

**A LOOK AT SELECTED FUTURE CHANGES LIKELY TO AFFECT  
THE OKLAHOMA REAL ESTATE ATTORNEY**

BY:

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## **TABLE OF CONTENTS**

### **INTRODUCTION**

#### **I. LISTING/CONTRACTS**

- A. UNIFORM RESIDENTIAL (1-4 UNITS) PURCHASE CONTRACT ADOPTED
- B. INCREASING "FOR SALE BY OWNER" TRANSACTIONS
- C. IMPROVEMENTS CONDITION DISCLOSURE CHANGE
- D. REGULATION OF IMPROVEMENTS INSPECTORS
- E. ELECTRONIC SURVEYS, FOR TITLE INSURANCE PURPOSES

#### **II. ABSTRACTS/ABTRACTERS**

- A. ALTERNATIVE TITLE SUMMARY WHERE ABSTRACTS ARE UNAVAILABLE IN A TIMELY MANNER
- B. ALLOW CREATION OF PRIVATE TITLE PLANTS BASED ON PARTIAL PUBLIC COURT HOUSE PLANTS
- C. TITLE CHAINING AND TITLE EXAM BASED ON ON-LINE INFORMATION
- D. CONSOLIDATE PRIVATE TITLE PLANTS AND OTHER TITLE OPERATIONS

#### **III. EXAMINATIONS**

- A. ATTORNEYS RELY ON OTHER ATTORNEYS' EARLIER TITLE OPINIONS TO ISSUE TITLE INSURANCE
- B. LENDERS USING INSIDE ATTORNEYS FOR EXAMINATION
- C. TITLE EXAMINATION STANDARDS REDUCING CURATIVE REQUIREMENTS
- D. ATTORNEYS JOIN WITH OTHER PROFESSIONALS TO CREATE MULTIDISCIPLINARY ORGANIZATIONS

#### **IV. TITLE INSURANCE**

- A. ATTORNEYS RELY ON PRIOR TITLE OPINIONS ALONG WITH SUPPLEMENTAL ABSTRACTS FOR TITLE OPINIONS FOR TITLE INSURANCE
- B. LENDERS USE MORE TITLE REPORTS IN LIEU OF TITLE INSURANCE
- C. AVAILABILITY OF QUASI-TITLE INSURANCE PRODUCTS IN LIEU OF TITLE INSURANCE
- D. INCREASED USE OF NEW "SIMPLER" PLAIN LANGUAGE TITLE POLICIES, WITH EXPANDED COVERAGE

#### **V. CLOSING**

- A. E-FILING
- B. REGULATE CLOSING COMPANIES

**VI. OTHER**

- A. R.E.S.P.A. CHANGES
- B. INCREASED "1031" TRANSACTIONS
- C. MORE AGGRESSIVE LENDING
- D. MORE SUBDIVISION DEVELOPMENTS
- E. ADVERSE POSSESSION ELIMINATED
- F. M.E.R.S. (MORTGAGE ELECTRONIC REGISTRATION SYSTEM)
- G. CLOSER'S AFFIDAVIT IN LIEU OF RELEASE OF MORTGAGE
- H. UNIFORM TRUST ACT

## **INTRODUCTION**

The purpose of this paper is to bring forth for consideration several matters that are likely to affect the legal practice of the real estate oriented attorney in the State of Oklahoma in the next 5 years.

The Real Property Law Section of the Oklahoma Bar Association is in the process of creating a Technology And Long Range Planning Committee. The purpose of this Committee is still in its formative stages. Jay Struckle, who is an attorney practicing with a title company in El Reno, is the chairman for this committee.

As part of the initial start-up process, I agreed to present a paper on this topic at the annual Real Property Law Section CLE program in November, 2003.

In order to identify topics, which might be of interest and concern to real estate attorneys, a meeting was held September 16, 2003 with a group of attorneys associated with the title companies in Oklahoma City. The attendees included: Jay Struckle (Warranty Title), Jeff Noble (American Guaranty Title), Ken McBride (Lawyers Title), Barry Schmulbach (Stewart Title, and president of the OLTA), Monica Wittrock (First American), Hayden Chapman (First American) and other staff members from First American. Hayden Chapman, on behalf of First American hosted this meeting. Barry Dixon (OCA) provided comments although he was not able to be present for the meeting.

