

# THE TITLE *examiner*



An Informational Newsletter Provided Courtesy of Ticor Title Insurance Company

## From the Editor

Is it Spring "already"?! Sun rising early, birds chirping, and hopefully clients are calling you to ask them to represent them on the sale or purchase of a home. In this issue we feature an article submitted by Mike Blinkoff reminding us how important proper title examination of title is to the transaction. Variations between record and measured distances, fence location variations, and "minor" encroachments can become problems for property owners after closing. How often are these clearly reviewed with the client before closing? We thank Mike for his thought provoking article.

If any of you would like to submit an article to me for a future issue of The Title Examiner, I'd be happy to review it. The article does not need to be on a real estate topic but can be a personal interest story, about changes in legal and business practices in your region, or real estate practice tips.etc.

In this issue you will also find an article submitted by Elissa Fagelman, one of the underwriters in our Syracuse office, regarding recent changes in the Limited Liability Company Law related to publication requirements. Elissa is one of our 15 underwriters located in our Northern New York offices who are available to assist you with all of your title needs and questions.

Finally, because it's Spring, many young couples are planning their wed-

## **Variation Between Distances of Record from Those Measured Can Be the Shortest Distance to the Courthouse**

By Michael Blinkoff, Esq.



Michael M. Blinkoff, Esq.

**W**e have all seen the notations on surveys showing that the distances according to the record title do not seem to match what is the measured distance in the field. Often it is a simple case of resolution by following the hierarchy of rules regarding monumentation. Thus, if the deed call is 100 feet to the river from the road but the measured distance is 110 feet, the natural boundary of the River is controlling, the measurement does not matter. (See *Paquette v. Ray*, 58 A.D. 2d 950).

More troubling though is where the variation is caused by lines of historical occupancy that vary from deed calls. Here the surveyor is warning you that once in the field he found evidence of occupation that does not match legal description. Usually it is in such form as 66.00 ft. D. (for deed) or R. (for record), and 75.00 ft. M. (for measured). These notations require some serious analysis and must be viewed with respect to the property subject to the survey and the type of evidence causing the surveyors remark.

Where the variation is small and the parcel is large often the problem is of little concern. Often in such cases if the occupied area were to be shifted to meet the record description it would have little effect. Of course, if the variation is significant, or could result in causing improvement encroachments, or even a squeeze on each side of the parcel being examined, it should be cause for alarm.

The most serious issues are raised by variations of distance of a beginning point from a known monument. This can cause contiguous parcels all to be shifted and beg for boundary line agreements from neighbors. Putting aside the doctrine of adverse possession, the resolution of all these matters should begin with the attempt to determine the original grantor's intent as to where the parcel was to be located and what its dimensions were to be.

This can mean tracing back the title through several grantors to try and figure out  
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what was taking place when each parcel was conveyed, irrespective of what may have been occupied to the contrary.

Recently I was retained to give expert testimony in a boundary dispute in Wyoming County. The principal matter to be determined in the lawsuit was the location of the plaintiff's west line and the defendant's east line. One surveyor placed the plaintiff's line by historical occupation as being approximately 70 feet east from where another surveyor had placed it who had adhered strictly to legal descriptions and without field evidence of occupation. The result was a disputed area of over 3 acres.

Through the years various surveyors had placed pins along or close to each of the line locations. This brings to mind a common problem often found in these cases, where surveyors and examiners rely on field evidence of other surveyor's pins as "bootstrapping" their conclusions as to line location when in fact the earlier pins were originally placed incorrectly. This results in the problem just being perpetuated. Unfortunately, I have seen examiners and surveyors who are influenced by the number of pins surrounding any given point. It is easy to be lulled into the concept that the party with the most pins should be the winner.

Plaintiff's counsel had retained me to give expert testimony as to where I would place the boundary line and upon what theories such an opinion would be based. The case presented to me one of the most ancient unchanged legal descriptions I have ever examined. In fact, the description used in 1843 to convey the parcel out from the larger one from which it originated remained unchanged right to the present.

Moreover, only one earlier deed of record included the plaintiff's parcel within its broader description – the original grant from the Holland Land Company in 1835. Interestingly, that deed was recorded in Genesee County because Wyoming County had yet to even be formed. Thus, there were no issues of concern regarding reconciling errors in description or locating long-removed monuments in order to find the grantor's intent.

With a distinct unambiguous description, the law is clear that parol evidence is not to be admitted to determine the grantor's intent. Further, as common with conveyances of more than a century ago, sketched pictures were used to identify the parcels within the deed rather than metes and bounds descriptions being written in full. This parcel had been neatly sketched out with the dimensions of the surrounding parcels depicted as well. There was little doubt as to exactly what piece the grantor intended to convey in 1853, and neither fences, surveyors, field findings, nor errors in the beginning points of adjacent lots were going to change that determination.

