

# TITLE EXAMINATION STANDARDS:

## A SECOND STATUS REPORT

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#### I. INTRODUCTION

Do you examine title to real property by reviewing either an abstract of title or the County records themselves; and, in the process, do you depend on bar sponsored statewide title examination standards ("Standards")? Your answer to this question obviously depends on which state you are in, and it is interesting to note that the number of states with such Standards has been growing...and shrinking...at the same time.

What is a "title standard"? One definition states:

*A uniform title standard may be described as a statement officially approved by an organization of lawyers, which declares the answer to a question or the solution for a problem involved in the process of title examination.*

Simes & Taylor, Model Title Standards, The University of Michigan Law School, 1960.

Since 1938, when the State Bar of Connecticut adopted the first set of statewide Standards in the United States (albeit preceded by county bar Standards in Livingston County, Illinois, in 1923 and Gage County, Nebraska, in 1933 or 1934), it appears that 23 states had adopted statewide Standards by 1960. However, as will be discussed below, in the intervening three and a half decades since 1960, four more states adopted statewide sets (i.e., Georgia, Maine, Massachusetts and Rhode Island) raising the nominal total to 27; but, then again, in the same period, only 17 of these 27 have kept theirs up-to-date.

Under the auspices of the ABA Conveyancing Committee and the Oklahoma Bar

Association's Real Property Law Section, this author conducted a nationwide survey in the 3-year period between 1987 and 1989 ("1989 Survey"), and then repeated a similar survey in the Summer of 1993 ("1993 Survey"), and again in the Spring of 1995 ("1995 Survey"). The principal purpose of these surveys was to determine which states had current sets of Standards and to collect copies of such Standards at a central location for the use of attorneys throughout the country.

The initial and subsequent collection efforts were successful. The National Title Examination Standards Resource Center ("Resource Center") was created as the result of these efforts. The principal asset of this collection is a modest, yet still impressive, 3-foot shelf holding copies of the 20 sets of statewide Standards which were first collected in 1989 (17 of which are still relatively current; meaning they have been revised within the last 5 years). This collection was brought up-to-date in 1993 and again in 1995 ("Standards Collection"). This Standards Collection is housed at the Oklahoma City University School of Law Library in Oklahoma City, Oklahoma. The results of the 1989 Survey were discussed in an article entitled "Title Examination Standards: A Status Report", Probate and Property (Sep./Oct. 1990), co-authored by Kraettli Q. Epperson of Oklahoma and Kevin Sullivan of Texas.

This current article is intended to give to attorneys, who are involved in providing title examination services, two resources: (1) an updated status report on which states do and do not have current Standards, and (2) a description of the future activities which are scheduled to facilitate the further growth and use of such Standards, especially the increased use of the Standards Collection at the Resource Center.

## II. STATUS OF T.E.S. NATIONALLY

### A. HISTORICAL BEGINNINGS OF STANDARDS

The number of states with statewide Standards grew beginning in the 1930's and continued steadily through the 50's and beyond. In 1960, as noted above, there were 23 sets of statewide Standards reflected in a report arising from a joint study co-sponsored by the University of Michigan Law School and the Real Property, Probate and Trust Law Section of the American Bar Association ("Model Title Standards"). [See Exhibit 1] Simes and Taylor, the authors in the report resulting from this 1960 effort, projected the continued growth in the number of states which would ultimately adopt such Standards. It is true that -- as predicted in 1960 -- 4 more states (i.e., Georgia, Maine, Massachusetts and Rhode Island) did adopt statewide sets of standards since 1960, raising the apparent total to 27.

However, as noted above, in 1987 a 3-year study was initiated and the results were published in 1990 ("1989 Survey"). The results of the 1995 updated version of this Survey show that only 17 states had updated their set of Standards within the past 5 years (i.e.,

between 1990 and 1995). [See Exhibits 1 and 2] Due to the rapid pace with which the law is changed by both court decisions and the Legislatures, the existence of a 5-year gap suggests that 10 of the 27 states have let their Standards become so out-of-date as to be at least suspect.

It should be noted that the 17 states with active Standards as of May 1995 tended to be located in the Great Plains, Great Lakes, Southeast and New England areas. The far West, Southwest and Central Atlantic areas were the big gaps in such coverage. [See Exhibit 3] What is especially interesting about these geographic "gaps" is that they correspond roughly with the apparent strongholds for the title insurance industry.

