EXAMINING AND RESOLVING TITLE ISSUES

I. Identifying the Appropriate Mindset for the Examination at Hand

Title insurance is not "insurance" in the same sense that fire insurance and life insurance are "insurance." In these latter instances, premiums are collected to pay damages to cover a loss that the insurance company knows *may* occur in the future, or that the insurance company knows *will* occur but at some indefinite time. In issuing such policies, insurance companies are making a business judgment that enough premiums can be collected over time to cover the expected future payouts, and then some.

Title insurance is described as "risk-elimination." Title policies insure against potential claims that exist at the time that the policy is written (not in the future), but are unknown (and perhaps unknowable) to the title company. If the potential claim is known, the title company will either refuse to write the coverage, except that claim from coverage, or require that something be done to make the possibility of a claim remote. The upshot of this is that some consider buying title insurance buying phantom insurance.

Title examination is often described as a three step process of: (i) searching the chain of title; (2) abstracting the relevant parts and arranging them in appropriate order; and (3) examining the abstract to analyze the condition of the title. Obviously, the abstract itself cannot reveal that which affects the status of the title, but is not on the public records. That is where the analysis and underwriting process of title insurance comes in.

A commitment is an offer; it is an agreement to provide a policy of title insurance. There are a couple of standard "preliminary commitment" forms that title companies use, but note that a standard "Preliminary Title Report" contains no promise to provide insurance coverage. It is not a commitment contract.

(However, Montana law defines a "preliminary report" as an offer to issue title insurance. 33-25-104, M.C.A.)

Commitments to provide coverage will indicate what insurance will be provided, what special exceptions are noted of record, and will include instructions and requirements that the potential insured must follow and meet before a policy will be issued. *(Like, having to pay for it!)* A standard "Preliminary Title Report" will contain the same basic insurance coverage and exceptions to coverage information, but does not contain a requirements section.

Montana has, within its insurance code, enacted legislation regulating the practice of title insurance, which is designated the "Montana Title Insurance Act." *See,* § 33-25-104, M.C.A. et seq.

Under Montana statutory law, "title insurance policy" and "title insurance business" are defined terms. *See,* § 33-25-106, M.C.A. Interestingly enough, the standard coverage offered in both owners and lenders policies exceeds that which Montana statutory law defines title insurance to be. Under the Montana code, "title insurance means a contract . . . [insuring] against loss" from: (1) defects, liens or encumbrances; (2) unmarketability of title; and (3) invalidity or unenforceability of liens or encumbrances. § 33-25-106(13), M.C.A. This definition says nothing about insuring the right of access, nor does it specifically require coverage to insure that the title is vested as stated in the policy.

Abstracts of title are not title policies in fact, and Montana statutory law purports to recognize that. *See*, § 33-25-111, M.C.A. However, as will be seen, Montana case law saddles title insurers with all of the legal duties of an abstractor, and considers the issuance of title insurance by a title insurer to be secondary to its duty to fully disclose the status of the title.

Montana title insurers must abide by certain standards and practices. A title insurer must conduct a "reasonable search," use "sound underwriting practices" and must retain a file with "evidence of the examination of the title and determination of insurability." § 33-25-214, M.C.A. These phrases are not defined terms; a title insurer must look to industry practices, case law, and the requirements of the insurance commissioner to understand its obligation.

Establishing what the required standard is if litigation arises may require expert testimony; if the cause of action is against the title insurer for negligence, expert testimony is part of the prima facie case. *Doble v. Lincoln County Title Co.,* 215 M 1, 692 P.2d 1267, 42 St. Rep. 128 (1985), distinguished in *Old Republic National Title Ins. Co. v. Realty Title Co.,* 1999 MT 69, 294 M 6, 978 P.2d 956, 56 St. Rep. 286 (1999). *(Expert testimony is required to establish the standard of duty in a tort action, but not in a contract action.)*