In advance of the meeting, each attorney was asked to submit his own list of impending issues. They provided a substantial wealth of ideas in response

both in writing before the meeting and verbally at the meeting. The following materials represent a brief summary of the topics they brought up for discussion.

You are encouraged to consider these issues, and to send your comments on them, and on other similar areas of interest, to Jay Struckle for consideration by the Section's Technology and Long Range Planning Committee.

As you will quickly realize, the following materials are not meant to an exhaustive exploration of each of the listed issues, but are to be a beginning point for discussion at this seminar and elsewhere.

The notation as to "Likelihood" in the following pages refers to the likelihood that the event will occur in the near term – the next 5 years. "High" means the event has occurred; "Medium" means there are active efforts underway to make the event occur; "Low" means the idea exists in Oklahoma or elsewhere but there is no organized or active effort underway to make the event happen.

**I. GENERAL TOPIC: LISTING/CONTRACTS**

A. TOPIC: UNIFORM RESIDENTIAL (1-4 UNITS) PURCHASE CONTRACT ADOPTED

IMPACT: REDUCE NUMBERS OF CONTRACTS DRAFTED BY ATTORNEYS

LIKELIHOOD: HIGH

DISCUSSION:

1. The Oklahoma Real Estate Commission was directed by statute to draft a uniform real estate purchase contract for residential (1-4 family units) land. 59 O.S. Section 858-208 (14)
2. A committee was established including representatives from the OREC, the Oklahoma Association of Realtors and the Oklahoma Bar Association to draft this uniform contract.
3. It is expected that this contract will be completed by the committee by sometime in 2005, with it thereafter being submitted to the OREC for approval.
4. The use of this contract will not be mandatory but is only suggested; it will be used for training purposes for all state licensed real estate licensees.

**I. GENERAL TOPIC: LISTING/CONTRACTS**

**B. TOPIC: INCREASING "FOR SALE BY OWNER" TRANSACTIONS**

**IMPACT: INCREASE NUMBER OF ATTORNEYS HELPING BUYERS AND SELLERS; INCREASE NUMBER OF LAWSUITS ARISING FROM DISPUTES**

**LIKELIHOOD: HIGH**

**DISCUSSION:**

1. Increased use of internet mechanisms to advertise real estate is providing an alternative to usual listing services with access limited to real estate licensees.
2. When legal questions arise concerning drafting contracts or dealing with loan-related documents, the opportunity will arise to provide legal assistance.



**I. GENERAL TOPIC: LISTING/CONTRACTS**

C. TOPIC: IMPROVEMENTS CONDITION DISCLOSURE CHANGE

IMPACT: REDUCE NUMBER OF LAWSUITS AGAINST SELLERS AND REALTORS

LIKELIHOOD: HIGH

DISCUSSION:

1. Since 1995, a law has been in effect requiring the seller of a residential home to affirmatively disclose known defects in the improvements to the potential buyer, in writing, before the buyer made an offer to purchase the house. 60 O.S. §§831 et seq.
2. In January 2003, 2003 OK 6, the Oklahoma Supreme Court ruled that in addition to the actual damages arising from undisclosed, but known, defects, the buyer could seek actual and punitive damages for the seller's fraud and/or misrepresentation.
3. Effective November 1, 2003, an amendment is effective, changing the current State statute, so that even if the seller failed to disclose known defects in the residential improvements, the buyer would no longer be eligible to recover actual and, more significantly, punitive damages for a tort.
4. It is likely that there will be fewer lawsuits filed by buyers or that any such lawsuits will have to go to trial, because the pressure for the seller, and real estate licensee to settle will decrease now that punitives are not available.

**I. GENERAL TOPIC: LISTING/CONTRACTS**

D. TOPIC: REGULATION OF IMPROVEMENTS INSPECTORS

IMPACT: REDUCE NUMBERS OF LAWSUITS DUE TO IMPROVED INSPECTORS/INSPECTIONS AT TIME OF PURCHASE; INCREASE AVAILABILITY OF SOLVENT INSPECTORS TO SUE WHEN MISTAKES ARE MADE

LIKELIHOOD: MEDIUM

DISCUSSION:

1. The Oklahoma legislature attempted in 2001 to enact legislation to regulate and license home inspectors.
2. The act ("Home Inspection Licensing Act") would create a supervising Committee to establish educational requirements, to test and license inspectors, and to enforce such process through fines, suspensions and injunctions.
3. In addition, the inspectors would be required to have general liability insurance.
4. No legislation has been passed yet.