## B. GROWTH OF TITLE INSURANCE

The most rapid rise in the use of title insurance was apparently between World War I and World War II, with one author reporting that in 1945 title insurance was the major form of title assurance in the United States. D. B. Burke, Law of Title Insurance 4 (1986).

According to Burke, regional dominance for title insurance companies first occurred in the West especially along the California coast, and it simultaneously became established in larger urban areas. In the 1950's there were 150 title companies, in the 1970's the number had dropped to 100, and in 1986 there were fifteen large title insurance related holding companies with the 4 largest insurers handling over 50% of the nation's title insurance business. According to the insurance industry's recent "Form 9" reporting forms, seven underwriters handle 90% of the industry's business. In 1993 the four states with the largest amounts of title insurance being written were California, Texas, Florida and New York. Consistent with the early inroads of title insurance, these 4 states include the west coast and many of the nation's larger urban areas. However, it appears that title insurance failed to find acceptance initially in Iowa and the New England area.

This general surge in the use of title insurance in the 30's, 40's and 50's coincided with the period of rapid expansion of state bar sponsored Standards. It might be asserted that these two methods for standardizing the title examination process were mutually exclusive alternatives and that they were in essence staking out their territories initially, and were then appearing to hold onto their turf thereafter. It might also be asserted that, in the opposite vein, title insurance companies have good cause to endorse the adoption and use of state Standards to assist such companies in identifying in advance those defects and encumbrances that would render titles unmarketable in a local market. Reducing such uncertainty would lower the number of ed areas of local law. Another hypothesis is that because title insurance companies do not usually insure titles to mineral interests, attorneys in states with substantial quantities of mineral titles to be examined, such as in the Rocky Mountain and Great Plains areas, felt a strong need to both establish and maintain such Standards. Probably all of these factors played some role in the initial adoption and later maintenance of such Standards.

## C. RECENT STATUS OF STANDARDS

When the 1989 Survey was duplicated in 1993 and 1995, by another joint effort of the same three ABA-OBA-OCU groups, it was discovered that the adoption and maintenance of statewide Standards is a dynamic process -- which in this instance is another way of saying "you win some and you lose some". Of the 23 states with sets actively maintained in 1960, only 13 had been updated within the 5 years between 1990 and 1995, although another 4 with active sets had been added since 1960. It should be noted that, however, four states beyond this core of 17 were discovered to have active efforts underway in 1995 to update old sets or to create new sets for the first time. It should also be noted that, as of June 1994, Georgia adopted their first set of revisions since 1972 and, as of May 1995, New York updated their 1976 set. The following four states hope to have their new or revised sets adopted by the noted dates: Arkansas by June 1995, Utah in 1996 or 1997, Vermont by January 1996 and Texas by some indefinite date in the future. [See Exhibit 3] If and when these 4 states' efforts are successful, the total number of states with active Standards will rise to 21.

The collection of the current 17 active sets of Standards, along with 3 inactive sets (i.e., Missouri (1980), South Dakota (1988) and Wyoming (1980)), which is housed in the Library of the Oklahoma City University School of Law in Oklahoma City, Oklahoma, is supervised under the umbrella of an informal institute known as The National Title Examination Standards Resource Center. The author of this article, Kraettli Q. Epperson, is the Center Director. There are continuing efforts by this author to keep the Collection current.

Anecdotal evidence gathered during the conduct of the most recent 1995 Survey suggests that this process of examination of real property titles may have changed so that such examinations are done predominately in the areas of rendering opinions on mineral related matters and opinions for title insurance companies. It is interesting that the Natural Resources Sections of the Arkansas and Utah State Bar Associations are the groups which initiated the current efforts towards the adoption of the first set of stat towards major updates in Utah. It should also be noted that, in Oklahoma, which updates its Standards annually, and in both Arkansas and Texas, which are diligently moving toward adoption of their first statewide sets, such working committees' efforts also include attorney representatives of the title industry as active participants.

In summary, it appears that the examination of real property titles is and will continue to be an income-producer for some attorneys, including (1) the occasional abstract sitting on one's desk waiting to be examined when a block of time presents itself, (2) the high volume of examinations conducted by the title company's inside or outside attorney-examiner, (3) the drilling opinion or the division order title opinion done by a mineral lawyer, (4) the title report or litigation guaranty being interpreted and used to identify whom to include as

defendants in the proposed quiet title suit or mortgage foreclosure, (5) the title insurance commitment schedules of requirements and exceptions being reviewed as part of the real estate transaction, or (6) the title insurance policy being studied intently when a challenge to the insured's title by a third party arises.