By statute, an owner's policy must show "*all* outstanding enforceable recorded liens or other interests against the property." § 33-25-214(3), M.C.A., *emphasis added. (Does this allow a title insurer to "insure around" a known defect?)* Apparently, a commitment to issue a title policy requires a Montana title insurer to disclose everything in the public record, regardless of its eventual underwriting decisions. *Malinak v. Safeco Title Ins. Co. of Idaho,* 203 M 69, 661 P.2d 12, 40 St. Rep. 301 (1983). *(The Court found that a title insurer issuing a commitment to insure, had the same rigorous duty as a title abstractor to disclose everything of public record.)*

But a title insurer cannot stop at an examination of the public record; it must also disclose what its own records indicate about the status of title. *Old Republic National Title Ins. Co. v. Realty Title Co.,* 1999 MT 69, 294 M 6, 978 P.2d 956, 56 St. Rep. 286 (1999). *(Does this place a higher standard upon a title insurer who maintains its own title plant than one that merely relies upon public records?)*

Finally, it appears that an insured is entitled to rely upon the title record as disclosed in the title policy as an accurate representation of the title status. This is true even if the insured is aware that there might be encumbrances not disclosed by the policy. *Lipinski v. Title Ins. Co.,* 202 M 1, 655 P.2d 970, 39 St. Rep. 2283 (1982). In the *Lipinski* case, the Montana Supreme Court found that a title insurer must disclose potential encumbrances in some fashion in the title policy, and that the insured's knowledge of the encumbrance was not a defense against the issuer's failure to disclose. According to this case, the primary expectation of an insured is in receiving a complete and accurate disclosure of the status of the title; insurance is secondary. *Lipinski v. Title Ins. Co.,* 202 M 1, 655 P.2d 970, 39 St. Rep. 2283 (1982).

II. Muniments of Title

The genesis of current Montana real property law dates from 1895 with certain legislative enactments borrowed from the Field code. David D. Field, a New York attorney, created and published in 1865 a proposed statutory framework of law. Field intended to supersede the common law because he was dissatisfied with the uncertainty of a system of law that developed through a case-by-case process. By publishing his code, he proposed that the law be based upon legislative enactments rather than upon a process of court decisions.

The Field Code never got much play in the east, but it did find a receptive audience in the west, where legislative bodies in young states such as California and Montana patterned significant portions of state law after it.

Since Montana's real property law is a matter of legislative enactment, you would think that the courts would consider the common law replaced or preempted, but that is not so. For example, Montana defines easements and servitudes in Title 70, Chapter 17, but nowhere in the Code does it state that an easement is a nonpossessory interest. But that didn't stop the Montana Supreme Court from harkening back to the common law to declare easements

nonposessory. *Burlingame v. Marjerrison,* 204 M 464, 665 P.2d 1136, 40 St. Rep. 1005 (1983).

This country's common law is based upon English common law, of course, and we still see old English real property notions surviving to this day. Under the common law, the distinction between real and personal property was closely associated with the classification of property as being movable or immovable. Moveable property was personal; immoveable property was realty. However, real property could also include certain offices and dignities the privileges of which traditionally arose out of the ownership of land, even when those offices or dignities no longer depended upon land ownership. Also, ownership of certain entities, such as railroads and canal companies, was also classified as real property.

The designation "real" has it roots in feudal law, and referred to lands, tenements or hereditaments. When suing, the claimant demanded the "real" thing, i.e., the land itself. Otherwise, one was left with mere pecuniary damages.

Under the common law, a hierarchy of ownership interests in property was recognized. Not surprisingly, the sovereign could claim ultimate title. Within certain recognized limitations and constraints, this is still so today. Hence, real property can be taxed and taken if the taxes are not paid, and the right of eminent domain.

Not all of the common law has survived. Terminology and concepts have been updated and simplified—thankfully! Our Constitution, reflecting a seismic shift in the viewpoint of the citizenry from England's autocratic government to that of a representative democracy in the United States, has also been a revolutionizing influence. For example, compared with the common law, and especially under the laws of an estate still harkening back to feudal times, the common law property interests of community and family have been de-emphasized *vis-a-vis* the rights of the individual. And who remembers what *profits a prendre* means except when

the Montana Supreme Court dredges up the old term to remind us. *(Hint: the right to take soil, gravel, minerals, and the like from the land of another.)*

The concept of "ownership" of real property is best understood as a summation or the accumulation of property rights. These rights include such powers as the right of title, the right of possession, the right of use, the right to encumber, the right to convey, the right of inheritance, etc. "Ownership" in real property is often classified as an "interest" or an "estate." However, these terms may not be used when referencing lesser rights to property, as in the rights of the holder of a lien, an easement or a license.

