TITLE EXAMINATION STANDARDS:

SUGGESTIONS ON ADOPTING AND MAINTAINING STANDARDS

By Kraettli Q. Epperson

I. INTRODUCTION

Where does your state fall among these three categories: (1) regularly update (i.e., at least every 5 years) their title examination standards ("Standards") (i.e., 17 states); (2) are on the verge of either adopting a first-time set or reviving an old set (i.e., 4 states); or (3) do not have an active set at all (i.e., 29 states)?

For those who do not even know what Standards are, a 1960 report, sponsored in part by the ABA Real Property, Probate and Trust Section, states at page 1:

> *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 and Taylor, Model Title Standards, The University of Michigan Law School, 1960.

After an initial surge in 1938, when the State Bar of Connecticut adopted the nation's first set of statewide title examination Standards, the growth in the numbers of states establishing sets of statewide Standards grew to 23 in 1960, when Simes and Taylor published their report on Model Title Standards. An ABA Survey, conducted between 1987 and 1989

showed that by 1989 four more states had adopted such Standards. [See: "Title Examination Standards: A Status Report," Probate and Property (Sept./Oct. 1990), co-authored by Kraettli Q. Epperson and Kevin Sullivan.] However, as was discovered in a more recent 1995 fifty-state survey conducted by Mr. Epperson -- in a joint cooperative effort between the Real Property Division of the ABA, the Real Property Law Section of the Oklahoma Bar Association and the Oklahoma City University School of Law -- only seventeen states still have up-to-date sets of Standards (i.e., those updated within the last 5 years). On a more positive note, it was observed that in 1995 four other states are on the verge of adopting first-time statewide sets or reviving old Standards. In fact, Georgia adopted an updated set on June 18, 1994, after allowing its set to remain unrevised since 1972, and in May 1995 New York updated its 1976 set. The other four states which hope to have new or revised sets by possibly sometime in 1995 or 1996, are Arkansas, Texas (indefinite adoption date), Utah and Vermont.

This recent revival in interest in Standards may result in the numbers of states with Standards rising again to a total of twenty-one active sets. This resurgence is apparently attributable, at least in some small way, to the discussions prompted in various states by the publicity surrounding the earlier 1989 and 1993 ABA surveys, conducted by this author, and the simultaneous announcement of the establishment of the Standards Collection at the Oklahoma City University School of Law Library in Oklahoma City, Oklahoma. Additional efforts to update the Standards Collection and to develop other work products are expected to be undertaken as part of this joint national, state and law school effort.

To encourage the exchange of information between attorneys in states with an interest in adopting and maintaining active sets of Standards, and to thereby improve the chances that such adoption and maintenance efforts are successful, this article will briefly summarize a few hints and lessons about alternative steps involved in the creation and maintenance of statewide sets of Standards. These ideas are principally derived from the experiences from the past combined with the recognition of new communications technologies and the benefit of anecdotal lessons of more recent times. If you try these techniques, please communicate your experiences to this author, so the results can be shared.

The ideas covered in this article include: (1) what kinds of title issues are amenable to being addressed through such Standards; (2) what adoption steps should be followed; (3) what uniform format should be used to give structure to a typical Standard; (4) what form should be used for the Standards pamphlet; and (5) what methods should be used to improve the chances that reliance on such Standards will become the recognized practice in your community.

II. ISSUES TO COVER

The drafters of Standards must first address the threshold question of whether to cover topics on which there is either little difference of opinion or, at the other extreme, on which there is substantial controversy among title examiners and title insurers. On the other hand, should Standards be limited to the middle ground where there is some, but not a substantial

amount of, confusion? Simes and Taylor, in at page 6 of the introduction to their 1960 Model Title Standards Report ("Model Title Standards"), suggest the following:

> *What form should title Standards take? First, except insofar as they are concerned with Federal statutes, they should deal with state law and with state conveyancing practices. One of the most valuable things which a bar Standard can accomplish is to inform the bar generally of some decision or statute, which is well known to experienced conveyancers but which is likely to be overlooked by other members of the bar. It is true, a very considerable number of title Standards are about the same in all states because, as to the particular problems involved, the title practices are practically identical throughout the country. What these often seek to do is to crystallize a liberal practice as opposed to a strict and overmeticulous practice. Of course, the only justification for a set of model title Standards such as is presented herein, is that either the same Standards can be used in all states, or that the same problems arise in all states and the solutions are similar.*
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> *Should the question involved in a title Standard be a controversial one, or should it be a question the answer to which would be agreed upon by all members of the bar? If on the one hand, the question is extremely controversial, there is danger that the Standard will not be followed by those who disagree with it. On the other hand, if there is no possible question about the Standard, it may be said that there is no point in declaring it, since the conveyancing practice which it expresses will be followed anyway. Thus, there is no particular point in having a Standard which declares that a recorded deed is presumed to have been delivered, since every lawyer will apply that presumption anyway.*
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> *It would seem that a Standard should represent the substantially unanimous opinion of the members of the bar who are experienced conveyances, but it should involve a question upon which inexperienced conveyancers may be uninformed, or with respect to which overmeticulous conveyancers may take a position opposed to that of practically all competent, experienced conveyancers. In other words, it should not be a question which is controversial among competent, experienced conveyancers, but it should be one upon which the inexperienced may go wrong or the "fly specker" may reach an unreasonable conclusion. To find these problems, it may be suggested that there should be an organized conveyancing section of the state bar, and that a committee of this*

section should secure opinions on the appropriate matters for title Standards from lawyers representing all geographical areas of the state.

Another commentator, John C. Payne, has taken a slightly different tack towards identifying which topics to address through the use of Standards. The four areas where uniform title examination Standards are, in his opinion, typically useful are as follows:

1. The presumptions of facts which will support the record, such as:
   a. Identically named people are the same people,
   b. There's no forgery,
   c. The granting parties are competent, and
   d. The documents were delivered;
2. The legal rules applicable to the facts to be presumed;
3. The period of search necessary to establish a good title; and
4. The effect of the statute of limitations upon substantial defects appearing in the record under examination.

John C. Payne, "Increasing Land Marketability Through Uniform Title Standards", 39 Va.L.Rev.1 (1953) ("Increasing Marketability").

Bayse proposed a different description of general areas that can be successfully addressed by such uniform Standards. He explained his position as follows:

Title Standards have encompassed several different areas. These include (1) attitude and relationships between examiners themselves and between examiners and the public; (2) the duration of search; (3) the effect of lapse of time on record title defects; (4) presumptions of fact which should ordinarily be applied by examiners; and (5) the law applicable to commonly recurring situations. Some have specified the form and content of abstracts and their certificates, the form of certificates of title, the effect of wild deeds, and sometimes the effect of legislation itself. Such is particularly true of Marketable Title Acts which have recently appeared on the scene with far-reaching application to titles and their appraisal.

P. Bayse on Clearing Land Titles, §7. Real Estate Title Standards.

The Model Title Standards, developed by Lewis M. Simes and Clarence B. Taylor in 1960, included chapters on the following topics:

CHAPTER I.	THE ABSTRACT
CHAPTER II.	THE TITLE EXAMINER
CHAPTER III.	USE OF THE RECORD
CHAPTER IV.	MODEL MARKETABLE TITLE ACT
CHAPTER V.	NAME VARIANCES
CHAPTER VI.	EXECUTION, ACKNOWLEDGEMENT, AND RECORDING
CHAPTER VII.	DESCRIPTIONS
CHAPTER VIII.	THE USE OF AFFIDAVITS AND RECITALS
CHAPTER IX.	MARITAL INTERESTS
CHAPTER X.	CO-TENANCIES
CHAPTER XI.	CONVEYANCES BY AND TO TRUSTEES
CHAPTER XII.	CORPORATE CONVEYANCES
CHAPTER XIII.	CONVEYANCES INVOLVING PARTNERSHIPS AND UNINCORPORATED ASSOCIATIONS
CHAPTER XIV.	TITLE THROUGH DECEDENTS' ESTATES
CHAPTER XV.	EXECUTION AND ATTACHMENT
CHAPTER XVI.	MORTGAGES AND MORTGAGE FORECLOSURES
CHAPTER XVII.	MECHANICS' LIENS
CHAPTER XVIII.	TAX TITLES
CHAPTER XIX.	BANKRUPTCY
CHAPTER XX.	FEDERAL TAX LIENS
CHAPTER XXI.	SOLDIERS' AND SAILORS' CIVIL RELIEF ACT
CHAPTER XXII.	MISCELLANEOUS

As further noted by Simes and Taylor at page 9 of their Model Title Standards:

In conclusion, in setting up title Standards, the members of the bar should never lose sight of their basic function, which is to declare and establish officially the practice of conveyancers. In spite of its limitations, this so-called practice of conveyancers is probably the most potent element in the process of title examination. For essentially it is nothing less than the recognized practices of the conveyancing bar in determining what risks of fact or of law, actual or theoretical, are to be assumed by the title examiner on behalf of his client in approving a title.

