Issues Involving Railroad Rights-of-Way in Virginia (Mostly) â?? Part Two

Description

Article by R. Michael Smith

This is the second installment of a two-part article that is an expansion of the materials included in the VLTA seminar, *The Sound and the Fury: Railroads, Rights-of-Way, and Revesting*, and a 2017 *Examiner* article, *Derailed by the Supreme Court*. Some sections have remained the same, other sections have been enlarged, while the section on the *Brandt* case has been downsized and largely rewritten. The first part of the article covered a short economic and social history of railroads in Virginia, acquisition of a railroadâ??s right-of-way (ROW), formal abandonment of an acquisition today, and a review of Virginiaâ??s participation in a quasi-public version of Rails-To-Trails. Read ***Issues Involving Railroad Rights-of-Way in Virginia (Mostly) â?? Part One*** here.

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This second part focuses on the real estate interest held by the railroad in the ROW, what happens to the interest upon actual and/or legal abandonment of the ROW by the railroad, tort liability for grade crossing incidents, and suggestions for title underwriting with a ROW present. Also, in this part, a ten-year-old US Supreme Court decision, important in defining whether a ROW is a fee or an easement, will be reviewed. The case was expected to impact abandoned rail lines nationally, but its impact in Virginia will be slight. The overall effect of *Brandt* is, frankly, unknown. A clear result of the case, though, is that railroad property or property affected by a neighboring ROW requires a thorough title examination and intervention by professionals in the title industry.

Grade Crossings and Tort Liability

Railroad crossings across public or private lands create hazardous conditions that must be mitigated in order to accomplish the public purposes of the flow of commerce and exercise of the inherent right of free travel. See, e.g., Va. Code Â§ 33.2-903; Va. Code Â§ 56-25; Va. Code Â§ 56-365.1. The State Corporation Commissionâ??s Division of Utility Safety is the government body responsible for regulation of the rail industry in the Commonwealth. In both investigating and deciding conflicting evidence from citizens, localities, and railway companies, the SCC acts as both a legislative and judicial body. Statutes and the Virginia Constitution give this unique position to the SCC in railroad matters. *Norfolk and Western Railway Co. v. Tidewater Railway Co.*, 105 Va. 129, 52 S.E. 852 (1906); *see also*, *City of Bristol v. Virginia and Southwestern Railway Company, etc.*, 200 Va. 617, 107 S.E.2d 473 (1959).

Regulation of traffic at grade crossings also appears in the Virginia Motor Vehicle Code. For example, a motor vehicle operator with a commercial license may be â??disqualifiedâ?? from operating a commercial vehicle if convicted of offenses involving a grade crossing. Va. Code Â§ 46.2-341.20:1. Also, a driver who passes another vehicle at a grade crossing â??shall be guiltyâ?• of reckless driving. Va. Code Â§ 46.2-858.

Virginia caselaw is replete with tort cases involving motor vehicle collisions with trains at grade crossings. While tort law is beyond this discussion, it is useful to note that landowners, whose land is

the site of a private grade crossing, have no special liability to users of the private grade crossing merely due to ownership of the land. Common law tort principles of proximate cause, last clear chance, and contributory negligence (as modified by statute) are relevant to grade crossing collisions. While the railroad may have a greater degree of care to operate its intrinsically hazardous equipment upon the tracks in compliance with state safety laws, a motor vehicle operator does have a duty to exercise reasonable care and, specifically a duty to stop, look, and listen, at unmarked grade crossings, include private ones. The driver may still reach a jury verdict if he/she fails to exercise reasonable care, but, at minimum, contributory negligence by the driver will impact damages as a result of the collision. Illustrative cases on these points: *Norfolk and Western Railway Company v. Epling, Administrator, etc., et. al.,* 189 Va. 551, 53 S.E.2d. 817 (1949); *The Chesapeake and Ohio Railway Company v. Pulliam*, 185 Va. 908, 41 S.E.2d 54 (1947).