**I. GENERAL TOPIC: LISTING/CONTRACTS**

E. TOPIC: ELECTRONIC SURVEYS, FOR TITLE INSURANCE PURPOSES

IMPACT: INCREASE IN NUMBERS OF LAWSUITS DUE TO INCREASE IN NUMBERS OF BUYERS WITH SURVEY COVERAGE, RESULTING IN MORE TITLE INSURANCE OR SURVEY CLAIMS

LIKELIHOOD: HIGH

DISCUSSION:

1. Limited survey coverage in a title insurance policy usually only protects against loss arising due to a court order requiring the removal of a structure encroaching across a property boundary, easement or building limit line.
2. When considering an encroachment, the court balances the equities between making the offending landowner pay for the diminution in value of the encroached-upon land compared to the cost and consequences of chopping off a portion of a structure. In equity, it is highly doubtful that the court will ever say "move it".
3. Therefore, such coverage against loss due to "forced removal" is unlikely to ever give rise to a real claim, although the costs of defense might be incurred by the insurer.
4. Therefore, the suggested use of an abbreviated -- aerial photo based -- survey, similar to what is available on-line through the County Assessor's office, is a low risk undertaking. Such aerial photo can show if there is a possible encroachment, which can be checked by a better follow-up survey, when indicated.

**II. GENERAL TOPIC: ABSTRACTS/ABSTRACTERS**

A. TOPIC: ALTERNATIVE TITLE SUMMARY WHERE ABSTRACTS ARE UNAVAILABLE IN A TIMELY MANNER

IMPACT: INCREASE IN STAND-UP TITLE OPINIONS BY ATTORNEYS IN RURAL COUNTIES WITH ONE-TWO ABSTRACTERS

LIKELIHOOD: LOW

DISCUSSION:

1. In Texas, if the local abstractor cannot produce an abstract in a timely manner, the title insurer can use an alternative records summary, such as a "stand-up" title opinion.
2. In Oklahoma, all title insurance commitments and policies must be based upon a full, certified abstract and an opinion of title by an Oklahoma attorney.
3. 36 O.S. § 5001, Qualifications of title insurers: provides:  
*"no policy of title insurance shall be issued in the State of Oklahoma except after examination of a duly-certified abstract of title prepared by a bonded and licensed abstractor as defined herein."*
4. There are many counties where there are only one or two separate abstracters providing competing abstract services.
5. In such counties, where there is only one abstractor, there is no incentive for the abstractor to provide quicker service in order to convince the lenders and real estate licensees, and general consumers, to move their business from one abstractor to the other. The sole abstractor has a monopoly on all the title insurance business generated in such county. There is no need to hire more permanent staff or to pay for either temporary help or overtime to improve service during peak times.
6. There is no effort under way to allow the use of non-abstract records summaries to expedite service.
7. In regard to doing oil and gas abstracts and opinions -- not involving title insurance -- the increased use of stand-up title opinions conducted by landmen and attorneys is often used when abstracts are not prepared in a timely way.

**II. GENERAL TOPIC: ABSTRACTS/ABSTRACTERS**

B. TOPIC: ALLOW CREATION OF PRIVATE TITLE PLANTS BASED ON PARTIAL PUBLIC COURT HOUSE PLANTS

IMPACT: INCREASE USE OF ATTORNEYS FOR COMPETING TITLE AGENT/ABSTRACTERS

LIKELIHOOD: LOW

DISCUSSION:

1. Under current circumstances, anyone interested in creating a complete title plant in a county to provide competitive abstracting services, can do so only if it can copy all of the documents, affecting real property, located in the local courthouse, all the way back to sovereignty. 74 O.S. §§227.10 et seq; Application of Richardson, 1947 OK 347, 199 Okla. 406, 184 P.2d 642
2. After acquiring copies of such documents, the abstracter must create its own index for the retrieval of such documents.
3. Therefore, in those counties where the courthouse records are incomplete – due to fire or other disaster – no competing abstracter can gain a foothold.
4. There has been some discussion about changing the statutes to allow a newcomer to rely upon either a partial plant, or to force the existing local abstracter to allow access to the documents in its plant. Such access to the existing local abstracter's records would still not include access to the indexes that an abstracter must initially create (and then maintain) from a review of each and every separate document.
5. Such occurrence – allowance of using a partial plant or forcing existing abstracters to cooperate -- would probably not occur unless lack of competition caused sufficient complaints to motivate the state legislature to change the current laws.