The Court in its decision had little difficulty ruling record title as prevailing over "purported established lines":

"As explained by Plaintiff's expert, Michael Blinkoff, during his testimony, the description of Plaintiff's premises has remained intact for well over a century and the description of said premises is very clear and without any ambiguity...this

being the case, there is no need to look at parol evidence to ascertain what each party owns."(decision of Supreme Court Justice Mark H. Dadd)

The maxim applied was best stated by Owen Mangan in his chapter in *Real Estate Titles, 2nd Edition*, Pedowitz, N.Y.S.A. 1994. "Occasionally, a surveyor will assert that the monuments he found in his fieldwork override the legal descriptions in the deed. However, the survey does not create a title." (emphasis supplied)

The caveat to be learned from all of this is that before you pass on the next title you examine where the surveyor shows variations between distances of record from those measured, remember how such variations can shorten the distance to the courthouse.

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*(Mr. Blinkoff has lectured at various real estate seminars for the Bar Association of Erie County, New York State Bar Association, and private educational companies. He is available for evaluation of title matters or as an expert witness.)*

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Real estate attorneys do not just "close a simple real estate deal". They review and approve contracts with their clients, review and give advice on financing options, either examine the title or have an examiner or title company do so, and then coordinate and attend the closing.

Attorneys and their staff should be a bit more patient with these clients- they may have never done this before while you see it every day. This is a perfect time for you to become their family attorney. They'll need Wills, help with family estate issues and other unexpected legal situations. When that time comes, they will remember your name, how you reassured them at their house closing, and how competent you and your staff were. They will feel comfortable referring you to their family, friends and co-workers. This is the image of our profession that attorneys should enhance.

Enjoy your Spring, spend more time outdoors with your children and grandchildren, and take some long walks (on a golf course) for better health.

## Limited Liability Companies New Publication Requirements Will Cause Headaches for Clients and Their Counsel.

By Elissa Fagelman, Esq.

**E**ffective June 1, 2006, Section 206 of the Limited Liability Company Law will be amended. A few of those changes are summarized below:

**Reduction in duration of required publication:** Affidavits of Publication "shall be published once in each week for four successive weeks, in two newspapers of the county in which the office of the limited liability company is intended to be located, one newspaper to be printed weekly and one newspaper to be printed daily, to be designated by the county clerk." When a county clerk has not designated a "weekly or daily newspaper of the county, or both," then the statute permits publication in a weekly or daily newspaper, or both, of the county closest to the county in which the office of the limited liability company is intended to be located.

**Disclosure of membership interests:** The published notice must include the names of the ten persons "who are actively engaged in the business and affairs of the limited liability company and who are members of the limited liability company having the most valuable membership interests."<sup>3</sup> However, the exceptions to this disclosure requirement include any limited liability company that is "an investment adviser as defined in the Investment Advisers Act of 1940 or a commodity pool operator or commodity trading advisor as defined in the Commodity Exchange Act."<sup>4</sup>

**Suspension of authority:** A limited liability company formed after the effective date of the new statute has 120 days after formation to file proof of publication with the Department of State.<sup>5</sup> A limited liability company formed prior to the effective date of the new statute that did not comply with the publishing and filing requirements in effect at the time of formation has 18 months after the effective date of the new statute to comply (i.e. December 1, 2007).<sup>6</sup> In both instances, at the expiration of the applicable compliance period, failure to comply will result in the suspension of the authority of the limited liability company to do business in New York.<sup>7</sup> However, filing the certificate of publication and the affidavits of publication with the Department of State can annul the suspension of the limited liability company's authority.<sup>8</sup>

Note: Senate Bill No. 6831 has been introduced to amend the Limited Liability Company Law scheduled to take effect on June 1, 2006. On February 28, 2006, it was referred to the Senate Corporations, Authorities and Commissions Committee. If adopted by the legislature, this bill will have a significant impact on the changes summarized above.

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## GOOD NEWS FOR CONSUMERS

### Lower Title Insurance Premiums on Refinance Transactions

**T**he New York State Department of Insurance has recently approved a change to Section 14 of the TIRSA Rate Manual. Section 14 is the section that deals with refinance rates and subordinate mortgages. The effective date of the change was February 15, 2006.

A summary of the changes is as follows:

1. The threshold amount that determines whether a 30% or a 50% discount applies has been increased from \$250,000 to \$475,000.
2. The method by which to calculate the discount has changed. Now you must use the LARGER OF the amount

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<sup>1</sup> Limited Liability Company Law, Section 206(a)

<sup>2</sup> Limited Liability Company Law, Section 206(a)

<sup>3</sup> Limited Liability Company Law, Section 206(a)5-a

<sup>4</sup> Limited Liability Company Law, Section 206(a)

<sup>5</sup> Limited Liability Company Law, Section 206(a)7

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of the consideration paid for the deed into the mortgage or the aggregate of the face amounts ( not unpaid principle balances) of **all** existing open mortgages on the property. These amounts are ascertained by reviewing the County Clerks' recording information and/or a title search or abstract of title.

3. The 3 requirements for refinance credit are the same—and all three must be satisfied to be entitled to a refinance or subordinate rate: **1)** that the instrument(s) on which the reissue rate is based was made within ten years from the date of their title application; **2)** there has been no change in ownership (note: transfers of title between spouses or related parties are changes in ownership); **and 3)** the property being mortgaged must be exactly the same as that which was acquired or mortgaged. It is not necessary to provide proof of any prior insurance to qualify for the discount.

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*The Title Examiner* is a periodic newsletter of Tigor Title Insurance. Please let us know if you would like to see a particular topic addressed in a future issue or if you have any questions regarding an article.