An estate is the degree, quality, nature or extent of an interest in real property. The law recognizes a hierarchy of interests in real estate, from absolute, or fee simple, to mere "bare" possession. In practice, however, this hierarchy of rights and powers is not like those Russian dolls, where each one nestles completely inside another slightly larger version. The powers of one level of an estate do not necessarily completely encompass all the powers of those on the next lower level, so to speak. Instead, the rights and powers of real property ownership can be compared to a rope, the strands of which can be untwisted and separated. Theoretically, every ownership right can be separated from the others and separately conveyed. The separation of the rights of ownership happens routinely; in fact, it is rare to find title to any particular parcel of real property that is not subject to some limitation in title or use, such as happens with a mortgage or an easement. Much of the litigation regarding real estate is an exercise in determining who has the authority to do what, and whose power trumps whose.

The top rung of the ladder of land ownership *(or, if you like the rope metaphor better, if you have a hold of the whole ownership rope)* is fee simple. "A fee-simple title signifies an estate of inheritance clear of any condition, limitation, or restriction. It stands "the highest in dignity" and the "most ample in extent"

recognized by law. *Gantt v. Harper,* 82 M 393, 267 P 296 (1928). Title to property subject to a mortgage, or use of property subject to an easement, is still classified as fee simple, but subject to those restraints.

Statutorily, fee simple is defined as: "Every estate of inheritance is a fee, and such estate, when not defeasible or conditional, is a fee simple or an absolute fee." § 70-15-203, M.C.A. The owner of fee simple title has the "the right to the surface and to everything permanently situated beneath or above it." § 70-16-101, M.C.A. Fee simple title is what is presumed to pass from a grant, unless otherwise disclosed. § 70-20-301, M.C.A.

Historically, actual possession, the right to possession and the right to the property, when joined, formed complete title. A *good* title gave a person the right of possession and to the property. A *marketable* title was good title clear enough that, if push came to shove, a court would force a purchaser to take it, if that is what he bargained for. The terms "good" and "marketable" title are still used, but under Montana law, marketable title is classified as being fee simple. See, *Gantt v. Harper,* 82 M 393, 267 P 296 (1928), followed in *First Mont. Title Co. v. N. Point Square Ass'n,* 240 M 33, 782 P.2d 376, 46 St. Rep. 1920 (1989).

Although an interest in real property can be transferred by operation of law *(see, § 70-20-101, M.C.A),* in this section we will discuss only transfers that pass by an instrument in writing, specifically grants. Used generically, the term "grant" refers to all transfers of real property; however, this section will focus primarily on deeds and similar conveyances.

"The purpose of a deed is to pass title to land rather than to express the terms of an underlying contract of sale." 23 Am. Jur. 2d Deeds §9. The idea is that title to the real property passes concurrently with the passing of the grant. If title is to pass later, the instrument will probably be interpreted as a contract of sale, rather than a deed. *See, Norwegian Lutheran Church of America v. Armstrong,* 112 M 528, 118 P.2d 380 (1941). Hence, and as a necessary conclusion to these

principles, a seller under a contract for deed is not obligated to provide marketable title (fee simple) until final payment is made. *Liddle v. Petty,* 249 M 442, 816 P.2d 1066, 48 St. Rep. 779 (1991).

Traditionally, there was much formality required in the making of a deed:

> "Deeds are traditionally regarded as consisting of a number of formal parts, the first of which is known as 'the premises.' The premises of a deed, sometimes designated the caption, embrace matters preceding the habendum clause, such as the recitals of the grantor's intention and motives for his deed, the names, designations, and descriptions of the parties, the consideration expressed for the deed, words of grant, and the description of the property conveyed. In short, it is in the premises of the deed that the property is really granted.
>
> "Other formal parts of a deed include the habendum, the redendum or reservation, the conditions upon which the estate is granted, the warranty and other convenants of title and the covenants relating to the use and enjoyment of the land, the testimonium, the date of the deed, and the attestation clause."