**II. GENERAL TOPIC: ABSTRACTS/ABSTRACTERS**

C. TOPIC: TITLE CHAINING AND TITLE EXAM BASED ON ON-LINE INFORMATION

IMPACT: DECREASE IN OVERALL USE OF TITLE RELATED SERVICES INCLUDING ATTORNEY TITLE EXAMINATIONS; INCREASE IN LITIGATION TO CURE INCREASED TITLE DEFECTS

LIKELIHOOD: MEDIUM

DISCUSSION:

1. The Oklahoma County Clerk (Registrar of Deeds) has undertaken a major effort to place its computerized real estate records searching systems (searching either by name or legal description) on-line, along with a summary of the contents of the described instruments. There is no charge for accessing, and for printing this information.
2. An image of the instrument itself is available on the computer screens in the Oklahoma County Clerk's land records room, but such image is not made available on-line.
3. Several reasons for withholding such documents images from being available on-line have been circulated, including: (a) loss of revenue from making fewer copies of instruments in the clerk's office, (b) concern about increasing risk from "hackers" if the records were more open, and (c) worry that people would rely upon the accuracy of the on-line records to transfer and mortgage interests in real property, with possible losses due to errors in the records.
4. This issue continues to be actively considered by the county clerks, who are collecting a new recording fee designed to promote the modernization and preservation of their records.
5. 28 O.S§ 32, County clerk—Fees, provides:

*"C. For the purpose of preserving, maintaining, and archiving recorded instruments including, but not limited to, records management, records preservation, automation, modernization, and related lawful expenditures, in addition to all other fees required by law, the county clerk shall collect Five Dollars (\$5.00) for each instrument recorded with the Registrar of Deeds.*

*"D. There is hereby created a fund to be known as the "County Clerk's Records Management and Preservation Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of the fees and monies accruing to the fund, as prescribed in subsection C of this section with all monies accruing to the fund to be expended by the clerk and not transferred to any other fund. The intent of this section is to increase the net funding level available to the county clerk to maintain and preserve public records."*

**II. GENERAL TOPIC: ABSTRACTS/ABSTRACTERS**

D. TOPIC: CONSOLIDATE PRIVATE TITLE PLANTS AND OTHER TITLE OPERATIONS

IMPACT: DECREASE IN NUMBERS OF IN-HOUSE COUNSEL NEEDED TO EXAMINE TITLES

LIKELIHOOD: LOW

DISCUSSION:

1. Over the years, the local private abstract and title insurance companies have endeavored to reduce their operating expenses by consolidating some of their services.
2. Such efforts have included: (a) shared in-putting of the information from each new document, to reduce the duplicative costs of each company paying the county clerk for its own separate copy of each new document and to reduce the numbers of personnel needed to input the data, and (b) shared abstract storage facility, to facilitate locating abstracts to speed up the abstracting process.
3. There was an idea circulating at one time about consolidating the county clerk and private abstracters' staff, at least for inputting purposes.
4. The current statutes require an abstracter to have an independent title plant, and an independent index. [74 O.S. §§227.15 & 227.19] This fact, combined with the title companies' self interest in maintaining the value of their existing title plants by restricting the entrance of additional competing companies, it is unlikely that there will be support within the industry to allow newcomers to operate without making the initial capital outlay needed to create a new title plant – by simply sharing another companies' plant – like operating one railroad company's cars on another company's tracks.