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The right to maintain and use a private grade crossing for a landowner is by easement. Even if the railroad only has a right-of-way upon the ownerâ??s property, the owner has no implied right to cross over the ROW, even if the purpose of the crossing is to gain access to the other side of the tracks, which other side is also the ownerâ??s property. Consequently, it is imperative for a landowner to obtain an easement to cross the right-of-way at the time the right-of-way is granted to the railroad. Doing so and recording the agreement in the land records will create a separate right in the landowner in the railroadâ??s fee or right-of-way through or beside the landownerâ??s property. The easement for the grade crossing should be specific as to obligations to construct and maintain. Having a recorded easement for the grade crossing allows the landowner to pursue a future injunction to maintain the crossing in the event that the railroad or a successor attempts to abandon the right-of-way. Caselaw indicates that the landowner probably does not have to show actual damages if a crossing is closed as the cases indicate that unilateral termination of an easement right by the servient estate (the railroad) is irreparable harm to the dominant estate (the landowner) as a threshold test for granting an injunction to maintain the easement (the grade crossing). *Norfolk Southern Railway Company v. Breeden*, 287 Va. 456, 756 S.E.2d 420 (2014).



One general observation that may be made about tort liability at grade crossings: The law is favorable to the railroad involved. So long as the train is being operated within promulgated safety and warning protocols, the railroad, as a defendant, will likely be found free of liability to the victim(s) of the collision.

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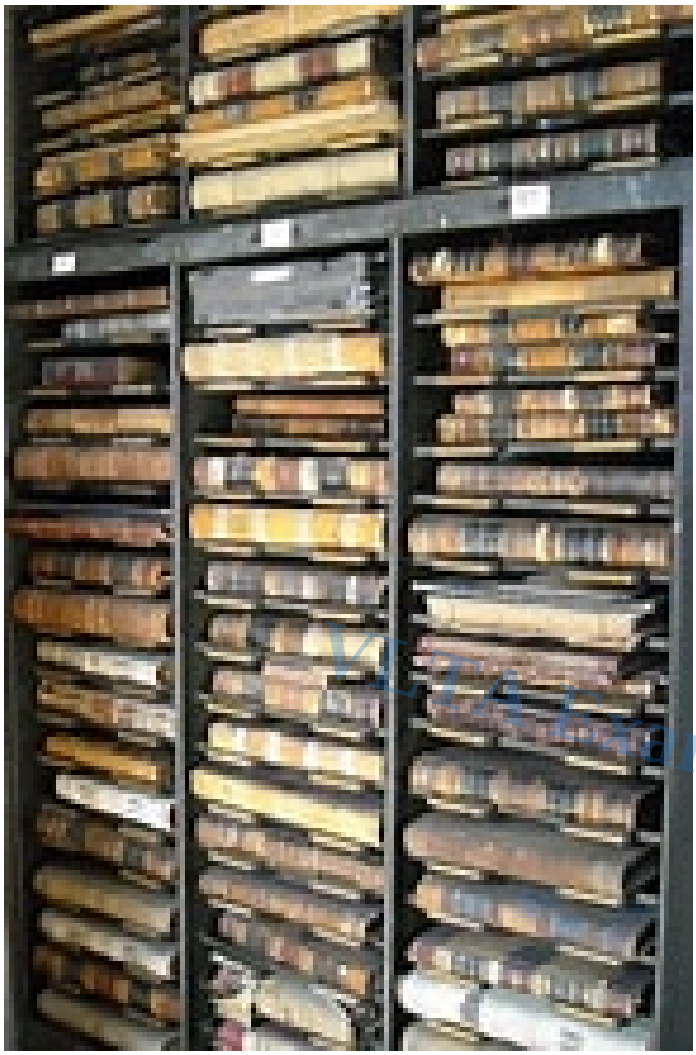
The Railroadâ??s Interest in the Land

As stated in the first part of this article (Smith, R. Michael, *Issues Involving Railroad Rights-of-Way in Virginia (Mostly)*, VLTA *Examiner*, Dec. 23, 2024, Issues Involving Railroad Rights-of-Way in Virginia (Mostly) â?? VLTA Examiner Publication), there is never a doubt that a railroad occupies land by the presence on the ground of its rails, water towers, signals, crossings, etc., and the thundering locomotives and clanking rail cars. This occupancy can be a license, easement, or fee interest depending on the language creating the use of the land by the railroad. First, there must be a determination by a government entity that the public needs a railroad ROW for the common good. The railroad can obtain the designated route thereafter by eminent domain or purchase from the sovereign or private landowner. The language of the conveyance document(s) defines the extent of the railroadâ??s ROW as a fee in the land or merely an easement.

