

IOWA STATE BAR ASSOCIATION  
AD HOC COMMITTEE CONCERNING  
IOWA LAND TITLE ASSOCIATION LEGISLATIVE PROPOSAL

\* \* \* \* \*

MEMORANDUM BRIEF IN SUPPORT OF IOWA  
LAND TITLE ASSOCIATION PROPOSAL

COME NOW Rachelle Johnson, Johnson Law Firm, P.C., and Patrick Murphy, Murphy, Collins & Bixenman, P.L.C., Attorneys at Law, and for this, their memorandum letter brief in support of the Iowa Land Title Association's proposed amendment to Section 16.91(5) of the Code of Iowa, state as follows:

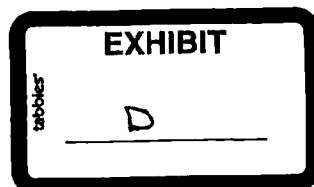
I

RELEVANT FACTS

Section 16.91(5) of the 2007 Code of Iowa, as amended, presently states, in part:

Each participating Abstractor is required to own or lease and maintain and use in the preparation of Abstracts, an up to date Abstract of Title plant including tract indices for real estate for each county in which abstracts are prepared for real property titles guaranteed by the division. The tract indices shall contain a reference to all instruments affecting the real estate which are recorded in the Office of the County Recorder, and shall commence not less than 40 years prior to the date the Abstractor commences participation in the Title Guaranty Program. However, the participating Attorney providing abstract services continuously from November 12, 1986 to the date of Application, either personally or through persons under the Attorney's supervision and control is exempt from the requirements of this paragraph. The division may waive the requirements of this subsection pursuant to an Application of an Attorney or Abstractor which shows that the requirements impose a hardship to the Attorney or Abstractor and that the waiver clearly is in the public interest or is absolutely necessary to ensure availability of title guarantees throughout the state.

The Iowa Land Title Association (ILTA) is proposing legislation to change Section 16.91(5) to clarify that: "The Division may waive the requirements of this subsection for a specific county pursuant to an Application..." ILTA also proposes to add:



The number of persons providing services in a county pursuant to the Title Guaranty standards shall be a consideration in determining whether the public interest is being served and whether a waiver should be granted. Such standards shall be adopted by the Title Guaranty Division pursuant to Chapter 17A."

In the case Berger v. Iowa Finance Authority, 593 N.W.2d 136 (Iowa, 1999) the Supreme Court clarified that 40-year tract index exemption for participating Attorneys has no county-based geographic limit on Attorneys' ability to prepare Abstracts of Title. In dicta, the Court stated:

"...we could not escape the fact that the geographic limitation it seeks appears nowhere in the statute. We may not, under the guise of construction, enlarge or amend a statute as adopted by the legislature...nor, when language used is plain and unambiguous, may we speculate about legislative intent apart from statutory wording." id P. 139.

Attorney Charles W. Hendricks, West Des Moines, Iowa, did file an Abstract application for waiver with the Title Guaranty Division on May 2, 2007. On July 31, 2007, the Iowa Finance Authority Title Guaranty Board entered a ruling granting the waiver application for Hendricks. The decision clarified that Hendricks had shown that the requirements under Section 16.91(5) did, in fact, propose a hardship to the Attorney and that the waiver was in the public interest and further necessary to ensure the availability of Title Guaranty. The waiver effectively grants Hendricks the right to conduct abstracting and title searches throughout the State of Iowa without a 40-year marketable title plant. A decision of the Title Guaranty Board is apparently under appeal.

ILTA has prepared legislation to introduce to the General Assembly during this 2008 session to clarify Paragraph 5 of Section 16.91, both in response to the Berger decision and the Hendricks waiver ruling. ILTA has requested support from the Iowa State Bar Association in reference to this proposed legislation.

## II ISSUE

Which of the following positions should the Iowa State Bar take?

- A. Support the ILTA proposed legislation.
- B. Oppose the ILTA proposed legislation.
- C. Remain neutral and take no position on the issue.

III  
PROPOSED RECOMMENDATION

The Iowa State Bar Association should endorse and support the ILTA's proposed legislation to amend Section 16.91(5) of the Iowa Code.