### III. GENERAL TOPIC: EXAMINATIONS

A. TOPIC: ATTORNEYS RELY ON OTHER ATTORNEYS' EARLIER TITLE OPINIONS TO ISSUE TITLE INSURANCE

IMPACT: INCREASE IN SPEED IN PREPARING OPINIONS; REDUCED DISPUTES WITH SUBSEQUENT EXAMINERS

LIKELIHOOD: LOW

#### DISCUSSION:

1. There is no statutory prohibition on an attorney choosing to rely on an earlier title opinion by another attorney for non-title insurance purposes, if the examiner deems it safe and if the client accepts any resulting risks, such as not being able to go against the earlier attorney if he made an error.
2. However, there is some authority suggesting that a third party (non-client) can rely upon a title opinion prepared for another party in the same transaction. Vanguard Production, Inc. v. Martin, 894 F.2d 375 (10th Cir. 1990)
3. However, for title insurance purposes most attorneys insist on performing their own examination of the entire abstract.
4. If a statute or case came along encouraging reliance on prior opinions, especially for title insurance purposes, it would speed up the process for the examiner and the client.
5. The uncertain quality of another's attorney's work makes most attorney's unwilling to rely directly upon another attorney's opinion. However, there is a Title Examination Standard encouraging communication by a subsequent examiner back to any earlier examiner, to determine why the earlier found the title acceptable, when the later one did not do so. TES 1.2 provides: *"When an examiner finds a situation which the examiner believes creates a question as to marketable title and has knowledge that another attorney handled the questionable proceeding or has passed the title as marketable, the examiner, before writing an opinion, should communicate, if feasible, with the other attorney and afford an opportunity for discussion."*
6. There is no known active effort at this time to promote this practice.



**III. GENERAL TOPIC: EXAMINATIONS**

B. TOPIC: LENDERS USING INSIDE ATTORNEYS FOR EXAMINATION

IMPACT: DECREASE WORK FOR OUTSIDE ATTORNEYS

LIKELIHOOD: MEDIUM

DISCUSSION:

1. Lenders can hire attorneys to work in-house to provide legal services to the lender itself.
2. Such services often relate to preparing closing-related documents that might include a title examination for the lender only.
3. The in-house attorney could not provide legal services to a customer of the bank, because such services would be from the bank and, therefore, would constitute the unauthorized practice of law by the lender. *"If a lay agency is not entitled to practice law directly, it is not entitled to do so indirectly by employing licensed attorneys to carry out that portion of its activities for it."* [Advisory Opinion No. 1] However, a recent Ethics Opinion seems to contradict this firm rule, by allowing a non-attorney company to provide legal representation to customers, such as providing a defense under an insurance policy– if such a duty is owed to them – by inside counsel, instead of outside counsel. Such a step undermines the sense of loyalty between the attorney and the attorney's client (not the person paying the bills, but the one receiving the representation), and prevents the giving of unbiased advice, which might be adverse to the full-time employer of the attorney. [Legal Ethics Advisory Opinion No. 1997-1]
4. In Oklahoma, the Ethics panel reversed itself due to an ABA opinion, so that it is permissible to represent both the buyer of the tract and the title insurance company insuring the buyer's title. [Opinion No. 281(1974) which was reversed in 1976, Opinion No. 290].
5. It can be expected that lenders will continue to provide increasing services of a legal nature to its customers.

**III. GENERAL TOPIC: EXAMINATIONS**

C. TOPIC: TITLE EXAMINATION STANDARDS REDUCING CURATIVE REQUIREMENTS

IMPACT: INCREASE IN SPEED, REDUCE CURATIVE REQUIREMENTS

LIKELIHOOD: MEDIUM

DISCUSSION:

1. The (a) adoption of Uniform Curative Acts, (b) use of title insurance to insure over minor or soon-to-lapse defects, and (c) use of title examination standards, can all assist in facilitating the review and approval of titles.
2. Title Examination Standards can be adopted with two differing philosophies: (a) to establish standards to encourage uniform results when different attorneys examine the same title, without a preference for approving or disapproving any particular title, or (b) to establish standards which tend to reduce title requirements.
3. While there is not usually a conscious choice between these two philosophies when title standards are adopted in Oklahoma, both seem to peaceably co-exist.
4. A major effort has been made to avoid condemning titles that had previously been found acceptable under the earlier version of a standard. The only time recently when good titles became bad was when stray deeds were deemed potential roots of title due to a then-recent court case. Recent efforts have been made to, again, render stray deeds inconsequential, where an affidavit of possession can be filed to help choose between two competing chains of title.

**III. GENERAL TOPIC:            EXAMINATIONS**

D.     TOPIC:            ATTORNEYS JOIN WITH OTHER PROFESSIONALS TO  
                              CREATE MULTIDISCIPLINARY ORGANIZATIONS

IMPACT:                DECREASE CONTROL OF WORKING CONDITIONS AND  
                              DECREASE QUALITY OF SERVICE TO CLIENTS

LIKELIHOOD:          MEDIUM

DISCUSSION:

1. [See the above discussion about Lenders using in-house counsel to provide services to third parties]
2. The joke is that Wal-Mart will provide "legal services" at the end of "Aisle 7".
3. This trend will probably continue due to pressure for all businesses to provide "one-stop" help, rather than getting trust services one place and surveying services another, and insurance at a third.