23 Am. Jur. 2d Deeds § 18.

Generally, to be enforceable, a grant must be made in writing. § 70-20-101, M.C.A. One Montana case states that at a minimum, a grant needs to include language of conveyance, be signed and identify: (i) grantor, (ii) grantee, and (iii) what is being conveyed. *Kuhlman v. Rivera,* 216 M 353, 701 P.2d 982, 42 St. Rep. 863 (1985). *(Does it need a date? What about an attestation? Consideration?)* Much of the legalese formerly required under the common law to make a valid grant of fee simple title has now been eliminated. The transfer itself can be effectuated by the single word "grant;" it is not necessary to use repetitious phrases such as "given, granted, bargained, sold, released, conveyed, and confirmed, and by this deed gives, grants, bargains, sells, releases, conveys, and confirms to grantee. . ." *See,* § 70-20-103, M.C.A. Nonetheless, this continues to be the general practice. Additionally, words of inheritance or succession (such as, "to grantee's heirs and assigns forever") are no longer required. § 70-20-104,

M.C.A. The rights of inheritance are embodied within the rights of fee simple title, and need not be separately specified.

The parties to a deed need to be separate people (or legal entities), as a person cannot be both grantor and grantee at the same time. However, if the purpose of the deed is to create a joint tenancy, there is no longer any requirement to pass the title through a third party "straw man." Joint tenancies can be created directly. § 70-20-105, M.C.A. To be valid, the grantor of a deed must be legally competent; an incompetent grantee, however, can be vested with title, but any contractual obligations in the deed will not be binding upon the incompetent grantee.

Naturally, the best practice requires being as precise as possible when describing the real property being conveyed or encumbered by a grant. However, Montana law will recognize a grant that merely uses a descriptive name for the property, such as "the Norris ranch," or "Burke homestead at Big Sandy." *See,* § 70-20-103, M.C.A., and *Shaw v. MacNamara & Marlow, Inc.,* 85 M 389, 278 P 836 (1929). *(Good luck getting the Clerk and Recorder to record it though!)* Also, if the purpose of the grant is to effect a conveyance, the property as described must comply with all subdivision requirements. A deed that fails to comply with the subdivision requirements will not be recorded.

Unless there are specific indications otherwise in the grant, encumbrances and easements appurtenant to the described property will pass with the grant. § 70-20-308, M.C.A. Language such as "together with," "subject to," "excepting therefrom" and "reserving therefrom," is used in a conveyance to qualify or modify the interests in property being granted. "Together with" is used to include additional property, rights or appurtenances; "subject to" is used to as qualifying language or to disclose encumbrances, etc.; "excepting therefrom" is used to withhold a portion of a property or a property right; and "reserving therefrom" is used to reserve a right, such as an easement. *(Note: don't use "subject to" to create an encumbrance, such as an easement.)*

If there is a question regarding the construction of a grant, the Court must look to the "four corners" of the document to construe it. As noted, the primary purpose of the investigation will be to determine the intent of the grantor. Parol, or oral evidence, will not be permitted unless there was a mistake or imperfection in the grant, or the validity of the grant is in dispute. § 70-20-202, M.C.A.

A grant is presumed to pass fee simple title, unless a contrary intent can be shown. § 70-20-301, M.C.A. What happens if the grantor does not have fee simple title at the time he gives the grant, but later acquires clear title? The law will "connect up" the title, and the after-acquired title will pass by operation of law to the grantee. § 70-20-302, M.C.A. *(Does this apply if the grant is a quitclaim deed?)* The legal conclusion that after-acquired property passes by a grant is based upon the equitable principle of estoppel, and applies when the title at the time of the grant was defective or lacking. *Rowell v. Rowell,* 119 M 201, 174 P.2d 23 (1946).

