill also provides a method by which a protected individual can waive the redaction requirement to facilitate a transaction and allow the title industry to examine unredacted vesting records and the like. We hope to publish more guidance to assist agents confronting redacted records after we learn the details of how the various counties will implement these provisions but anticipate this will vary between counties.

**Remote Electronic Notarization:** The big news out of the 2019 Legislative Session for the title insurance industry is the adoption and authorization of remote electronic notarization of documents. HB 409 allows for a Florida notary located in Florida to interface in real-time with a signatory in another state or country, for that signatory to electronically sign documents (think deeds, mortgages, etc.), and for the notary to notarize the documents as though the signatory was physically present before them. While HB 409 provides the framework for implementation of remote electronic notarization, many existing administrative rules need to be amended to address this change in the law, and new administrative rules adopted before the bill goes into effect on January 1, 2020. Old Republic is intimately involved in the rule implementation process and will keep you apprised of developments as the effective date of the legislation draws near including how and when you too can become authorized as a remote Florida notary.

**Blockchain:** Blockchain technology is the wave of the future (at least if you listen to the tech sector). The technology behind the digital currency Bitcoin is now being touted as a possible replacement for the Official Records and a more efficient means of doing business. In overly simplistic terms, blockchain technology seeks to create a permanent and unalterable record of transactions which build upon each other, kind of like the e-mails in an e-mail chain. In theory, it is easy to see how such technology may ultimately benefit the title industry, but there are many unknowns. To appropriately investigate the benefits and impacts of adopting blockchain technology for various purposes in Florida, SB 1024 establishes a task force to study blockchain technology and to make recommendations to the Governor and Legislature. While we are still many years from any kind of implementation of blockchain technology, all indications are that this technology will remain a hot topic for years to come.

Florida law is ever evolving. Staying on the forefront of legislation enables Old Republic to quickly adjust to a changing landscape in order to provide the best possible underwriting support for our agents.

# Title Talk Florida



## JUST THE ONLINE FAX MA'AM

By Peter Croizat

*"Most people are starting to realize that there are two different types of companies in the world: those that have been breached and know it and those that have been breached and don't know it." – Ted Schein, a venture capitalist with Kleiner, Perkins, Caufield and Byers.*

The latest cyber fraud emerging from the ever expanding and increasingly dangerous threat landscape involves the interception and modification of Payoff Statements and Wiring Instructions being transmitted via online fax.

Commonly referred to as **electronic or online fax** the underlying fax is still an inherently analog technology and the VoIP (Voiceover Internet Protocol) transmitting the data emulates the analog phone line. In simple terms; this means that online fax capability is equally susceptible to the same type of cyber threats and vulnerabilities that plague other forms of online transmissions and communications, e.g. MITM/Man-In-The-Middle and BEC/E-mail Account Compromise (EAC).

Things that should be done to protect the data include:

- Obtain verbal confirmation from parties.
- Make sure "HTTPS" – with the S- is always in the URL bar of the websites visited.
- Be wary of potential phishing emails from attackers asking to update your passwords or any other login credentials.
- Never cut and paste a link URL, always free type into the address bar.
- Since these attacks primarily use malware for execution, make it a habit to install Full Disk Encryption and a VPN (Virtual Private Network)
- Stay current on all updates and patches on your computers, networks, and routers.
- Enforce strict password protocols on all devices and networks.
- Use approved master vendor list and/or transaction/file PIN numbers.

### Details:

According to FBI figures real-estate is the number one target of cybercrime which puts us all at risk. Do not become one of the statistics. According to the FBI's 2018 Internet Crime Report:

IC3 received 20,737 BEC/E-Mail Account Compromise (EAC) with adjusted losses of over \$1.2 billion.

Count by Victim per State:

1. California.....49,031
2. Texas.....25,589
3. Florida.....23,984

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# Title Talk Florida

## JUST THE ONLINE FAX MA'AM (continued)

Total Losses by Victim per State:

1. California..... \$450,482,128
2. New York..... \$201,090,065
3. Texas..... \$195,611,047
4. Florida..... \$178,141,470

*"I get hired to hack into computers now and sometimes it's actually easier than it was years ago".*

– Kevin Mitnick, Former Hacker.