**IV. GENERAL TOPIC: TITLE INSURANCE**

A. TOPIC: ATTORNEYS RELY ON PRIOR TITLE POLICIES ALONG WITH SUPPLEMENTAL ABSTRACTS FOR TITLE OPINIONS FOR TITLE INSURANCE

IMPACT: INCREASE IN SPEED IN PREPARING OPINIONS; REDUCED DISPUTES WITH SUBSEQUENT EXAMINERS; REDUCE NUMBERS OF OUTSIDE ATTORNEYS

LIKELIHOOD: LOW

DISCUSSION:

1. Currently attorneys must examine a complete abstract, covering back to sovereignty, in order to prepare an opinion to be relied on to issue title insurance.
2. This is due to statutory requirements. 36 O.S. § 5001, "Qualifications of title insurers" provides:  
*"no policy of title insurance shall be issued in the State of Oklahoma except after examination of a duly-certified abstract of title prepared by a bonded and licensed abstractor as defined herein."*
3. If an examination could start with the earlier policy, supplemented with an abstract for the intervening period, it would save time and money.
4. It is probable that this practice already occurs where the earlier policy was issued by the same company that is about to issue a new policy.
5. However, in the absence of cooperative agreements between the insurers, or a statutory change to allow such reliance, it is not likely that a title company will rely on another company's policy to come forward from.
6. There is some cooperation to achieve this reliance on a different company's prior policy.

**IV. GENERAL TOPIC: TITLE INSURANCE**

B. TOPIC: LENDERS USE MORE TITLE REPORTS IN LIEU OF TITLE INSURANCE

IMPACT: DECREASE NUMBERS OF TITLE OPINIONS BY ATTORNEYS

LIKELIHOOD: HIGH

**DISCUSSION:**

1. To the extent that lenders do not intend to re-sell their loans on the secondary market, but are keeping such loans in-house, they do not need to pay for title insurance for the benefit of themselves and their assignees.
2. Instead, just as various equity loans are made based upon 125% of the value of the land, which are obviously undersecured, the lenders can choose to take a calculated risk and rely upon a title report. Such a title product does not purport to be based upon an abstract or an attorney's opinion. Instead it is based upon an abstracter's or underwriter's title search for a short time frame, such as the last 10 years.
3. This short title search picks up those matters that would be of most concern to the lender, primarily other senior liens. Lenders assume, perhaps incorrectly, that they can join any other persons making claims to the land in the foreclosure action, if it becomes necessary, and "quiet them" out.
4. Based upon their loss history in relying upon such title reports, individual lenders will either continue or end their reliance on such title reports.

**IV. GENERAL TOPIC: TITLE INSURANCE**

C. TOPIC: AVAILABILITY OF QUASI-TITLE INSURANCE PRODUCTS IN LIEU OF TITLE INSURANCE

IMPACT: DECREASE NUMBERS OF TITLE OPINIONS BY ATTORNEYS

LIKELIHOOD: HIGH

**DISCUSSION:**

1. Over the last few years, there have been several products presented for use by the lending industry that are cheaper and quicker than traditional title insurance.
2. The current variation is known as "Radian Lien Protection".
3. Such product is available on refinances, second mortgages and home equity loans.
4. This product relies primarily on a credit report check of the prospective borrower, combined with an affidavit from the borrower.
5. Because this product appears to insure a lender against superior liens and against other title defects, it will probably be deemed title insurance and, therefore, become subject to the current statutory requirements including the use of an abstract and an examination of title.
6. This product is being challenged in other states by the title insurers.

**IV. GENERAL TOPIC: TITLE INSURANCE**

D. TOPIC: INCREASED USE OF NEW "SIMPLER" PLAIN LANGUAGE  
TITLE POLICIES, WITH EXPANDED COVERAGE

IMPACT: INCREASE IN LITIGATION WITH INCREASED COVERAGE

LIKELIHOOD: HIGH

DISCUSSION:

1. Simple language policies add two dimensions that will probably increase litigation.
2. These include: (a) increased coverage, such as building code violations, and (b) uncertainty over new un-litigated coverage language.
3. Such increased litigation will presumably be concentrated in the outside favored law firms, or, as discussed above, in new expanded inside counsel.