Consequently, the role of the title records searcher/examiner is paramount. First, the searcher must locate that original document of conveyance to the railroad â?? deed, grant, order of eminent domain. Most of those records date to the 1800s. In the Twentieth Century, transfers of existing ROWs frequently occurred by merger of railway lines or bankruptcy reorganization. Records of such transactions from the bankruptcy court or SCC are usually located in the same land records as the original deed of conveyance. Nevertheless, out conveyances, conveyances of lesser interests (e.g., a leasehold or other utility easement on the land affected by the ROW), or private easements for grade crossings may be seen on the land but not found among the land records.



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Once found by a hyper-diligent title searcher, the recorded original conveyance to the railroad may be illegible due to deterioration of the records or their loss due to fire or war. Supplements to the land records may be found with the railroads themselves, but such records are not legally conclusive of a railroadâ??s rights without review and confirmation by a court of competent jurisdiction in a quiet title or declaratory judgment action involving the railroad. [In a VLTA seminar in November 2017, Virginiaâ??s premier title examiner, Doug Dewing, provided two useful websites for the history of railroad rights-of-way in Virginia for its leading rail carriers: CSX â?? https://www.csx.com/index.cfm/about-us/history-evolution/; Norfolk Southern â?? https://www.nscorp/en/the-norfolk-southern-story.html]

The importance of a professional and thorough title search/examination is highlighted in *Valenzuela v. Union Pac. R. R. Co.,* (D.Ct.AZ, CV-15-01092-PHX-DGC, 2017). In that case, the essential issue was a procedural one: Whether or not a class action could be certified in the federal court by private landowners as representatives of a class of about 1100 landowners against a railroad and a pipeline company for trespass, unjust enrichment, quiet title, inverse condemnation, recovery of rents, and accounting, upon abandonment of the railroadâ??s ROW, but continuance of the gas pipeline easement under the ROW granted by Union Pacific, its predecessors or successors in interest. The Courtâ??s Order quoted at length from an expertâ??s title opinion submitted by John H. Rall. The Order does not state whether Mr. Rall was an attorney or a licensed title insurance agent (with plant access) in Arizona. The Order recites verbatim from Mr. Rallâ??s expert opinion on five points in his title search and review of documents. The Court led into the quote with this language: â??With apologies to the reader, the Court quotes the relevant but lengthy language from the Rall opinion because it aptly illustrates the complexity of the title inquiry required for just one parcel of property.â• The defendants presented their own expert on title matters who disagreed with one or more of Mr. Rallâ??s conclusions. Ultimately, the Court decided ***not*** to certify the case as a class action under FRCP 23, because the claims for trespass, quiet title, or rents for each individual with a property interest affected by the ROW can succeed â??only if the history of their real estate ownership shows that they actually own the subsurface where the pipeline is located.â• In other words, fee title to railroad right-of-way surface lands upon abandonment by the railroad can only be determined by judicial action after a thorough study of title documents and physical facts on an individual, case-by-case basis.

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Abandonment of the Railroadâ??s Interest as a Right-of-Way in the Land

The problem of ownership arises when abandonment of the ROW can be illustrated in fact when operations as a railroad have ceased, tracks have been removed, trees and underbrush has overgrown the ROW, and/or historic disrepair of rail facilities has continued, but no out conveyance or other form of divestment is found among the land records. A final judgment in a quiet title action would be needed to resolve an open question of fee ownership after an abandonment.



Virginia applies the common law principle that, upon abandonment of an easement by the dominant estate holder, title to the underlying soil vests in the servient estate holder unencumbered by the easement. Restatement of Property, Third, Servitudes, asserts this same principle. Railroad rights-of-way that were an easement only, upon abandonment by the railroad (dominant estate), will vest in the landowner free of the railroadâ??s rights. That is, in Virginia, a railroad right-of-way is just an easement without special residual rights to use of the ground in the future.