Cybercrime takes on a lot of forms with one of the oldest and most dangerous being man-in-the-middle or MITM. This type of cybercrime is common, potent and devastating. The concept behind a MITM attack is simple: Intercept traffic coming from one computer and send it to the original recipient without them knowing someone has read and potentially altered its content.

Cybercriminals typically execute a MITM attack in two phases – interception and decryption. In Phase One the cybercriminal gains access to an unsecure or poorly secured device, network, or router. In Phase Two they deploy tools to intercept and read (decrypt) the victim's transmitted data while inserting themselves between the victim's computer as the transmitter and the receiving computer.

Another scam is called the Business E-mail (Account) Compromise or BEC. The BEC is a scam targeting businesses working with other entities or businesses that regularly perform wire transfer payments. A variation of the BEC is the E-mail Account Compromise or EAC that targets individuals instead of businesses. Whether a BEC or EAC, these sophisticated scams are carried out by fraudsters compromising email accounts through social engineering or complete intrusion techniques to alter instructions and redirect unauthorized payments. The interception and modification of **electronic or online fax** conforms to this definition.

*"Companies spend millions of dollars on firewalls and secure access devices, but it's money wasted because none of these measures address the weakest link in the chain: the people who use, administrate and operate computer systems".* – Kevin Mitnick, Former Hacker.

### Prevention:

Some methods of prevention in combatting BEC/EAC and MITM attacks include using some form of endpoint authentication. TLS (Transport Layer Security) or SSL (Secure Socket Layers) are examples. They use an authentication key that ideally can't be spoofed. Authentication methods have become stronger, leading to end-to-end encryption. However, that does not mean encryption cracking does not happen – cybercriminals often manage to fake certificates and pose as banking websites, title agents, and/or realtor websites and others which they use to steal information.

MITM attacks are the perfect example of the cybersecurity arms race. As soon as a new form of encryption is cracked, vendors create a new one, which in turn is cracked, repeating the cycle. In our rapidly evolving connected world it's important to understand the types of threats that could compromise the online security of your business and consumers Non-Public-Private-Information. Stay informed and make sure your devices, computers, and network servers are fortified with proper security. Follow the tips detailed above and join with Old Republic Title in its efforts to prevent and stop cybercrime.

*"Data privacy and security is about much more than keeping hackers at bay. It is also about assuring customers that the trust they place in your brand is warranted".*  
– Pat Conroy, Deloitte University Press.

### Partnership:

Old Republic Title is committed to helping protect your business, customers, and staff from cybercrimes through ongoing education and training. As an Old Republic Title Agent, you can log into StarsLink.com click on education and marketing-cybersecurity information. There you will find an email signature alert about changes in wiring instructions, tips to avoid cybercrime losses, and an infographic you can share on your social media channels. For more information and training on our cybercrime awareness materials, please contact your agency account manager today.

# Title Talk Florida

## Is This Power of Attorney Okay?

By Trish Ladan, Esq.

Black's Law Dictionary defines "Power of Attorney," in part, as *[a]n instrument authorizing another to act as one's agent or attorney. One of the most common underwriting questions is whether it is okay to use a Power of Attorney ("POA") for a particular transaction. The short answer is "maybe." Of course, POAs may be used in real estate transactions, but whether a specific POA can be used will depend upon various factors. These factors are explained below:*

