

WILD INSTRUMENTS, SURVEYORS GONE BAD, CONFUSED COURTHOUSES AND STRIP CLUBS: FOUR REASONS TO CAUTIOUSLY DRAFT DEEDS

By: J. Cliff McKinney

Unfortunately, too many lawyers cede the responsibility of drafting deeds to non-lawyers, such as secretaries, paralegals or title agents, who use form deeds. This has two potentially fatal flaws: 1. the deeds are often wrong; and 2. this leads to lawyer complacency. Lawyers should not rely on canned deeds prepared by non-lawyers. Instead, lawyers should draft deeds with extreme caution. Following are four particularly important points to consider, all based on mistakes I've seen in non-lawyer prepared deeds:

Names—Does the deed list the correct parties? This sounds elementary, yet, is a frequent mistake. Consider these two questions:

1. Does the seller's name match the last record owner's name? Consider this scenario: "Chuck's Meathouse, Inc." takes title to a restaurant in 1995. In 1998, Chuck becomes a vegetarian and changes the business name to "Chuck's Veggiehouse, Inc." Chuck records the change with the Secretary of State but not in the real estate records. In 2007, Chuck sells his business, and the deed reads, "Chuck's Veggiehouse, Inc. to Sue's Fishhouse, Inc." However, the record owner of the property is still Chuck's Meathouse, Inc. This deed is a wild instrument failing to adequately convey title and giving Sue no protection from third-parties.

2. If the seller is an individual (i.e., not a corporate entity), will the seller's spouse sign the deed? Arkansas has dower and curtesy, meaning the spouse must sign even if not listed on the title. If the seller is unmarried, eliminate future questions by saying so in the deed.

Legal Description—Is the legal description correct? There are two types of legal descriptions: 1. metes and bounds, and 2. platted. A metes and bounds description defines property boundaries through measurements and references to fixed points. A platted description references a recorded survey that fully describes the property boundaries (ex., Lot 1, Block 2, Kingwood Subdivision).

Both types of descriptions are vulnerable to error. For platted descriptions, be absolutely certain to reference the correct lot and block. For metes and bounds, be sure the description actually "closes" (forms a complete box without gaps). Special computer software can check metes and bounds descriptions. However, it doesn't hurt to make the surveyor write a letter swearing on pain of death that the legal is correct.

Also, many surveyors like to include the following phrase at the end of the legal description: "Subject to all matters of record or fact." When included in the deed, this language creates ambiguity about the warranties of title. Delete this language from the deed.

Place of Recording—Before recording a deed, always ask, "Is this deed being recorded in the right place?" Again, sounds like a stupid question, but mistakes happen, especially for the ten counties with TWO county seats. This dual-county seat system creates an unfortunate

guessing game that must be carefully navigated to be certain the deed is filed in the right courthouse. The ten counties are: Arkansas, Carroll, Clay, Craighead, Franklin, Logan, Mississippi, Prairie, Sebastian and Yell.

Restrictive Covenants—Back in college, I was with a group of friends at a restaurant when one friend became too affectionate with his girlfriend. Disgusted by the behavior, another friend exclaimed, "This is a family establishment, not a place to establish a family!" I think of this every time I prepare a deed because it reminds me to consider how the land will be used after the transaction is complete. If a new business is planned, will it be family-friendly, or, well, not so family-friendly? Are there other things the parties should consider about the property's future use?

If the seller retains adjoining property, he has a legitimate interest in the future use of the land (and vice-versa for the buyer). For instance, if my client sells land to a restaurant developer, that's all well and good until the restaurant fails and becomes a strip club. Less dramatically, if my client owns an electronics store and sells excess land to a restaurant developer, what happens if the restaurant closes and TechnoShack moves in?

Don't forget, land can be restricted to control future uses. Be sure to ask whether the deed should have use restrictions. If so, what types of restrictions would help your client, and what restrictions would the other side accept? Truth be told, this issue should be considered long before you are ready to prepare the deed. Regardless, it is important to consider whether to include restrictive covenants.

Certainly, there are many more things to consider when preparing a deed than the issues noted in this article. The main point is that deeds are extremely important and not to be treated flippantly. When a lawyer relies on a non-lawyer to draft the deed (and doesn't at least carefully review the result), the lawyer abdicates his responsibility and exposes his client (and himself) to considerable risk.

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