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Evidence for finding abandonment has extensive jurisprudence in Virginia. Key in the caselaw is â??abandonmentâ?• as shown by presence or lack of structures related to railroad purposes equates to release of the right-of-way as easement but not â??abandonmentâ?• of the legal right to the landâ??s title. â??While there is much evidence tending to show an abandonment of the easement, there is little, if any, tending to show an abandonment of the title to the rails.â?• *Talley v. Drumheller*, 143 Va. 439, 448, 130 S.E. 385 (1925). Lack of railroad activity and removal of tracks can be evidence sufficient to sustain a claim of adverse possession against a railroad by a private landowner/user of the ROW land (so long as the other legal requirements for adverse possession are met). *Chesapeake & Ohio Canal Co., Inc. v. Great Falls Power Co.*, 129 S.E. 731 (1925). Failure to maintain the easement area â??for an unreasonable length of timeâ?• is evidence that the holder of the right is acting inconsistently with an intent to reserve â??the future enjoyment of the rightâ?• and can be held to be an abandonment of the right or interest in the land.

Oney v. West Buena Vista Land Co., 104 Va. 580, 52 S.E. 343, 345 (1905). Note that intent to abandon a lease of railroad ROW facilities or operations by a lessee may be enjoined by the lessor/holder of the ROW rights in order to prevent a scenario that could be challenged as an abandonment of the interest in the land by the lessor/holder in a third partyâ??s action. *Southern Ry. Co. v. Franklin & P. R. Co.*, 96 Va. 693, 32 S.E. 485 (1899).



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Underwriting Title Insurance with a Railroad Interest Present

The presence of a railroad in a title search, whether an active railway or not, should be called out by the examiner. An underwriter should except to the railroad in title commitment and policy. Removal of the Exception should be made by senior underwriters or by your title insurance companyâ??s underwriters. Language for these Exceptions is broad. These are ALTA recommendations from the 2008 draft of Standard Exceptions:

Railroads

Exceptions

RROX01 Railroad Easement (No Recording Data)

Rights-of-way for railroad, switch tracks, spur tracks, railway facilities and other related easements, if any, on and across the Land.

RROX02 Railroad Easement (Shown on Survey)

Rights-of-way for railroad, switch tracks, spur tracks, railway facilities and other related easements, if any, on and across the Land along the _____ portion of the Land as shown on survey dated _____ by _____.

RROX03 Railroad Easement (Recorded)

Rights-of-way for railroad, switch tracks, spur tracks, railway facilities and other related easements, if any, on and across the Land along the _____ portion of the Land recorded _____.

ALTAâ??s Title Forms Committee considered revising the Standard Exceptions in connection with the ALTA 2021 policy forms rollout, but further discussion was tabled. The need for change was not established. Eventually, with affirmation from the ALTA Board of Directors, the Title Forms Committee dropped the subject. The consensus was that the language of Exceptions varied too much among

underwriters and from state to state to make such a project a practical impossibility. Underwriters are left to make their own choices for Exceptions to make on all issues, including railroad rights-of-way.

Common practice in the title insurance industry is to treat all cases involving a railroad right-of-way as an extra hazardous insurance risk situation requiring intervention and review by the title company underwriting the title insurance policy. An agent should be prepared to take Exception to any recorded instrument referencing a railroad in the chain of title, including documents such as plats or surveys that show an ROW adjacent to the subject Land. If a transaction directly involves the title to property held or once held by a railroad, the required title examination period will be expanded to the original document that originally created the railroad title and right-of-way. Such title exams will necessarily take more time, be more expensive, and should only be undertaken by highly qualified commercial title examiners. [Recommendation: Seek out the services of a holder of the VLTAâ??s Certified Title Examiner status.] These are searches that will not be aided by artificial intelligence or virtual search products that can produce minimal risk products for essentially static title chains (e.g., a 40-year-old residential subdivision).

All documents that affect the railroadâ??s ROW should be copied in full and forwarded to underwriting counsel to review. If title insurance is sought for property that has abandonment of the ROW as an issue, anticipate further requirements from your underwriter, such as, quitclaim deeds, indemnities, special Exceptions to coverage, etc. Title might only be insured after an action to quiet title is resolved.

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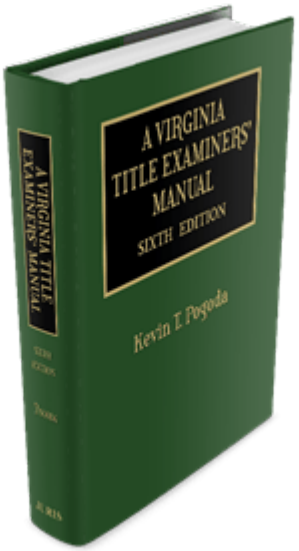

Cullen M. Marshall, at the time an underwriting counsel for Old Republic National Title Insurance Company, delivered a title insurance webinar on underwriting with a railroad issue. The material presented is an effective primer on the topic. The webinar slides can be found at Marshall, Cullen M., *Railroads and Title Insurance*, ALTA Title School 2020 (2020), Railroads-Title-School-2020.pdf, retrieved 6/11/2025.