IV  
ADDITIONAL CONSIDERATION

The undersigned have been advised by representatives of ILTA that in addition to the proposed Amendment to Section 16.91 of the Code, ILTA does plan to introduce licensing legislation to the General Assembly for this 2008 year which will differ to some extent from the licensing bill put forward by the Iowa Title Guaranty several years ago which was not actively promoted. Although not yet formally prepared, the proposed legislation may include establishing an independent and separate Board of Abstract Examiners and establishing a specific curriculum for a Certified Land Title Professional designation. An Abstracter's duties and responsibilities will be specifically defined. There is some urgency to this proposed legislation due, in part, to the fact that the judicial branch needs a method to describe Abstracters for purposes of access to Clerk of Court documents on line as the Clerk's Offices ultimately become "paperless." When said proposed legislation is presented, it is suggested that this, too, be reviewed by this Ad Hoc Committee, or another committee established by the Iowa State Bar Association and that, if appropriate, such licensing legislation of Abstracters likewise be supported by the Iowa State Bar.

V  
MEMORANDUM ARGUMENT IN SUPPORT OF PROPOSED LEGISLATION

Is it in the best interests of the State of Iowa to maintain the quality standard of land titles as presently exist? A professional Abstracter in Iowa presently goes through a minimum of four general processes in researching the title in order to prepare an Abstract of Title, or complete a written or oral title search. The Abstracter examines the current and up to date tract index maintained by that Abstract plant to clarify a chain of

title. In addition, based upon the availability of records (whether they are current or not) from the County Recorder's Offices, the Grantor-Grantee index is examined. In addition, the Abstracter examines records from the Treasurer's Office in reference to tax obligations and further examines records in the Clerk of Court's Office and/or utilizes the Iowa Court Information System to determine the status of judgments and liens, child support obligation and probate related matters. Apparently, the Attorney Abstracters utilize the Grantor/Grantee index and his title search which goes from a specific date forward and is not always current. Absent examination of a tract index, easements, breaks in the chain of title and restrictions as to title are typically not abstracted.

Section 515.4A(10) of the Iowa Code prohibits the origination of title insurance within the State of Iowa. We are the only state in the country that prohibits title insurance within a given state. The Iowa Title Guaranty program was created by the Iowa Legislature in 1985, primarily at the request of the Iowa Banker's Association in order to package mortgages and sell them on a secondary market nationwide. Although there is title insurance sold generally outside the State of Iowa on property located in Iowa, the Iowa Title Guaranty program has done a good job in assisting banks and lending institutions to be competitive nationwide. It is likewise clear that the Iowa process is cheaper than the purchase of title insurance generally nationwide. Iowa Title Guaranty has been successful in assisting bankers in participating in the secondary market sales, but it has done little to assure the integrity of the Iowa Land Title System.

Economics is a great motivator for the practice of law. Likewise, economics plays an important role in the preparation of Abstracts and title searches by abstract companies and the examination of those Abstracts by practicing Attorneys in every county in the State of Iowa. The ILTA legislative proposal preserves an economic benefit to both practicing Attorneys and Abstracters while it continues to make Iowa land titles the envy of every other State in the country.

## VI ILTA POSITION

A brief is supposed to be "brief." The following merely constitutes the position of the vast majority of Abstracters as members of the ILTA. This information was delivered to the undersigned from representatives of ILTA:

This memorandum outlines a few reasons the Iowa State Bar Association should support ILTA's position to limit waived attorneys to one county and to require the Title Guaranty Board to consider the level of service already being provided by participating abstractors in a particular county when deciding whether or not to grant a waiver.

The issue appears to be not whether lawyers can abstract throughout Iowa, but rather if their abstracts will be accepted by Title Guaranty. Here are some reasons why Title Guaranty should not allow attorneys to abstract in any county in Iowa:

1. The quality and method of record indexing varies from county to county. Even the types of books vary from county to county. Needless to say, the quality of indexing even varies within one county, depending on who was in office at the time, as well as the experience and training of the person actually writing in the record books. An experienced searcher familiar with the quirks of that particular county knows what to look for.

Someone working statewide might understand the basics but not the nuances--going through the motions, for example, but not being totally competent. In Ringgold County, for instance, the county recorder recorded current documents out of order on blank pages in older books (I believe because there happened to be room on that particular page). In Keokuk County, old telephone matters are indexed under "S" for switchline. The Washington County clerk of court used to index an action for a change of name under "C" rather than the under the name of the person involved. Another potential pitfall illustrating why title searchers need local experience are such things as the location of underground gas storage documents, the location of pipelines or rural water easements, as well as old and abandoned railroad rights-of-way. An experienced title searcher with knowledge about his/her particular county will be aware of these oddities and will know the time period when such unorthodox practices might have occurred.