### III. FUTURE T.E.S. ACTIVITIES

#### A. BENEFITS OF STANDARDS AND A STANDARDS COLLECTION

According to the Standards committee chairs in Arkansas and Georgia, the availability of this centralized collection of Standards helped substantially in their state's efforts to establish or revise their own states' Standards. Direct communications between states developing Standards has also begun, for instance Connecticut and Oklahoma have exchanged copies of their draft standards on Limited Liability Companies. And the contacts in Vermont say they are relying extensively on the Connecticut set in the creation of their own first set.

While it could be argued that the use of title insurance for many, if not most, of the country's real estate conveyancing and lending transactions makes the need for attorney-generated title examination Standards obsolete, the opposite position can also be argued. A solitary attorney trying to convince a national title company, or a title company attorney arguing with a stubborn "know-it-all" outside attorney, will find substantial comfort and support from a bar-supported set of uniform Standards which backs up the examiner's position with the expertise and the reputation of the bar group which develops and adopts such criteria. While it appears that most sets of Standards are adopted by the state bar associations (e.g., the association's house of delegates or their governing board), it should be noted that an article describing the benefits and disadvantages of using certain organizations within a state as the approving entity for that state's Standards is currently being written. This effort is being undertaken by the Chair of the Title Standards Revisions Sub-Committee of the Energy, Natural Resources and Environmental Law Section of the Utah State Bar.

#### B. USE OF THE STANDARDS COLLECTION

It was mentioned in the earlier 1990 article on the Status of Standards that, according to the responses to that 1989 Survey, the Standards Collection located at OCU would be utilized most frequently for these purposes:

(1) to request a list of the publications available in the Collection, and to borrow and/or copy the materials in the Collection.

(2) to communicate with each state's title Standards contact, and

(3) to use a computer/modem system to access the Collection.

### 1. Obtaining Lists and Copies:

There is not a count of the number of "walk-in" users of the Standards Collection. However, when the Standards Collection was created in 1990, there was an initial rush of telephone requests for copies of the list showing which materials were available, thereafter followed by requests for copies of the Standards themselves either for selected states or for all of the states. In FY 1990-91, there were telephone requests for over 80 sets of the various sets of Standards. Such requests dropped to less than 20 in each of FY 1991-92 and FY 1992-93; however, a slight increase occurred in FY 1993-94, probably stimulated by the conduct of the 1993 Survey.

The requests for copies of the materials came principally from law firms (12 of 26 separate requests) and title companies (6 of 26). The remaining inquiries were from governmental agencies (2), realty companies (2), bar associations (1), banks (1) and "other" (2).

The most requested set of Standards was from New York with 13 requests; and the least asked-for were from Florida, Iowa, Maine, Missouri, Rhode Island and Wyoming, with 3 each. (NOTE: A possible, partial reason for the high number of requests for the New York set was a typographical error in the 1990 article which showed the set with an effective date of 1988, when it was actually last revised in 1976. Also, one might wonder whether this typographical error prompted some of the discussion that led to adoption of the recent May 1995 update).

### 2. Inter-State Contacts:

Contacts between the Standards Committee Chairs in the various states has increased to some degree since 1989; for instance, as noted above, Oklahoma and Connecticut have exchanged copies of their respective state's pending draft Standards dealing with Limited Liability Companies. In addition, the author of this article, who is also the Chair of Oklahoma's Title Examination Standards Committee, has presented two papers in Arkansas in support of Arkansas' effort to adopt its first statewide set of Standards. Also, Owen L. Anderson, who is the Eugene Kuntz professor in Oil, Gas and Natural Resources at the University of Oklahoma College of Law in Norman, Oklahoma, is assisting Texas in the development of that state's first set of Standards. Professor Anderson was active in North Dakota's bar committee work on Standards before coming to Oklahoma.

### 3. Modem Access:

The Oklahoma Bar Association has established a computerized, modem-accessible "bulletin board system" which includes among its topical areas, one on "Real Estate/Tax/Estate Planning". Through the exchange of communications between the several

hundred attorneys, who have joined this system since its inception in November 1994, various real property issues have been explored and debated. These have included the use of Power of Sale Administrative Sale Procedures, ethical issues concerning title examiners not being told who their borrower-clients are by the lender-clients, probate sale proceedings, and others. Someday this system may provide direct access to the Resource Center Standards Collection.

Thus, it can be said that the 3 types of anticipated uses for the Standards Collection have already occurred, to varying degrees.