Brandt Revocable Trust v. United States **and Conclusions**

On March 10, 2014, the United States Supreme Court decided *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 134 S.Ct. 1257, 188 L.Ed.2d 272, 82 USLW 4187 (2014). The decision reversed a ruling of the Federal Circuit Court of Appeals in favor of the United States and remanded the

case for further proceedings consistent with the decision in favor of a private citizen landowner. The case was not a ruling on a major current social or constitutional issue, but a simple decision of statutory and common law on property rights. It raised (or settled) questions of title to the fee in the bed of railroad rights-of-way across federal lands, particularly in the West. The case triggered concerns of many public interest groups, resulting in nearly a dozen *amici* on each side of the appeal (including the American Land Title Association on behalf of the landowner). The decision had an adverse impact on the popular rails-to-trails program. Chief Justice Roberts delivered the majority opinion, an 8-1 decision, with only Justice Sotomayor dissenting. The Chief Justice outlined the case and the issues succinctly in his opening paragraph:

In the mid-19th century, Congress began granting private railroad companies rights of way over public lands to encourage the settlement and development of the West. Many of those same public lands were later conveyed by the Government to homesteaders and other settlers, with the lands continuing to be subject to the railroadsâ?? rights of way. The settlers and their successors remained, but many of the railroads did not. This case presents the question of what happens to a railroadâ??s right of way granted under a particular statute â?? the General Railroad Right-of-Way Act of 1875 â?? when the railroad abandons it: does it go to the Government, or to the private party who acquired the land underlying the right of way? Brandt, 572 U.S. 95.

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Ultimately, the Court held that, without limiting language in the original patent creating a residual fee in the United States, Congress intended that fee in the land grants was to be sold to individuals, and that the railroad would only receive a right-of-way for railroad purposes. Since the legislation was silent as to the issue of abandonment of the ROW in the title chain of a private landownerâ??s property affected by the railroad, the Supreme Court applied the common law principle that the title in the soil above and below the ROW defaulted to the adjacent landowner.

Ironically, the Court resolved *Brandt* by grabbing dictum from an earlier decision, which dictum was derived from an argument advanced by the United States. In *Great Northern Railway Co. v. United States*, 315 U.S. 262, 62 S.Ct. 529, 86 L.Ed. 836 (1942), held that the railroad did not have the right to exploit minerals below the surface of its right-of-way. Great Northern was granted its ROW pursuant to the 1875 Act. Part of the argument of the government was that the railroad did not own the subsurface because its surface rights were only to use the land as an easement. That is, there was no â??easement plusâ?• interest held by the railroad, in which extended interest the U.S. might have a reversionary interest.

Ultimately, the holding of the Court in *Brandt* can be said to be a desire to settle land titles that came out of abandoned railroad rights-of-way. The desire to settle land titles is a basic premise of property law in the United States. In confirming *Great Northern* on the concept that the railroadâ??s interest under the 1875 Act was an easement only, the Court was sustaining the common law on abandonments. The last word from the majority opinion written by Chief Justice Roberts (8-1 decision) was this: â??Now the Government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position, especially given â??the special need for certainty and predictability where land titles are concerned.â?? *Leo Sheep Co.,* 440 U.S. 668, 687, 99 S.Ct. 1403, 59 L.Ed.2d 677 (1979).â?•

The reliance by the Court on the certainty of land titles and respect for the work of title examiners cannot be understated. The Supreme Court overcame significant public policy issues to arrive at the decision supporting the property rights of individual citizens. Among these considerations was the potential cost to the government of reacquiring rights in the land to provide public services not related to railroad purposes (e.g., conservation, rails-to-trails). The greater public good was held to be the certainty of land titles and the common law principle that â??Once an easement, always an easement.â?•

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Much more on *Brandt* has been written, including a previous article in the VLTA *Examiner*. Smith, R. Michael, *Derailed by the Supreme Court: (Some) Railroad Rights-of-Way Are Just an Easement*, VLTA *Examiner*, March 1, 2018, Derailed by the Supreme Court â?? VLTA Examiner Publication. See the appended bibliography for further reading.