Historically, at least one of the reasons for allowing a waiver of the title plant requirement for an attorney/abstractor was the understanding that the attorney would abstract in the county where they live or work. In such circumstances, an attorney would have a wealth of local knowledge about land transfers that would help them avoid the pitfalls of preparing title searches without a title plant. One thing that is hard to describe is the potential dangers when one who is unfamiliar with the way a certain county is set up - for those who have

experienced it, there is that nagging feeling that something has been overlooked. It's also hard to describe how humbling it is, shall we say, to fall on your face in a county where you think you know what you're doing. I guess those who abstract statewide don't care about that. They just insure over it. And that doesn't address quality of service to the customer, which should be the whole and entire point of what we do.

Although it is true that there are lawyers who abstract without a title plant, and although it is true that a particular lawyer may not have had a claim, it does not follow that a lawyer can abstract in all 99 counties without risk to the public. The fact is that having an accurate title plant is the only way a title searcher can find duplicate and stray chains of title. The fact is that abstractors do not search from the public record. They search from their title plant. The little known fact is that the public record is often in a less than desirable state. For instance, judgments against "John Smith" may be indexed in a particular Clerk's docket under "J" rather than "S". Easements are not indexed at all. Handwritten deeds are lost in a general claimants book rather than the Grantor - Grantee book. The fact that an abstractor correctly enters this information in their tract index cures these public record errors. This is a service to all Iowans that helps us avoid unwanted litigation over issues of the quality of the public record.

Historically, we believed that a lawyer who lived in a county would have some personal knowledge of the land where he or she lived and would therefore be more able to discover interlopers, stray deeds and the like than someone who had no local knowledge. By allowing a lawyer to abstract in all 99 counties, we are eliminating that concept of local knowledge. Such a policy will increase the possibility of negligence in title searches and will degrade the quality of title for Iowans.

2. Inadequate, incorrect and/or erroneous abstract work will result in higher claims for defective titles, whether it be title insurance claims or Title Guaranty claims. Missed documents increase the risk for lenders, insurer, and owners. We can minimize that risk with thorough title work done by experienced professionals with proper tools (title plants).

Here is what a title plant does: it is an index. Nothing more. Nothing less. A title plant cross-indexes legal descriptions and grantors and grantees. Without such a cross-index, it is possible that an easement or judgment or stray deed will be missed. Also, this index allows an abstractor to show

interloper deeds that are extremely difficult to find without such an index.

Insuring over a quick and dirty search, which is really all one can expect from searching the Internet, means that claims will occur more often. Somebody will pay, somebody will lose, somebody will be hurt, and sometimes money isn't a satisfactory resolution.

3. The Hendricks model (lightweight abstracting done from a remote site) cannot provide full service, that is, it cannot prepare root-of-title abstracts or update older abstracts economically. If Hendricks et al. can't do root-of-title abstracts or update older abstracts efficiently, they will pressure Title Guaranty to allow Pottawattamie County-type searches instead, thereby further degrading and poisoning Iowa's stellar title history. Pottawattamie County searches have no standards and disclose only "those matters currently affecting title," which may well be limited to whatever the abstractor wants to show and can happen to find without much effort. This type of search does not show the proper chain of title, and amounts to the title insurance model which the Bar has opposed vigorously for as long as anyone can remember.

4. We have also seen in the new statewide land title records ([www.iowalandrecords.org](http://www.iowalandrecords.org)) where the names have not been properly indexed (e.g., a deed from both an individual and a corporation indexed only under the individual's name, even though title was held only by the corporation, so the deed won't show up on a grantor-grantee search).

5. The Hendricks abstracting model (searching over the Internet because "that's the way abstracting is done these days") creates inherent problems as recorders are still required by statute to maintain only a name (grantor-grantee) index - nothing more. Even if the recorders maintain a legal description index (or a tract index), the recorders are not involved in retrieving that information by legal description. Most of them have little or no understanding of what's involved in searching by legal description, and consequently, any index they might maintain, while it may meet the technical requirements of a land record index, would not be reliable for purposes of protecting the public's title evidencing interest and Iowa's current pristine titles.

Recorders index and store information; they are custodians of the records. Unlike abstractors, they don't typically or

commonly retrieve that information. It requires different skills and a different focus, purpose and mind set.

6. The quality of the county recorders' electronic indexes varies just like the quality of indexing in the paper books. In Keokuk County, for example, it is possible, though cumbersome, to search the electronic index by legal description. The recorder is technologically sophisticated, has two additional employees, and not many recordings. They have the time to chew the records into very small pieces.

In Washington County, however, it is pointless to attempt a search of the electronic index by legal description. The recorder indexes only the first section or lot in an instrument's description - not every section or every lot that appears within that description. In some cases, seemingly random machine-assigned codes appear in the legal description column of the InVision index. An electronic search of InVision by legal description in Washington County is impossible and highly unreliable.