### C. FUTURE OF THE STANDARDS COLLECTION AND RELATED PROJECTS

In order to ensure the correctness and up-to-date status of the materials in this Standards Collection, thereby avoiding the obsolescence of the collection, especially in those states that make revisions annually, an effort is underway to establish a system to update the materials in the Standards Collection, not only every 3 years, but, if possible, at least annually.

It seems ironic, but many of the projects planned to be conducted under the auspices of this new Resource Center were originally suggested in 1953 by Payne. He indicated that:

*The standards adopted up until this time generally evidence a piecemeal attack upon some of the specific problems of practice. There has as yet been no systematic effort to meet the functional problems faced by the title examiner. Many title standards have been hastily and awkwardly drawn. In part this has been due to the limited talent locally available and in part to a lack of knowledge of what had been done in other jurisdictions. It is understood that an effort will be made at an early date to induce the Section of Real Property, Probate, and Trust Law of the American Bar Association to create a central clearing house for standards. It is to be hoped that this effort will be successful, and that a uniform edition of the standards, cross-indexed and so physically arranged as to allow subsequent amendment, will be produced. It is also hoped that the Section will undertake the drafting of uniform standards covering common problems not governed by purely local practice. (emphasis added)*

John C. Payne, "Increasing Land Marketability Through Uniform Title Standards", 39 Virginia Law Review 1 (Jan. 1953)

The 1960 Simes & Taylor report, including the related Model Title Standards, was a significant post-1953 effort, but it was the only reported major effort to establish a national set of uniform Standards taken in the 4 decade period since 1953.

The components of the current on-going Oklahoma-based project include the following elements, which were modified in 1995 due to the lessons learned in conducting the 1989 and 1993 Surveys:

1. STANDARDS COLLECTION UPDATE: Update the 1990 collection of Title Examination Standards housed at the Oklahoma City University School of Law under the auspices of The National Title Examination Standards Resource Center. (Status: Completed; see attached list of Standards [Exhibit 2].)
  
2. STANDARDS COLLECTION PROMOTION: Prepare and publish an article on the updated Standards Collection in various publications of the American Bar Association. (Status: This article is being published initially in the Newsletter for the "Group C Land Transactions" group of Committees within the Real Property, Probate and Trust Section of the ABA. Thereafter, a Monograph/Book is expected to be prepared and published by the ABA incorporating an updated version of this article. [See Exhibit 4]) (NOTE: To act as a continuing reminder, we need to publish in the ABA Journal, the Probate and Property Magazine and the Oklahoma Bar Journal, a periodic series of "Notices" of availability of these materials.)
  
3. STANDARDS ADOPTION AND MAINTENANCE PROCEDURES ARTICLE: Prepare and publish an article on suggested steps to follow to adopt and to maintain a statewide set of Standards in the various publications of the American Bar Association. (Status: Such an article is being published initially in the Newsletter for the "Group C Land Transactions" group of Committees within the Real Property, Probate and Trust Section of the ABA. Thereafter, a Monograph/Book is expected to be prepared and published by the ABA incorporating an updated version of such article. [See Exhibit 4])
  
4. STANDARDS COMPARISON CHART: Conduct analysis and prepare charts comparing each state's Standards to the 1960 Model Title Standards; the charts will show (1) whether each state has a Standard on each of the topics found in the model set and (2) whether the state's position on the particular issue and the language used is: identical to, similar to or contrary to, the model version. (Status: Attorneys have volunteered to help to develop these 5 states' comparisons: Florida, Massachusetts, Ohio, Oklahoma and Rhode Island. A law clerk has been hired to help the author of this article to prepare the analysis for the remaining states.)
  
5. STANDARDS COMPARISON CHART ARTICLE: Prepare and publish a short article comparing and contrasting the Standards in various states, including a discussion of the Standards Comparison Chart, in various publications of the American Bar Association. (Status: To be prepared after the Standards Comparison Chart is completed.)
  
6. STANDARDS MONOGRAPH: Prepare and publish a Monograph providing a more detailed discussion of the contents of, and the differences between, the Standards in each state, including a full version of the Standards Comparison Chart. (Status: To be prepared after the Standards Comparison Chart Article is completed.)

7. STANDARDS NEWSLETTER: Initiate a paper-based Quarterly Newsletter describing on-going state projects in those states with existing Standards and those currently drafting their first set of Standards. (Status: To be started after the Standards Comparison Chart Article is completed.)