1. **Valid reason for POA:** The first question that an underwriter may ask is: "What is the purpose of the POA?" This is because: (a) it is preferred that the owner of the subject real property personally sign the necessary instrument (deed or mortgage); and (b) there is a heightened risk of possible fraud when a POA is used. In some cases, the person delegating the specific authority to another (the "Principal") may be able to sign the deed, but authorizes an agent (the "Attorney in Fact") to sign the remainder of the closing instruments. If there is a legitimate reason for using a POA, then one may be used if it is properly executed and contains the proper powers, as this is the purpose of a POA.
2. **Proper execution of POA:**
  - a. In Florida, POAs created by individuals are governed by the Florida Power of Attorney Act, §709.2101, et. seq. F.S. ("FL POA Act"), which requires that if a POA is to be used for real estate transactions, such as conveying real property, then the POA must be executed with the same formalities as a deed. This means that the Principal's signature must be witnessed by two unrelated, disinterested persons, and notarized.
  - b. If the POA was executed outside of Florida, in another state, then two witnesses may not be required, depending upon whether compliance has been made with the execution requirements in the state where it was signed. Specifically, §709.2105(3), F.S., provides, in part, that an opinion of counsel, in the jurisdiction where the POA was signed, may be obtained "as to any matter of law concerning the powers of attorney, including the due execution and validity of the power of attorney." This opinion of counsel is provided at the Principal's expense. However, note that if the POA is to be used with regard to the Principal's homestead real property, then the POA MUST be executed with the formalities of a deed in Florida, including two disinterested witnesses and a notarization. Therefore, if a POA is executed out of state and does not have two witnesses, but an opinion of counsel is obtained in the jurisdiction of execution affirming its validity, then non-homestead language should be included on the deed or mortgage.
3. **Specific powers/authority MUST be granted in POA:** Whether a proposed POA was executed in Florida or another state, other than its execution, the POA must comply with FL's POA Act. This includes the specificity required, pursuant to §709.2201(1), F.S., for the authorized powers of the Attorney in Fact. Unfortunately, this is where many POAs fall short. For instance, broad language such as providing that the Attorney in Fact "may perform every act that I could perform," may not provide authority due to its lack of specificity.
4. **Whether POA is durable or non-durable:** Another issue to review when presented with a POA is whether the POA is durable or non-durable. If the POA is durable, then this simply means that the POA and the specific authority granted to the Attorney in Fact survive the subsequent incapacity of the Principal, as opposed to a non-durable POA, which does not. §709.2014, F.S., provides that a POA is durable if it contains the following or similar language evidencing the Principal's intent: "This durable power of attorney is not terminated by subsequent incapacity of the principal except as provided in chapter 709, Florida Statutes." Typically, POAs are effective upon proper execution. However, note that there are some Durable POAs executed prior to October 1, 2011, the date the FL POA Act became effective, which state that they are conditioned upon the Principal's incapacity (without formal adjudication). If this is the case, then the "Springing Durable POA" is valid upon execution, but is not effective until the Principal's subsequent incapacity, confirmed in writing by an attending physician. In Florida, these Springing Durable POAs may not be created after September 30, 2011.

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# Title Talk Florida

## Is This Power of Attorney Okay? (continued)

5. **Whether the Principal has been adjudicated incapacitated:** If a durable POA is proposed to be used, but the Principal has been adjudicated incapacitated (a court has determined that the Principal is incapacitated), then the POA may NOT be used, UNLESS the court specifically states otherwise.
6. **Whether the Principal is deceased:** Similarly, if the Principal has died, then the Principal's POA is no longer valid. The Principal's estate will likely need to be probated.
7. **Whether the POA has expired or been revoked:** Some POAs include a stated duration or expiration date, which will need to be reviewed to determine whether the POA remains valid. Typically, a POA Affidavit will be required for purposes of insuring title where a POA is used, which includes affirmation that the POA has not been revoked or amended, that the Attorney in Fact still has the authority to act, the Principal has not died or been adjudicated incapacitated, etc.
8. **One spouse appoints his/her other spouse as Attorney in Fact:** It is not uncommon for one spouse to appoint his/her spouse as their Attorney in Fact. However, if the parties divorce after the POA is executed, then the power(s) and authorities granted to the former spouse are no longer valid, and the POA may not be used UNLESS the POA properly provides for an identified, competent, successor Attorney in Fact.
9. **Military POA:** Note that if you are presented with a Military POA, then different rules apply, as these are governed by federal law, 10 U.S. Code §1044b, which pre-empts state law.