7. Attorneys who abstract statewide will most likely take the easy work - short searches, final continuations (if they are required even at all), saving the root-of-title abstracts and the older abstract continuations for abstractors with tract indexes. This "easy work" is the bread and butter for most abstractors and many abstractors will go out of business if they are limited to root-of-title abstracts and older abstracts or, at the very least, will be unable financially to keep their tract indexes updated, thereby further degrading the quality of titles in our state. If such attorneys farm out root of title abstract work, they may charge the customer more than the actual abstract bill to compensate themselves for placing the business. Out of state title companies do that and it is not in the best interests if the citizens of our state.

Abstractors with plants need the easy work to subsidize root of title abstracts (for which we can never charge enough) and plant maintenance, which constitutes much of our overhead, as well as acquiring, training and maintaining quality searches and employees. The Iowa State Bar Association has always said abstractors are an important part of the real estate transaction, that attorneys depend on our careful work, our knowledge, and our professionalism. Now ILTA needs the Bar to support this legislation to limit the spread of abstracting without a plant in order to maintain Iowa's high title-evidencing standards.

It would be a good compromise to take the position that lawyers can abstract in any county as they have in the past, but that their certificates should only be accepted by Title Guaranty when they abstract in their county of residence.

This is an instance where allowing lawyers to create abstracts without a title plant is a disservice to Iowa title holders, and the protection of Iowa property owners must take precedence over the desire of some lawyers to expand their law practice in a way not previously a part of our historical service.

I would recommend that all abstractors (whether attorney or not) within the state be licensed upon proof of competency - much like realtors and appraisers in our state. As an alternative, perhaps attorneys can become licensed abstractors, upon proof of competency - much like that of realtors and/or appraisers in our state.

## VII

### STATE-WIDE ABSTRACTING FOR LAWYERS?

Walter Murphy, a Board Member of the Title Guaranty Division did issue a written dissent on the part of the Title Guaranty Division Board Meeting Minutes of July 31, 2007, in reference to the Hendricks waiver request. The dissent, in part, clarifies that the mission of the Iowa Title Guaranty Program is:

"...to operate a program that offers guarantees of real property titles in order to provide, as an adjunct to the Abstract-Attorney's title opinion system, a low-cost mechanism to facilitate mortgage lenders', participation in the secondary market and to add to the integrity of the land title transfer system in the State." (265 Iowa Admin. Code, Section 9.2) (SEE Minutes of Title Guaranty Division Telephonic Board Meeting July 31, 2007.)

Abstracters are concerned about the integrity and quality of land titles in their respective jurisdictions operated through their 40-year marketable title plants throughout the State. Iowa Title Guaranty did effectively grandfather in Attorneys to act as Abstracters in Counties where there were no 40-year marketable title abstract plants through passage of Section 16.91 of the Code. Although some members of this Ad Hoc Committee believe that it would be economic disaster to attempt to market Abstracter services state wide, economic advantage appears to be

a major motivation in waiving Attorneys such that they can Abstract state wide.

Perhaps one could look at other state-wide legal service models. When prepaid legal services were introduced in Iowa in the 1990's, then ACS Lawphone was required to register with the Iowa Insurance Commission and in order to provide legal consulting services to business, labor unions and companies, they were required to establish access law firms in each state and/or smaller geographic area dependent upon population nationwide. These prepaid legal service organizations were therefore able to provide nationwide service utilizing contractual relationships with legal service providers in the given states and jurisdictions. If an Attorney wanted to abstract state wide and the legislature expected that every Abstracter continue to maintain a four year marketable title plant (other than Attorneys grand fathered in,) a state wide Abstracter need only to contract with abstracting companies maintaining title plants for services in their given area. There is more than one way to "skin a cat."

The issue raised as a result of the Title Guaranty Division's waiver for state wide abstracting by an Attorney may result in a significant impact on practicing lawyers, abstracters and individual titleholders. We believe it is important to maintain the quality of titles presently existing in the State of Iowa and to support and assist the vast majority of Attorneys practicing in Iowa in both large and small communities.

#### VIII CONCLUSION

The Iowa State Bar Association should embrace and support the proposed legislation offered by ILTA and either continue with an Ad Hoc Committee or transfer land title issues to the real estate division for further study and evaluation of any additional proposed legislation to be presented by any entity as it affects Iowa real estate.

Respectfully submitted,

RACHELLE JOHNSON  
PATRICK MURPHY