III. INITIAL ADOPTION PROCEDURES

The commentators and scholars who have studied the twenty year period during the 1930's, 1940's and 1950's, when the use of statewide Standards sprang onto the national scene, have, in retrospect, identified several suggested steps to follow when developing and adopting an initial set of Standards, which will also ensure the successful maintenance of such uniform title Standards.

Payne suggests:

> *Assuming that sufficient local support is already latent, what steps have been necessary to insure the success of the Standards adopted? It has been suggested that seven conditions are essential to a successful program:*
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> *(1) initial recommendation of a sufficient number of Standards to attract wide interests;*
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> *(2) inclusion in the initial recommendations of a number of the small, troublesome matters which are constantly causing difficulty in everyday practice;*
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> *publication of the Standards in advance of adoption;*
>
> *reiterated requests to the practicing bar to submit problems of actual practice;*
>
> *wide geographical distribution within the committee; and*
>
> *the impressing of individual lawyers with the proposition that it is as convenient to have a uniform practice as to ignore irregularities.*
>
> *In addition it has been suggested that the committee contain some of the most meticulous title examiners in the community, or at least, those whose opinions are accepted as authoritative by the entire bar.*

Payne, Increasing Marketability at page 21.

Haste in drafting Standards -- especially the first set for a state -- can hinder the initial effort to get a set approved, and can undetermine the continued acceptance of such Standards by the practicing bar. Every effort should be made to avoid earning the following condemnation:

> *It is likewise impossible to make any qualitative comparisons between the several adoptions. In general it can be said that none of the adoptions indicates a rational and comprehensive functional attack upon the problems faced by the title examiner. Without exception the Standards represent piecemeal solutions of particular problems brought to the attention of bar association committees by individual practitioners. Moreover many of the Standards appear to have been drafted with the haste and lack of attention that might be expected in the case of an expression of nonbinding principles.*

Payne, Increasing Marketability at page 23.

[Note: An article is being prepared for publication which discusses the benefits and disadvantages of using certain organizations within a state to adopt such Standards, e.g., the State Bar, the State Legislature, the State Supreme Court, a working State Bar Committee or Section, or a joint abstractors, title insurers, and attorneys association. This project has been undertaken by Philip Wm. Lear, Chair of the Title Standards Revising Sub-Committee of the Energy, Natural Resources and Environmental Law Section of the Utah State Bar.]

IV. STANDARDS BOOKLET FORMAT

While the general rule is that "form should not rule over substance", a Standards reference booklet can be designed in such a way as to make it "user-friendly."

Payne, in Increasing Marketability, at page 32, suggested that the following attributes would create a better Standards handbook:

1. Good index and table of contents;

2. Contents collected under topical chapters;

3. High quality materials for the cover and the individual pages;

4. Printed rather than poorer quality reproduction techniques; and

5. Low cost availability.

Mr. Epperson, the author of this article, also suggests the following ideas:

1. Noting in the table of contents the date when a Standard was last revised (e.g., see Oklahoma's table of contents);

2. Including in the pamphlet related articles and hints on the mechanics and philosophy of the examination process;

3. Noting effective dates on each page to allow piecemeal copying of the handbook's contents;

4. Adding a quick reference index on the outside of the back cover, directing the reader to a topical chapter or sub-chapter utilizing a black bar on the edge of the pages;

5. Putting extra spaces on each page for the reader's own notations; and

6. Using larger print to reduce eye strain.

V. INDIVIDUAL STANDARDS FORMAT

The usefulness of the Standards will be affected by the form of each Standard. Ideally the Standards will be stated in language general enough to fit many situations, rather than a limited number of circumstances. However, it is also advisable to provide enough specifics in the Standard to allow the examiner to apply the rule in a real examination situation.