By law, unless a contrary intent is expressly shown, when using the word "grant" in a conveyance, grantor impliedly covenants: (1) that grantor has not previously conveyed the same estate to someone else, and (2) that the estate is free from encumbrances made by the grantor or anyone claiming under grantor. § 70-20-304(1), M.C.A. These implied covenants are binding not only on the grantor, but also on grantor's heirs and assigns. As used in this section, "[t]he term 'encumbrances' includes taxes, assessments, and all liens upon real property." § 70-20-305, M.C.A.

If the grantor agrees to transfer real property with "the usual covenants," the grantor will be required to include five covenants in the deed: (1) seisin, (2) quiet enjoyment, (3) further assurance, (4) general warranty, and (5) against encumbrances. § 30-11-109, M.C.A. These covenants must be expressed in substance with the following language:

> "The party of the first part covenants with the party of the second part that the former is now seized in fee simple of the property granted; that the

> latter shall enjoy the same without any lawful disturbance; that the same is free from all encumbrances; that the party of the first part and all persons acquiring any interest in the same through or for him will, on demand, execute and deliver to the party of the second part, at the expense of the latter, any further assurance of the same that may be reasonably required; and that the party of the first part will warrant to the party of the second part all the said property against every person lawfully claiming the same."
>
> § 30-11-110, M.C.A

Seisen harkens back to old feudal law, and meant: "The completion of the feudal investiture, by which the tenant was admitted into the feud and performed the rights of homage and fealty." Stearns, Real Act. 2; Mitchell, Real Estate and Conveyances 225. Today, the covenant of seisen implies that the grantor has the estate to be conveyed, possession thereof, and the right to convey.

Quiet enjoyment: under the common law, the covenant of quiet enjoyment applied to leaseholds. It pertained to possession and not to title. Today when applied to grants, the covenant of quiet enjoyment is an assurance that the grantee's enjoyment of the property will not be disturbed as a consequence of a defective title.

Further assurance: is a promise that the grantor will do whatever is reasonably necessary to complete the transaction, and to remove all insufficiencies or deficiencies.

General warranty: is a covenant that no one has paramount title over grantee.

Against encumbrances: traditionally this meant exactly what it states, i.e., that there were *no* encumbrances. The mere existence of an encumbrance constituted a breach. The knowledge of the grantee was immaterial. The present language of § 30-11-110, M.C.A. says that the property is "free from *all* encumbrances," so does this mean Montana applies the old, strict application? What if the encumbrance is disclosed, but the grantor is, nonetheless, required to "give the usual covenants?"

When documenting a real estate transaction, what type of deed is the seller required to give? Deeds in Montana come in several flavors, such as: (1) quitclaim deeds, (2) bargain and sale deeds, and (3) warranty deeds.

Quitclaim deeds are akin to releases; that is, in their strictest form, they do not guarantee title or the right to possession, and offer no covenants or warranties. They get around the implied covenants of § 70-20-304, M.C.A. by conspicuously avoiding the word "grant," and do not include the usual common law covenants set out in § 30-11-109, M.C.A. Nonetheless, a quitclaim deed can include limited covenants to the grantee if the grantor includes them. So, if a quitclaim deed includes such language as: "to have and to hold, all and singular the described property, together with the tenements, hereditaments, and appurtenances belonging to the property, or in any way appertaining, and the rents, issues, and profits of the property to transferee, and transferee's heirs and assigns forever:" (1) Do any of the common law covenants apply? (2) Do any of the implied covenants of § 70-20-304, M.C.A apply? (3) Does the principle that after-acquired title passes by operation of law apply?

Bargain and sale deeds (sometimes going by other names) are deeds that include the implied covenants of § 70-20-304, M.C.A They may also include the common law covenant of general warranty. As such, they do not warrant that others besides the grantor have not executed encumbrances against the property conveyed, and do not generally include the other common law covenants set forth in § 30-11-109, M.C.A.

An ambiguity exists as to what a warranty deed is and what it must include under Montana law. Strictly speaking, a warranty deed includes only the covenant of general warranty. However, if parties contract to transfer land with "the usual covenants," then all the common law warranties of §30-11-109, M.C.A. are required, and must be in substantially the form set out in § 30-11-110, M.C.A. So, if in the contract of the parties, grantor is required to give the "usual covenants,"

then the grantor must include the language specified in § 30-11-110, M.C.A.; but what happens when the parties merely agree to convey by warranty deed?

