By Joel Leininger, LS

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Of Title Policy Descriptions and Reality

Frequently readers weigh-in with additional insight (or criticism) on what appears in the magazine, and my personal policy is to not respond, preferring to let others have their say. Occasionally, though, alternative viewpoints get airtime which, if left unchecked, could seriously damage our collective understanding of the practice. I consider myself *required* to respond in those instances, and we have one now. A few issues ago I wrote about our obligation to solve boundary puzzles, not merely to alert our clients to their existence and bow out of the matter. Two issues ago in his response to that essay, Gary Kent proffered among other things that the description in a title commitment or policy is reliable for us to use in retracement, and, if I understand what Gary implied, may be nearly sufficient for us on its face. This is a breathtaking assertion which, I'm afraid, does not withstand scrutiny. To be fair, Gary is basing his opinion in part on a discussion of the subject in one of the editions of Brown's Boundary Control and Legal Principles. Robillard and Wilson (Brown's co-authors) are, of course, able to speak for themselves should they wish, but they are not the final authority on the matter in any event—none of us scribblers are. (Binding authority is such an important topic, and one generally misunderstood by surveyors, that it deserves its own essay. Watch for it in the next issue.)

There are two factors shouting (not whispering) that surveyors cannot rely on the title policy description with impunity. First, the title company owes no duty to us. Put another way, should the description in that commitment later be found erroneous, we surveyors have no recourse against that company. In

fact, the insurer does not even have a duty for the description's accuracy to the policy owner unless some provision has specifically been made for it. Matters discoverable by survey (surely the boundary itself falls under that category, doesn't it?) are expressly excluded from coverage. When will it delete that standard exception? When provided with a current survey acceptable *and certified to it*. This places the responsibility for the description on the surveyor. Where did anyone get the idea that title companies are obligated to us? Unlike our sometimes pitiful attempts to limit who is entitled to rely on our work and for what, the title industry has had decades to fine tune that craft. And folks, surveyors are not in the "covered" camp. Read the fine print on the policy.

Title people have only a passing interest in the legal description. Lest this seem far fetched, remember that the deed is only required to provide a *reasonable* description of the property. There are but two classes of participants in the real estate arena for whom reasonable property descriptions are insufficient: property owners and surveyors. Property owners need precise descriptions to govern their conduct—such as how far to mow or where to build the fence. Surveyors need precise descriptions because property owners demand answers of us that can only be answered through them. Notice, though, that none of the other real estate players join us in this group. Their tasks can be performed adequately using the "reasonable certainty" threshold. And that is all they require.

It Gets Worse

But there is a more insidious problem with taking at face value (or nearly so) the description supplied by the title company: that reliance presumes that the document correctly distills all of the prior survey history of the parcel. Unless the parcel was created with a single transaction (like a subdivision plat), its sides are likely to have different ancestries from one another. Different ages imply different controlling transactions. To the extent that the latest document opines on

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the effect of the transactions it did not create, it merely represents that scrivener's conclusion as to those transactions. There is nothing wrong with this, of course, but the opinions of intermediate examiners are not dispositive of any questions we may have. More importantly, that intermediate scrivener has no legal "duty" to us either. We cannot sue him, for instance, because we adopted his opinion later found incorrect.

The general erosion of competence within the title community is not spoken of in polite circles and we shall not explore it either. But matters such as junior and senior rights, and the juxtaposition of the geometric figures created by them, are topics that cause an immediate glaze-over in the eyes of every non-surveyor I've ever encountered. This is not to say that there do not exist somewhere people who are interested in these topics besides us metes-and-bounds geeks, but they do not inhabit the halls of title companies in great numbers. All players in the real estate community have proper roles. The title insurer plays an important role, but it is not and should not be to pass on the reliability of the description. That's our job, and if we don't do it, it doesn't get done. It's that simple.

The Effects

Adopting a single description as the basis for the boundary survey when the property was not created at a single stroke injects immediate and permanent compromises into the retracement. One can argue the contrary, I suppose, but not from a position of history or logic, only expediency. What is our proper role in the real estate process: to get the job done as quickly and as cheaply as possible, or to get it *right*? One cannot consider the process of parcel creation and division and not conclude that replaying those events is the surest method of re-creating the lines. Those events—not a later summary of those events.

It is, of course, easier to adopt a single document handed to us for the retracement and "place" its location on the ground. Think of it: no research, little analysis, no dusty libers to heft. We simply ignore (or perhaps write a letter about) any potential conundrums and move on. Profits should go up, that's for sure. In twenty years only COGO jockeys will be required.

But I'm exaggerating; no one is suggesting that. Yet.