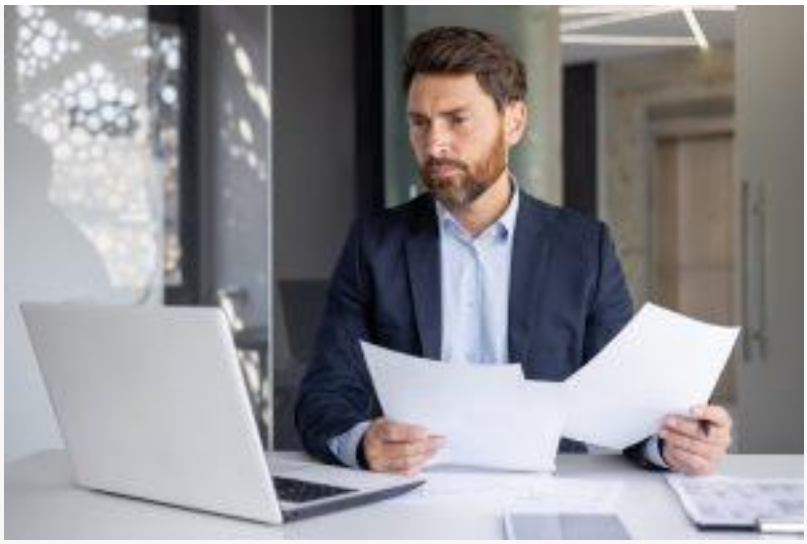
Oklahoma Title Examination Standards: Providing Guidance Since 1946

By Kraettli Q. Epperson



Why do we care whether an owner of real property in Oklahoma holds “marketable record title,” and why do we care that Oklahoma has a large set of Title Examination Standards, adopted by the Oklahoma Bar Association through its House of Delegates?

When a parcel of land is conveyed or encumbered in the state of Oklahoma, the county land records[1] are usually examined to locate deeds, judgments and other instruments to create a chain of title, starting with a patent out of the government and continuing up to the present, covering surface and minerals.

These instruments can be located only because the county clerk for each county receives deeds and other land-related documents for recording and indexing against land in that county.[2] When reviewing these instruments, the goal is to determine whether “marketable record title” is held by the latest buyer/grantee who now wishes to be a seller/grantor. This is because, as explained in *American Jurisprudence*:

The law implies an undertaking by the vendor of real property to make and convey a good or marketable title to the purchaser in every contract for the sale of real property in the absence of any provision indicating the character of the title provided. Indeed, ordinarily the only implication in an executory contract for the sale of land is the promise to convey good title. A purchaser of real property therefore is entitled to marketable title; a purchaser’s right to this is given by law and does not depend upon inclusion in an agreement. Accordingly, in the absence of a stipulation to the contrary, there is a presumption that marketable title will be conveyed to the purchaser of real property.[3]

The Oklahoma Title Examination Standards themselves provide:

1.3 REFERENCE TO TITLE STANDARDS

It is often practicable and highly desirable that, in substance, the following language be included in contracts for a sale of real estate: “It is mutually understood and agreed that no matter shall be

construed as an encumbrance or defect in title so long as the same is not so construed under the real estate Title Examination Standards of the Oklahoma Bar Association where applicable."

In line with this suggestion, the Oklahoma Real Estate Commission has promulgated form contracts for residential sales, commercial sales and farm/ranch/recreational lands, providing:

Any title requirements reflected in an Attorney's Title Opinion or Title Insurance Commitment, [must be] based on the Standards of marketable title set out in the Title Examination Standards of the Oklahoma Bar Association.

It is certainly beneficial to the public to have uniform procedures to confirm that identified parties have solid reliable chains of title (instead of each title examiner taking a separate arbitrary approach); such certainty, in turn, supports the ability of owners to be comfortable in using their land (surface and minerals) and for lenders to advance funds on it for mortgages. For this system to flow smoothly, one needs to know who holds title to the land and, therefore, has the right to use, mortgage and sell it.