Tenements and hereditaments: while we are at it, we might as well remind ourselves of what these terms mean, as they are routinely found in deeds. Tenements are rights incidental to real property and give the right to hold those aspects of real property that are permanent, including the land and inheritances, but also including rents and *profits a prendre.* Hereditaments are things capable of being inherited, as in an interest in land.

Before leaving this section on grants, we should say a word or two about enforceability. As between grantor and grantee, and others who have notice of it, a deed is enforceable regardless of whether it has been recorded. §§ 70-20-303 and 70-21-102, M.C.A. If the grant is not recorded, anyone who receives a grant for the same property without notice of the unrecorded grant, and who does so in good faith, for valuable consideration, is not bound by the unrecorded grant. Once recorded, however, a grant gives at least constructive notice of the conveyance to the whole world. § 70-21-302. The effect of this is to exclude anyone from arguing that they are not bound by the grant by claiming to be good faith purchasers for valuable consideration without acknowledge of the grant. *See,* §§ 70-20-303 and 70-21-304, M.C.A. Once recorded, everyone is deemed to have notice of the grant, and will be bound by its terms. Therefore, recording each grant is generally an essential part of the granting process.

Attorneys practicing in the area of real estate are familiar with the process for verifying authority to execute real estate documents for individuals and corporations. However, verifying the authority of entities such as limited liability companies has proven problematic.

When a transaction involves a natural person selling property in his or her individual capacity, the process of verifying identity and authority is fairly straight forward. Transactions generally require that the person whose name is on the title

execute the new conveyance. Proving that the person is the person whose name is on the title is accomplished by a signature and a sworn attestation before a notary. Sometimes an affidavit of alias is also needed, as when a person has used more than one variation of his or her name. Recent federal law has added a few additional requirements, such as the need to obtain acceptable proof of identity, noting what documentation was used to verify identity, and recording identifying information such as a social security number. Nonetheless, verifying authority for an individual comes down to an in-person appearance before a notary to verify identity.

The process of verifying corporate authority is also well understood. The common case requires a resolution of the board of directors, which should not only authorize the transaction, but also verify who has the authority to conduct the transaction on behalf of the corporation. *(Presidents of corporations are assumed to have the authority to execute conveyances, but not secretaries or treasurers.)* After that, it is back to the process of verifying the identity of the corporate signer.

It is also good practice to verify corporate authority in the conveying document itself; something like this:

IN WITNESS WHEREOF, grantor has set grantor's hand on the date and year first above written.

Grantor:	Attest:
Really Big Company, Inc.	The foregoing Warranty Deed was duly authorized by the Board of Directors in a meeting regularly called to consider and approve the same.
By: ______________________________	By: ______________________________
President	Secretary

(SEAL)
State of Montana)
:ss.
County of Ravalli)

On this __ day of March, 2008, before me a Notary Public for the State of Montana, personally appeared I Am President and Low Lee Secretary, president

and secretary respectively of Really Big Company, Inc., known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same, for and on behalf, and as the act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year hereinabove first written.

____
Print Name: ________________________________
Notary Public for Montana
(SEAL) Residing at: ________________________________
My Commission Expires: _____________________

Verifying the authority of entities such as limited liability companies turns out to be problematic in certain situations. Do limited liability companies execute resolutions? Who owns, manages and controls the company anyway?

A case now before the Montana Supreme Court illustrates the potential for misunderstandings and problems. A Montana citizen (we'll call him Oops) invested in a limited liability company, which was developing a high-tech agricultural product. Besides Oops' investment money, which was considerable, the only other real asset the company had was a patent, which the company intended to develop into a marketable product. For his investment, Oops was given what he thought was a controlling interest in the company. As so often happens there was a falling out, and Oops entered into a contract on behalf of the LLC with which the original owner disagreed (we'll call the original owner Gotcha). Gotcha sued. After reviewing all of the documentation, the Court found against Oops because the Operating Agreement only gave Gotcha the authority to convey a dispositional interest in the LLC, not a management interest. Therefore, the Court found that Oops had acted without authority and fined him $2.5 million in punitive damages for having entered into this contract that Gotcha disagreed with.