Evidence since the *Brandt* decision (or lack thereof) suggests that the issue of cost to the government has not been as great as feared. The U. S. Dept. of the Interiorâ??s website reveals no data on inverse condemnation actions nor information on large scale government eminent domain proceedings to reacquire fee or easement rights in abandoned railroad rights-of-way. The takeaway is that the government determined that the cheapest way to proceed after *Brandt* was to wait for private landowners to act to settle their titles by deed or action to quiet title. If an abandoned railroad, originally conveyed under the 1875 Act, was needed by the United States, it could still seek a quitclaim from the adjacent landowner to purchase rights or initiate an eminent domain action. Further, the concern that massive class actions by landowners for recovery of rents or profits for the use of their lands prior to *Brandt* was effectively tabled in *Valenzuela v. Union Pacific Railroad Company* referenced above. *Valenzuela* confirms that the title chain to each parcel of land is unique and not susceptible to resolution fairly in an amalgamation of landownersâ?? claims despite the supposed efficiency and cost savings of one case instead of multiple adjudications.

Railroad rights-of-way will remain an issue for title examiners and title insurers. While *Brandt* seemingly resolves the fee in the bed of abandoned railways granted by the United States under the 1875 Act, it does not resolve the threshold question of whom the purported owner of the adjacent land is. The rails-to-trails story here will be the train (*sic*) documents and facts researched and produced by qualified, specialized title examiners and underwriters.



Materials for Additional Reading

Related to Abandonment (Virginia):

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Supreme Court Ruling Represents Major Shift for Railroad Rights of Way, Brownstein Hyatt Farber Schreck blog, March 14, 2014, www.bhfs.com.

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Adv. No. 17-90161-LT (Bkcy. D. Cal. 7/23/2018).

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Related to Virginia Grade Crossings and Tort Liability:

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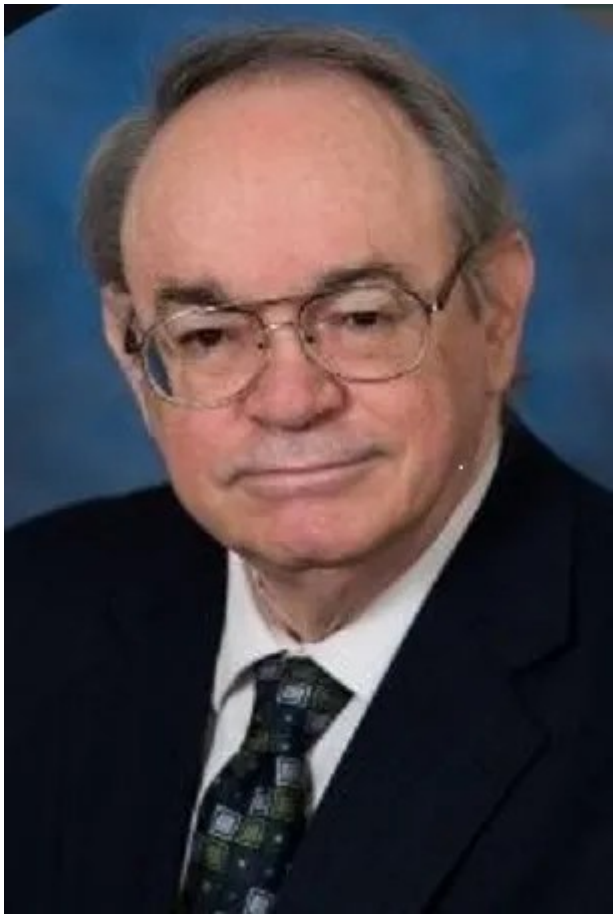

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1973, having attended the University of Virginia for both undergraduate and law degrees. After ten years of general legal practice, Michael spent most of the last 35 years in title insurance and financial services employment. He has served as underwriting counsel for Chicago Title, Stewart Title, and LandAmerica in Virginia, and Conestoga Title in Pennsylvania. He also serves as an Advisor for the American Land Title Associationâ??s Title Form Committee and is a member of the ALTA PRIA Liaison Task Force. He is a former Chairman of the Education Committee of the VLTA and its Underwriter Section.

Category

1. Legislative
2. Title Examination
3. Uncategorized

Date Created
2025/06/23
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