The procedure for examining title to a parcel of land and determining whether it is encumbered with liens or easements or other limitations begins with the compilation of copies (paper or digital) of the deeds, decrees/judgments, liens and encumbrances comprising the chronological "chain of title" from the county land records (commonly referred to as an abstract of title). Often, when examining title to severed minerals, a direct review of the county land indexes and instruments is undertaken by a landman to compile a set of notes or a collection of copies of the relevant instruments that form the chain of title. Such informal compilation or notes are usually accompanied by a copy of the relevant indexes maintained by the county clerk. Second, an examination of such abstract, copied instruments or notes is usually conducted by a licensed attorney (or, depending on the circumstances, by a paralegal or landman) reviewing such abstract, instruments or notes and then expressing an opinion as to who is the current owner of marketable record title and listing any recorded liens and encumbrances. The examiner would also identify any defects in the ownership "chain of title," such as a missing probate or defective deed, along with a requirement for the necessary curative action, usually by an instrument (*e.g.*, a quit claim deed) or a court proceeding (*e.g.*, a probate).

The use of title insurance to insure the title of buyers and the valid lien position of lenders (for surface or fee simple titles but not severed minerals) is a widespread practice in the real estate industry. Notably, the Oklahoma Statutes provide:

No policy of title insurance shall be issued in the State of Oklahoma except:

1. After examination by an attorney licensed to practice in this state of a duly certified abstract extension or supplemental abstract prepared by an abstractor licensed in the county where the property is located, from a certified abstract plant in the county where the property is located.[4]

Additionally, the Oklahoma attorney general has held:

Your second question raises the issue of whether the title examination for purposes of issuing a title policy must be done by a licensed attorney. A previous opinion of the Attorney General held:

"All such examinations of abstract ... shall be conducted by a licensed attorney prior to issuance of the policy of title insurance." A.G. Opin. No. 78-151 (June 6, 1978). This opinion was based on the assertion that a title insurance policy "expresses an opinion as to the marketability of title." A.G. Opin. 78-151, supra. In reality, title insurance simply insures the policyholder against defects in the title. It does not express an opinion that the title is marketable. *Land Title Company of Alabama v. State ex rel. Porter*, 299 So. 289, 295 (Ala. 1974). While the rationale of the previous opinion is incorrect*, we adhere to the conclusion expressed in that opinion that the examination of the abstract pursuant to 36 O.S. 5001(C) (1981) must be done by a licensed attorney. We reach this conclusion because the examination required by statute would only be useful if the examiner expressed an opinion on the*

marketability of the title. This constitutes the practice of law by the examiner. Land Title Company of Alabama v. State ex rel. Porter, supra at 295; *Kentucky State Bar Association v. First Federal Savings & Loan*, 342 S.W.2d 397 (Ky.App. 1961). The theory that the corporation is actually examining the title for itself through an agent or employee and thus not engaged in the practice of law is invalid since laypersons or nonprofessionals cannot perform legal services for their employers. *Kentucky State Bar Association v. Tussey*, 476 S.W.2d 177 (Ky.App 1972). There is no prohibition, however, against licensed staff attorneys furnishing title opinions for the company as long as these opinions are not sold or given to third parties. *The Florida Bar v. McPhee*, 195 So.2d 552 (Fla. 1967); *Steer v. Land Title Guarantee & Trust Co.*, 113 N.E.2d 763 (Ohio Com.Pl. 1953).[5]

When different title examiners examine the same instruments in the same "chain of title," they sometimes have a difference of opinion as to the adequacy or meaning of the instruments in the "chain." Such examination seeks to establish who holds "marketable record title." Ideally, this would be a series of recorded deeds and judgments connecting each grantee to the next grantee or from decedents to devisees/heirs to create an unbroken "chain of title."

In order to establish a common set of standards for a title examiner to apply to this process – to minimize title transaction delays and disputes arising from differing approaches and attitudes between different examiners – sets of statewide standards have been adopted across the country. This started with the adoption of the first set of statewide standards in 1938 by the Connecticut Bar Association.

The first set of "Model Title Standards" was published in 1960 under the auspices of the University of Michigan Law School and the Real Property, Probate and Trust Law Section of the American Bar Association, authored by Lewis M. Simes and Clarence B. Taylor.