**V. GENERAL TOPIC: CLOSING**

A. TOPIC: E-FILING

IMPACT: INCREASE NEED FOR ATTORNEYS TO UNDERSTAND  
ELECTRONIC FILING FOR TRANSACTION AND LITIGATION  
PURPOSES

LIKELIHOOD: MEDIUM

DISCUSSION:

1. There is currently both federal and state legislation encouraging and to some degree mandating the increased use of electronic documents, and, as a logical extension, the acceptance of electronic forms of such documents for recording purposes, in the public land records.
2. The state Act is the "Uniform Electronic Transactions Act". 12A O.S.§§ 15-101 et seq.
3. 12A O.S.§ 15-107, "Legal recognition of electronic records, electronic signatures, and electronic contracts" provides:

*"Legal recognition of electronic records, electronic signatures, and electronic contracts:*

*(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.*

*(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.*

*(c) If a law requires a record to be in writing, an electronic record satisfies the law.*

*(d) If a law requires a signature, an electronic signature satisfies the law."*

4. Lawyers will need to increase their understanding of these laws and be prepared to assist their real estate clients.



**V. GENERAL TOPIC: CLOSING**

B. TOPIC: REGULATE CLOSING COMPANIES

IMPACT: REQUIRE ATTORNEYS SEEKING TO PROVIDE CLOSING SERVICES TO INCREASE INSURANCE REGARDING CLOSING SERVICES

LIKELIHOOD: LOW

DISCUSSION:

1. Prior efforts by the Title Insurance Advisory Committee to the State Insurance Commissioner to propose and to have legislatively enacted regulatory procedures to license and control closing agents failed.
2. Reports of infrequent defalcation by closing agents, usually independent ones, periodically fuel efforts to regulate all closing agents. However, each major subgroup tends to try to exempt itself from such regulation, such as real estate licensees, title agents, and attorneys. Usually the reason given is that they are already regulated.
3. One problem that such regulatory proposals ran into was the difficulty in getting the required liability insurance.
4. There is no known effort currently pushing this issue.

**VI. GENERAL TOPIC: OTHER**

A. TOPIC: R.E.S.P.A. CHANGES

IMPACT: BUY BUNDLE OF TITLE RELATED SERVICES AT WHOLESALE PRICES; SELL AT RETAIL PRICES

LIKELIHOOD: MEDIUM

DISCUSSION:

1. There is a proposed amendment to the RESPA regulations, currently pending in Washington, whereby lenders could purchase title related services, at wholesale prices, through their bulk purchasing capabilities, to be resold at retail prices, with the lender keeping the difference. Monday July 29, 2002, Federal Register, Vol. 67, No. 145.
2. Title attorneys could be approached to provide reduced rate services, such as title exams, with a resulting decrease in income, and a possible increase in errors and the attorneys seek to cut corners to maintain a profit.
3. Prepaid legal services organizations have asked for low per-page examination rates from those attorneys seeking to have business directed to them.
4. Title companies are apparently seeking to defeat this bill.

**VI. GENERAL TOPIC: OTHER**

B. TOPIC: INCREASED "1031" TRANSACTIONS

IMPACT: INCREASED OPPORTUNITY TO PROVIDE LEGAL ADVICE,  
DUE TO INTERMEDIARIES INABILITY TO PROVIDE LEGAL  
ADVICE

LIKELIHOOD: HIGH

DISCUSSION:

1. As real estate investors continue to seek reduce or delay the federal tax consequences associated with buying and selling land at a profit, the use of the "1031" tax free (deferred) exchange mechanism will increase.
2. Those attorneys who are aware of such tools will be sought after due to the fact that they will be providing visible value to the transaction.

**VI. GENERAL TOPIC: OTHER**

C. TOPIC: MORE AGGRESSIVE LENDING

IMPACT: MORE MORTGAGE FORECLOSURES DUE TO LOWER  
QUALITY LOAN CREDIT UNDERWRITING

LIKELIHOOD: HIGH

DISCUSSION:

1. Supposedly, lenders have been making loans based on undersecured collateral (loaning 125% of value) to people with lower qualifications.
2. As the interest rate rises, as it is already doing, and as people find they cannot make their credit card and home equity loan payments, the numbers of mortgage foreclosures and bankruptcies will increase.
3. Attorneys who practice in these areas should enjoy increased work.