**How should an Attorney in Fact sign an instrument?** The agent or Attorney in Fact must clearly indicate that they are signing in a representative capacity, not personally, on behalf of the Principal. Follows are examples:

*Peter Principal, by Amanda Agent, his attorney in fact*  
*Amanda Agent, as attorney in fact for Peter Principal*

**Confirm the use of a POA:** POAs are a very useful tool and serve a valid purpose in the right circumstances. However, due to the risk of mis-use, such as possible elder abuse, it is prudent to ask questions to confirm that the POA is really needed. If possible, direct, independent contact should be made with the Principal to confirm the terms of the transaction, and the use of the POA. This will serve to mitigate risks associated with the use of a POA.

**POAs automatically terminate when one of the following occurs:**

1. The Principal dies;
2. The Principal revokes the POA;
3. The Principal is adjudicated totally or partially incapacitated and does not specifically provide that the POA is to remain valid;
4. The POA expires on its face, having a stated term;
5. The specified purpose of the POA is achieved;
6. A dissolution of marriage or petition for dissolution is filed and the designated attorney in fact is the Principal's spouse, UNLESS there is a named successor attorney in fact.  
NOTE: If husband and wife divorce and one of the parties subsequently executes a POA appointing their former spouse as attorney in fact, then this is acceptable. While this occurs in some cases, it is certainly prudent and highly suggested that the Principal appointing their former spouse to act as their attorney in fact be contacted to confirm the validity and use of the POA in a given transaction.

Finally, remember that for purposes of insuring title, the original POA and POA Affidavit will need to be recorded in the public records of the County where the real property is located.

As always, please contact an Old Republic Underwriter if you have any questions or concerns about using a POA in a particular transaction.

# Title Talk Florida



YOUR SOURCE FOR UP-TO-DATE 1031 EXCHANGE NEWS

## Like-Kind (A Commonly Misunderstood Term)

By Janet L. Schaum

In a tax-deferred exchange, under Internal Revenue Code Section 1031, an owner can defer capital gain taxes by exchanging property held for investment or used for productive use in a trade or business for other property that will also be held by them for investment purposes or for productive use in a trade or business.

Any type of real property – except for a person’s primary residence– can qualify for a tax-deferred exchange. Although the rules for exchanges require that the property sold and the property acquired are “like kind” to one another, it is important to understand that **“like kind” does not mean that the property sold and the property acquired must share the same physical characteristics.** In other words, an apartment building need not be exchanged for another apartment building. It can be exchanged for raw land; a farm; a duplex; retail property; industrial property; a perpetual conservation easement; a leasehold of 30 years or more, etc.

Instead, “like kind” simply refers to the requirement that property “held for investment or for productive use in a trade or business” must be exchanged for other property that is also “held for investment or for productive use in a trade or business.”

This requirement is stated in the Treasury Regulations governing IRC Section 1031 exchanges. Specifically, Section 1.1031(a)-1(2)(c)(2) provides as follows:

“No gain or loss is recognized if: ...

... (2) a taxpayer, who is not a dealer in real estate, exchanges city real estate for a ranch or farm, or exchanges a leasehold of a fee with 30 years or more to run for real estate, or exchanges improved real estate for unimproved real estate.”

Additionally, property held solely for future realization of appreciation is also considered “held for investment”.

Here are some examples of like kind real property:

- City property for ranch or farm
- Commercial property for residential property
- 30+-year leasehold for a fee interest
- Rental house and land for farmland and improvements
- Improved real property for unimproved real property
- Tenant in common interest in real property for another tenant in common interest in real property



Janet L. Schaum is the Vice President / Sales and Marketing Associate for Old Republic Exchange Company’s (ORE) Regional Sales Offices in Tampa, Florida and Atlanta, Georgia. For questions about this article or general inquiries regarding the 1031 Exchange Process, please contact Janet via email: [jschaum@oldrepublicexchange.com](mailto:jschaum@oldrepublicexchange.com) or by phone 813.849.2816. You can also visit ORE on the web at [www.oldrepublicexchange.com](http://www.oldrepublicexchange.com).

*Old Republic Exchange does not provide tax or legal advice; therefore, exchangers are encouraged to seek out the advice of a CPA or legal advisor to see if they are eligible for an extension to their exchange period or if they are contemplating doing a 1031 Exchange.*