So what does it mean to own an LLC, and what do you get for your ownership interest? One or more of three rights: (1) bare ownership rights, which means you

own the asset, but have no management (voting) authority and no right to distributions; (2) management authority; and/or (3) a dispositional interest, which means that you have the right to distributions of profits, but nothing more.

People often start LLC's with some do-it-yourself kit, and have no idea what the documents mean. Often the do-it-yourself Operating Agreements will attempt to conserve ownership of the LLC by limiting the authority of the original organizers to convey management rights. This is what happened to Oops. Unbeknownst to him, and probably everyone else in the company prior to the falling out, Gotcha, the original organizer, had no authority to convey anything more than a dispositional interest, which is what the Court determined Oops got for his money. Any management action by Oops was then without authority, and actionable by Gotcha and his LLC.

What to do? When dealing with an LLC, the safest practice is to get copies of the Articles of Organization, the Operating Agreement and any modifications or amendments. Then you will need to read them to sort out who has authority to do what, which will tell you how to proceed from there. The bottom line is that you will be looking for who has actual management authority, and then get verification that they are acting with that management authority for the LLC. If the LLC is managed by the members, the safest thing is to get them all to sign, even if one is permitted to act for the LLC.

Recording grants: Montana is a race-notice state. Under this system, the first bona fide purchaser for value who records on the public record preserves valid title. In other words, you take title subject to what you know and what you should know by searching the public records. You protect title by recording.

III. Avoiding Ethical Issues in Real Estate

Example One: Jeff goes to see his friend, Humphrey, an attorney. Jeff is the principle stockholder in Jeff's Sales and Distributing, a marketing company that employs 35 people, most of whom have some degree of vesting in the company's profit sharing plan. Jeff wants to use the profit sharing plan to purchase a recreational property at Seeley Lake for use by the company's management, best clients, and employees.

Who does Humphrey represent? What are his obligations to the others? What qualifications should Humphrey have in order to ethically agree to provide representation?

Example two: As an examiner working for a title company, you are asked to do a title search for a client of Able Real Estate, a real estate company with which the title company has frequent business. Upon examining the buy/sell agreement, you recognize the property and the buyer because you did some work previously on this property related to an aborted sale. Opening the previous file for the property you find:

- A note indicating that name of the grantee, Hollywood Jack, in a 1904 deed does not match the name of the grantee, Herman Lepenstein, in a 1911 deed, which was the next deed in the chain of title. Apparently, however, it was common knowledge that "Holywood Jack" was the stage name for Herman Lepenstein.
- Restrictive covenants applicable not only to this property but also to three neighboring properties that the parties intended to record at closing but never did because the closing never happened.
- A letter from the seller's agent noting that she claimed the right to a commission because the seller's prior refusal to close the transaction was not justified under the previous buy/sell agreement.

What do you need to disclose? Can you ensure title? Who are you working for? What are the risks?

Example three: A recent transferee from California comes to your law office with a problem. It seems that she bought her dream home in Montana last winter. After relocating here and getting situated, come spring she found that a neighboring rancher was crossing her property every day to irrigate. Her deed says nothing specific about a ditch easement or traveled way, nor does the title policy prepared when she bought the property. After investigation, you find that a deed three jumps back in the chain of title recognized the right of the neighboring property to walk along a pathway to access an irrigation ditch. The ditch itself, which also crosses your client's property, was never mentioned, although evidence indicates that it has been in existence since the early 1900's. No subsequent deed mentioned this walking easement, and none of the deeds mentioned the ditch.

What recourse does your client have, if any? If there is a claim against the title insurance company, what is the measure of damages?

(If there is a valid claim, the measure of damages for a property owner will differ from that of a lender. The Owner's policy will pay the diminishment in the fair market value of the land caused by the defect, up to the policy limits. The Lender's policy, on the other hand, will pay only that portion of the loan not recoverable because of the defect when the property is sold. Because lenders often do not lend up to the full market value of the property, there is often an equity cushion. If the equity cushion is not used up by the diminishment in marketable value caused by the defect, there will be no payout to the lender under the policy despite the defect.)

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