There is a freestanding Oklahoma Title Examination Standards Handbook, which contains the full set of the most recently adopted set of standards for Oklahoma. According to the brief history provided at the beginning of this handbook:

The impetus for the adoption of Title Examination Standards in Oklahoma was apparently supplied by the Title Lawyers Group of Oklahoma City under the leadership of Howard T. Tumilty. Seemingly at the instigation of this group and a similar group from Tulsa, the Central Committee of the Oklahoma Bar Association "gave its approval" to ten (10) Standards in the Oklahoma Bar Journal on September 28, 1946.

These Title Examination Standards, which are "persuasive" (as explained later), guide the title examiners of this state – especially attorneys – to ensure a smooth flow of commerce by providing a uniform approach to title examination. Like in the "Goldilocks" story, these uniform standards need to be neither too hot nor too cold, neither too hard nor too soft and (specifically for Title Examination Standards) neither too strict nor too loose but "just right." The goal is to avoid either extreme: the flyspecker (or nitpicker) who requires a quiet title lawsuit to confirm every title versus the blind examiner who has never found a title they didn't like!

The Title Examination Standards Committee has adopted the following policy statement explaining the goals of their standards: "for the purposes of educating and guiding title examination attorneys."

AUTHORITY

The authority behind the reliance on these Oklahoma standards to identify a "marketable record title" has been established by Oklahoma legislation, court rulings and contract terms.

The phrase "marketable record title" is defined by the Oklahoma Title Examination Standards in Section 1.1 "Marketable Title Defined," which provides:

A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title *fairly deducible of record*. ...

Comment: Marketable title is a title free of adverse claims, liens and defects that are *apparent from the record*. Any objections should be reasonable and not based on speculation. For purposes of this definition, words describing the quality of title such as perfect, merchantable, marketable and good, mean one and the same thing.

All Oklahoma Supreme Court opinions are binding and must be followed by all trial court judges, meaning that such decisions are "precedent" (binding). However, an opinion of one of the intermediate three-judge panels of the Oklahoma Court of Civil Appeals is only "persuasive" authority for trial judges while making their decisions and is not "binding" (provides guidance but is not precedent).[6]

The Oklahoma Supreme Court has accepted Oklahoma's set of standards as being "persuasive":

While [the Oklahoma] Title Examination Standards are not binding upon this Court, by reason of the research and careful study prior to their adoption and by reason of their general acceptance among members of the bar of this state since their adoption, *we deem such Title Examination Standards and the annotations cited in support thereof to be persuasive*.[7]

The Legislature has approved the use of these standards when dealing with oil and gas title as provided in the Production Revenue Standards Act:

2. a. Where such proceeds [of production] are not paid because the title thereto is not marketable, such proceeds shall earn interest at the rate of (i) six percent (6%) per annum to be compounded annually for time periods prior to November 1, 2018, and (ii) the prime interest rate as reported in the Wall Street Journal for time periods on or after November 1, 2018, calculated from the end of the month in which such production was sold until such time as the title to such interest becomes marketable or the holder has received an acceptable affidavit of death and heirship in conformity with Section 67 of Title 16 of the Oklahoma Statutes, or as set forth in subparagraph b of this paragraph. *Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association*.[8]

However, it should be noted that the Oklahoma attorney general has opined:

It is therefore, the opinion of the Attorney General that where there is a conflict between a title examination standard promulgated by the Oklahoma Bar Association and the Oklahoma Statutes, the statutory provisions set out by the Legislature shall prevail.[9]

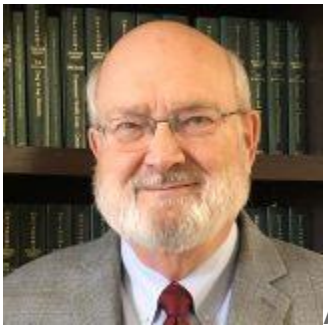
PROCEDURE FOR THE ADOPTION OF TITLE EXAMINATION STANDARDS IN OKLAHOMA

In Oklahoma, under current procedures, new standards or amended standards are drafted, discussed and adopted each year through a series of nine monthly meetings held by the Title Examination Standards Committee, which are held from January to September. Prior to this year, these proposals were published in the *Oklahoma Bar Journal* in October and then presented annually by the Title Examination Standards Committee to the OBA Real Property Law Section at the section's annual meeting, usually held in November.[10] The next day, the section would forward any new or amended proposals to the OBA House of Delegates for their consideration and approval.[11] The current practice is to only adopt standards if they receive almost unanimous approval from the Title Examination Standards Committee to ensure widespread acceptance by the bar at large.