**VI. GENERAL TOPIC: OTHER**

D. TOPIC: MORE SUBDIVISION DEVELOPMENTS

IMPACT: DEVELOPERS WILL NEED MORE LEGAL SERVICES RELATING TO REAL ESTATE DEVELOPMENTS: RESTRICTIONS (C,C & R'S), HOME OWNERS ASSOCIATIONS, REZONING, ETC.

LIKELIHOOD: HIGH

DISCUSSION:

1. Due in large part to lower interest rates, many real estate projects are underway, that were previously "on the shelf".
2. Those attorneys who are skilled in the areas related to subdivision development, zoning and lending areas should benefit.

**VI. GENERAL TOPIC: OTHER**

E. TOPIC: ADVERSE POSSESSION ELIMINATED

IMPACT: ELIMINATE TITLE BY ADVERSE POSSESSION AS A TOOL TO CLEAR TITLE

LIKELIHOOD: MEDIUM

DISCUSSION:

1. The use of title by prescription, also known as adverse possession, provides an incentive for people to supervise and maintain their lands, and also provides a tool for the courts to use to decide who owns otherwise clouded title, thereby allowing it to be cleared when disputes arise.
2. Over the last few years, there have been several attempts to eliminate or seriously impair the use of adverse possession. Such efforts have failed, so far.
3. Such legislation attempted to either eliminate the principal altogether or require the adverse claimant to meet unreasonable tests, such as paying the ad valorem taxes on the disputed tract.
4. The elimination of such a vehicle to clear title will leave more titles in limbo.

**VI. GENERAL TOPIC: OTHER**

F. TOPIC: M.E.R.S. (MORTGAGE ELECTRONIC REGISTRATION SYSTEM)

IMPACT: LESS ASSIGNMENT AND RELEASE PREPARATION WORK FOR LOCAL ATTORNEYS

LIKELIHOOD: HIGH

DISCUSSION:

1. The introduction of the MERS system was designed so that all commercial mortgages are made to MERS initially with any release coming from MERS.
2. The actual ownership of the promissory note and the servicing rights would be monitored and handled off of the public record system.
3. This procedure would eliminate the expenses and frequent mistakes made as the mortgages are sold repeatedly in the secondary market.
4. There needs to be an educational process made so that lenders use the process properly and so that attorneys know who should be giving (and especially who should be signing) a release of mortgage and who will be suing or being sued.
5. There are some concerns about how to establish in the public record the authority of the person signing the release, and whether prudence suggest that more entities rather than less (i.e., MERS and the beneficial lender) be named in a lawsuit when clearing title or lien issues.

**VI. GENERAL TOPIC: OTHER**

G. TOPIC: CLOSER'S AFFIDAVIT IN LIEU OF RELEASE OF MORTGAGE

IMPACT: REDUCE LAWSUITS FOR FAILURE TO RELEASE MORTGAGES

LIKELIHOOD: LOW

**DISCUSSION:**

1. There is an ancient mortgage statute which eliminates mortgage liens once a mortgage has been of record for 10 years beyond its disclosed maturity date, or 30 years beyond its initial recording date. 46 O.S§301
2. However, the suggestion has arisen that a person with knowledge, such as the title company closing agent should be permitted – without waiting such long periods of time – to file an affidavit verifying that the subject loan was paid off at closing by the subject closer, or closing company.
3. Such a legislated tool would aid in extinguishing stale mortgages in a quicker manner.
4. No efforts are underway to enact such legislation.



**VI. GENERAL TOPIC: OTHER**

H. TOPIC: UNIFORM TRUST ACT

IMPACT: INCREASE LAWSUITS DUE TO ITS ALLOWANCE OF ORAL TRUSTS IN REAL ESTATE

LIKELIHOOD: MEDIUM

DISCUSSION:

1. There is a massive Uniform Trust Act being submitted to the OBA House of Delegates in November 2003 to be approved as part of the OBA legislative package for consideration by the 2004 state legislature.
2. There is a substantial range of disagreement among attorneys as to the benefits and detriments of such proposed legislation.
3. The probate bar is apparently in favor of the bill, while the members of the OBA Real Property Law Section are strongly against it.
4. Due to the massive revision of the statutes, there is a great likelihood that confusion and increased lawsuits will result.