The following discussion provided at page 6 of the Introduction to the Model Title Standards elaborates on this point:

How specific or how general should title Standards be? In this particular, wide variation is found in existing Standards. A number of them state first a problem or question more or less concretely, and follow it with a specific answer, which is sometimes called a Standard. Thus, Iowa Standard 4.8 is as follows:

> *PROBLEM:*
>
> > *If A and B, who have acquired title as joint tenants, make a subsequent conveyance or mortgage, is it necessary to include anything in the granting clause relating to the grantors except the names of the parties?*
>
> *STANDARD:*
>
> > *No. Every outright conveyance of real estate passes all interest of the grantor therein.*
>
> > *See § 557.3 of the Code.*

In other jurisdictions, each numbered Standard consists merely in the statement of a more or less abstract proposition. Thus Oklahoma Standard 23 is as follows:

> > *The absence of revenue stamps on a deed does not affect the marketability of the title.*

The format of the Michigan title Standards is first an abstract statement of a Standard, followed by one or more concrete problems which are expressly answered, after which comment may be added and local authorities listed. Thus Michigan Standard 2.3 on abbreviation of names is as follows:

> *STANDARD: ALL CUSTOMARY AND GENERALLY ACCEPTED ABBREVIATIONS OF FIRST AND MIDDLE NAMES SHOULD BE RECOGNIZED AS THE EQUIVALENT THEREOF.*
>
> > *Problem: Blackacre was conveyed to L. Joseph Emery and Frederick Stephens. Later a conveyance thereof was executed by L. Jos. Emery and Fred'k Stephens as grantors. May*

identity of the grantees and grantors be presumed notwithstanding the discrepancies in spelling?

Answer: *Yes.*

Authorities: *People v. Tisdale, 1 Doug. 59 (1843); Standard v. Jewell, 206 Mich. 61, 172 N.W. 407 (1919).*

Certainly it is desirable to have the Standard stated in concrete and specific form. On the other hand, if the Standard consists merely in a hypothetical fact situation, much of its value is lost because situations which may arise will vary slightly from the facts stated in the Standard. But if a Standard is stated in such abstract and general terms that it must be construed before it can be applied, it is practically useless. The Model Title Standards which follow begin with a statement of a general proposition, which is as concrete as practicable but is not ordinarily in the form of a hypothetical case. This is then followed by citation of authorities and by comment, which may include one or more hypothetical cases. It is believed that local authorities in the form of cases and statutes should be cited. Ordinarily it should not be necessary to cite also treatises or decisions from other states, although this may occasionally be done to convince members of the bar of the soundness of the Standard.

Standards should be stated from the standpoint of the conveyancer who is passing upon the title, and should enable him to answer the question: Shall I pass the title? Or if not, what else must be required? a quiet title suit? an affidavit? a certificate of death or birth?

For those states which are adopting a set for the first time, an approach as to form which presents a general statement of principal, followed by appropriate Comments and Caveats which often include examples and warnings, might provide the best blend.

VI. WEIGHT FOR THE STANDARDS

The commentators on trends relating to the adoption of uniform Standards will, once in a while, step back and ask some thought-provoking questions about the concept itself. Payne, in Increasing Marketability, at page 33, raises the following query:

The use of title Standards raises two major legal problems: (a) whether such Standards will be adopted by the courts as the test for marketability; and (b) whether reliance upon the Standards constitutes due care on the part of the examiner. Neither of these questions has yet been answered.

Mr. Epperson, in response to Payne, would suggest that the following actions might be useful in making a state's set of Standards become that state's benchmark:

1. Formal development, adoption and maintenance of such Standards by the state bar, with guidance by recognized in-state experts and by reference to other states' experiences, with sufficient and timely input from a wide group of in-state practitioners;

2. Incorporation of the Standards into each land transaction by including an express reference to such Standards in the contract;

3. Incorporation of the Standards into some or all transactions by statutory declaration; and

4. Incorporation of the Standards into some or all transactions by court decision.

VII. CONCLUSION

As attorneys in various states undertake efforts to adopt or maintain their own sets of Standards, they need to consider the advice of numerous observers who suggest that one should focus on both the "process" for such adoptions and on the "form" of the work product. In this instance -- namely developing and maintaining a consensus among title examiners -- both "form" and "process" can be as important as the "substance."

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