The Oklahoma Title Examination Standards are published as an appendix to Title 16 "Conveyances" of the Oklahoma Statutes and are, therefore, available in any current version of the Statutes.[12] Although changes to the Title Examination Standards are effective immediately upon adoption by the OBA House of Delegates, until recently, *West's Oklahoma Statutes* usually came out with the revised set of Title Examination Standards only one to two years after these changes were adopted, meaning they were not generally available. Therefore, in 1982, a freestanding handbook was created by the

Title Examination Standards Committee to make a current version available within one to two months after their adoption (by February the following year) and has been kept current continuously since.[13]

Since 1946, the total number of standards has grown from 10 to 142 in 2023, separated into 35 topical chapters (including several reserved for future use). Since 1946, Oklahoma land owners, title examiners, title insurers, mineral owners and operators and lenders have benefited from the adoption, recognition and use of these standards.



ABOUT THE AUTHOR

Kraettli Q. Epperson is of counsel with Nash Cohenour & Giessmann PC in Oklahoma City. He received his J.D. from the OCU School of Law in 1978 and focuses on mineral and surface title litigation and expert representation. Mr. Epperson chaired the OBA Title Examination Standards Committee from 1988 to 2020 and taught "Oklahoma Land Titles" at the OCU School of Law from 1982 to 2018. He edits and co-authors West/Epperson: Oklahoma Real Estate Forms.

ENDNOTES

[1] *See* 16 O.S. §§71-80, Marketable Record Title Act; 1 O.S. §§20 *et seq*, Oklahoma Abstractors Act.

[2] 25 O.S. §§10-13; 16 O.S. §§15-16; 46 O.S. §7; 12 O.S. §§181, 706 and 2004.2; 16 O.S. §§31, 43, 62, 66, and 82-84; 19 O.S. §§263, 287, 291, 298(A), and 298.1; 43 O.S. §134; and 58 O.S. §§428, and 703; *see also* "Constructive Notice: Oklahoma's Hybrid System Affecting Surface and Mineral Titles," 89 *OBJ* 40 (January 2018) by Kraettli Q. Epperson.

[3] 77 *Am Jur* 2d Vendor and Purchaser §79 (obligation to furnish good or marketable title).

[4] 36 O.S. §5001(C).

[5] 1983 OK AG 281, ¶6-7 (italics added).

[6] But an opinion of the Court of Civil Appeals is a precedent if "it has been approved by the majority of the justices of the Supreme Court for publication in the official reporter." 20 O.S. §30.5.

[7] *Knowles v. Freeman*, 1982 OK 89, ¶16, 649 P.2d 532, 535; *see also Blair v. Richardson*, 2016 OK 96, ¶20, 381 P.3d 717, 723 (italics added).

[8] 52 O.S. §570.10(D)(2a).

[9] Okl. A.G. Opin. No. 79-230.

[10] For 2024, the OBA Annual Meeting was moved from November back to July to combine the OBA Annual Meeting with the annual Oklahoma Judicial Conference and the OBA Solo & Small Firm Conference.

[11] A brochure dated July 21, 2019, describes the "Authority and Procedure" the Oklahoma Title Standards Committee has followed for the last three decades, which was prepared by the longtime

chairman of the Oklahoma Title Examination Standards Committee, Kraettli Q. Epperson, serving from 1988 to 2020. Roberto Seda took over as the chairman and has served since 2021.

[12] A copy of the current Title Examination Standards is also available at this author's website: www.EppersonLaw.com.

[13] This handbook was originally created and edited by the then-current Title Examination Standards Committee chairman, Kraettli Q. Epperson, with the assistance of Dale Astle.

Originally published in the *Oklahoma Bar Journal – OBJ* 95 No. 6 (June 2024)