8. STANDARDS DATABASE: Establish a modem-accessible database containing the Updated Standards Collection (each state to directly update its Standards as they change). (Status: To be started after the Standards Newsletter is started.)

9. STANDARDS SEMINARS: Propose and coordinate one or more ABA Annual/Spring Meeting CLE's: HOT ISSUES IN TITLE STANDARDS (e.g., Limited Liability Co.'s, Environmental Issues, FDIC/RTC, Drug Forfeitures, etc.). (Status: To be proposed after the Standards Comparison Chart Article is completed.)

10. STANDARDS MODEM NEWSLETTER: Establish a modem-accessible "bulletin board system" to supplement the paper-based Quarterly Standards Newsletter. (Status: To be started after the paper-based Quarterly Standards Newsletter is functioning and the Standards Database is completed.)

Two of the three stated goals of the 1990 "Status Report" article were: (1) to update lawyers on the status of Standards in all 50 states, and (2) to introduce uninitiated lawyers to the concept and use of Standards. These aims were achieved by the publication of that 1990 article. However, the third goal (i.e., to undertake an effort to create new "model" Standards), has not been accomplished. A different approach appears to be more practical and is already being utilized on a defacto basis. As each state updates its own set of Standards by drafting new ones to cover new topics (e.g., limited liability companies), it appears that, instead of having some central national committee draft cutting-edge model title examination rules, each state looks at the handiwork of other states; and, to the extent such guidelines fit the reviewing state's own legal framework and needs, such drafters are modifying and adopting a version of their sister state's product.

When preparing such new Standards, the local drafters should note that the following information is available through the Resource Center:

1. Copies of the Tables of Contents, of each of the active sets of Standards,
2. Copies of the full text of each active set of Standards, and
3. A list of attorney contacts for each state with active (17) and transitional (3) sets of Standards.

## IV. CONCLUSION

The suggestions of the imminent demise of, or the shore-to-shore growth in, the general use of statewide title examination Standards have apparently been much exaggerated. Currently, 17 states have active sets and 4 more are on the verge of adopting a first-time set or reviving an old set (i.e., Arkansas, Texas, Utah and Vermont). The centralized collection of current Standards at the Oklahoma City University School of Law at the fledgling Resource Center has been utilized extensively and is being updated continuously. Communications among states with Standards is increasing, and future prospects suggest such contacts will continue to grow at a rapid rate through the use of newsletters and computer driven modem-accessible bulletin board systems.

The result of these efforts will hopefully provide, not only fewer delayed real estate closings, but increased public respect and appreciation for real property title attorneys who are able to facilitate smoother transactions through the use of such Standards. With such Standards being accepted community-wide and state-wide by the seller's, buyer's, lender's and title company's attorneys.

## **EXHIBITS**

1. Annual Handbook Status Report.
2. Proposed Outline for: The National Title Examination Standards Handbook.  
C:\WP51\KQE\TITLE.STD

(Last Revised November 10, 2009)

### EXHIBIT 1:

THE NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER

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**ANNUAL HANDBOOK**

*(Effective July 31, 2009)*

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**STATUS REPORT**

EXHIBIT 2:

***PROPOSED OUTLINE FOR:***

**THE NATIONAL TITLE EXAMINATION STANDARDS HANDBOOK**

**A MONOGRAPH OUTLINE:**

**THE NATIONAL TITLE EXAMINATION STANDARDS HANDBOOK:**

**By: Kraettli Q. Epperson**

**INTRODUCTION**

**II. THE HISTORY OF T.E.S. IN AMERICA**

**III. THE RESULTS OF A NATIONAL SURVEY OF STATES WITH T.E.S.**

**A. TITLE EXAMINATION STANDARDS: A SECOND STATUS REPORT**

**B. TITLE EXAMINATION STANDARDS: SUGGESTIONS ON ADOPTING  
AND MAINTAINING STANDARDS**

**IV. TRENDS IN THE TYPES & USES OF T.E.S.**

**V. A SET OF THE "MODEL T.E.S." (SIMES & TAYLOR: 1960)**

**VI. A CHART COMPARING THE T.E.S. IN EACH STATE**

**VII. THE TABLES OF CONTENTS OF ALL STATES' T.E.S.**

**VIII. THE STATE'S OWN "TITLE EXAMINATION STANDARDS"  
(OPTIONAL)**

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The above article was published in:

○ **Title Examination Standards: A Second Status Report** ○, ABA Land Transactions Group (C-Committees) Newsletter, Number 5, July 1995.