REBA NEWS

Winter 2005

Vol. 1, No. 5

The Newsletter of the

Real Estate Bar Association for Massachusetts

REBA continues active legislative agenda as new session opens

By Edward J. Smith

REBA's legislative agenda was a busy one in 2004. Some matters are still pending and may yet win final approval before the session ends on Jan. 5.

One that will *not* pass in 2004 is H.180, which would permit the performance of real estate closings by business corporations, notwithstanding statutory and judicial restrictions on the practice of law by non-lawyers.

REBA was pleased that H.180 never came to the floor of either the House of Representatives or the Senate.

Why closing companies support H.180

Proponents of H.180 were asking the Legislature to intrude upon the province of the judiciary to determine what activities constitute the practice of law. The legislation states that: "The provisions of section 46 [of M.G.L. chapter 221] shall not apply to a corporation, or its agents in … drafting deeds, mortgages, leases and agreements in connection with sales or leases made or negotiated, in examining the title and removing exceptions to such title, in representing lenders as their closing agents and in issuing title certification or policy of title insurance premised on evaluation of title to real estate."

These activities are the very ones that were determined to be the practice of law by the Superior Court in 2001 in *Massachusetts Conveyancers Association v. Colonial Title & Escrow,* C.A. No. 96-2746-C. The conduct of closing attorneys is subject to a number of official and other constraints, which is to the benefit of the consumer. No such controls apply to the activities of closing companies.

(See sidebar on "talking points" against this bill.)

We regret to report that the same legislation has been reintroduced for the 2005-06 session. The principal proponent is a Pittsburgh-based business trade association – the Title Appraisal Vendor Management Association, or TAVMA – whose members seek to enter the Massachusetts real estate settlement business. If they are successful, Massachusetts consumers would lose the benefits of lawyer supervision of the closing.

Notary public issues

We were gratified Gov. Romney included in Executive Order No. 455 the provision stating that "[a] notary public who is not an attorney licensed to practice law in Massachusetts, or who is not directly supervised by an attorney, shall not conduct a real estate closing and shall not act as a real estate closing agent."

While REBA was glad to see the Governor's endorsement of the holding in *Massachusetts Conveyancers Association v. Colonial Title & Escrow*, certain other provisions that were proposed in the draft Executive Order were not received as well by REBA.

Led by immediate past president Chris Kehoe, president Dan Ossoff and legislation chair Bob Kelley, REBA lobbied successfully to modify objectionable language, including the requirement that every notary public maintain a bound journal of official acts. The Governor's chief legal counsel agreed to make the Journal provision "a best practice," but not a legal requirement, for lawyers and their employees who are notaries public. *See also* St. 2004, c.149, § 206.

Mortgage discharges, assignments

REBA recognizes that the matter of unrecorded mortgage discharges and assignments is perhaps the most vexing problem for conveyancers handling residential mortgage closings. For many months we have labored with representatives of lenders and title insurers on legislation that would address these issues.

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Edward J. Smith serves as Legislative Counsel to REBA.

Formal peer-to-peer mentoring program launched

Informal peer-to-peer mentoring has long been a collegial cornerstone of REBA and its predecessor organization, the Massachusetts Conveyancers Association. This and every prior issue of REBA News carries the following mentoring statement on the newsletter's masthead:

"To promote the improvement of the practice of real estate law, the mentoring of fellow practitioners is the continuing professional responsibility of all REBA members. The officers, directors and committee members are available to respond to member inquiries relative to the Association's Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Association members is not, of course, a legal opinion."

This past year, in response to an increasing demand for mentoring and counsel from a growing membership, the association's Membership and Public Relations Committee, chaired by Arlington real estate attorney Sami Baghdady, developed a formal peer-to-peer mentoring program. The association's Board of Directors approved the plan in November following review by both the Residential Conveyancing Committee and Ethics Committee.

Any REBA lawyer member may request a mentor. The program will assist members who are new to the practice of real estate law. Mentors are experienced real estate lawyers committed to providing newer lawyers with guidance to help them in their professional development.

The REBA mentor will be available to discuss real estate-related matters and to provide appropriate guidance. The mentoring program is intended to be flexible and informal and to develop collegiality among the participants. The parties may meet, discuss over the phone or communicate by e-mail, as they choose.

REBA mentors agree to serve for a period of six

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What's in this issue…

National affairs update: Uniform Residential Mortgage Satisfaction Act and a new challenge to 'mark-ups'

By Joel A. Stein

The National Conference of Commissioners on Uniform State Laws has adopted a "Uniform Residential Mortgage Satisfaction Act" which addresses the all-too-common problem of obtaining mortgage discharges.

The Act provides that if a mortgage lender has not recorded a satisfaction of mortgage within 30 days after receiving payment of the obligation secured by that mortgage, the owner of the mortgaged land may make written demand upon the mortgagee.

If the mortgagee fails to record the satisfaction within the first 30 days, it is then liable for the mortgagor's actual damages. If it fails to act by the end of the second 30 days, it is then also liable for a civil penalty along with court costs and attorneys' fees.

The Act further permits the owner of the mortgaged land to initiate a procedure using an agent to record an affidavit of satisfaction that effectively clears the title of the satisfied mortgage. The mortgagee may also be liable for any damages as a result of its delay.

The statute includes the manner of giving and effective date of notification. Notification may be given by United States Postal Service, facsimile transmission, or electronic mail.

Article 2 of the Uniform Act requires the secured creditor record the satisfaction of mortgage and its liability for failure to record the satisfaction.

Section 201 deals with the payoff statement, and specifically notes that said statement must include the date on which it was prepared and the payoff amount as of that date, together with information reasonably necessary to calculate the payoff amount as of the requested payoff date and the payment cut off time.

Section 202 – entitled "Understated Payoff Statement: Correction; Effect" – notes that a creditor may send a corrected payoff statement and if the entitled person or their agent has a reasonable opportunity to act upon a corrected payoff statement, the corrected statement will supersede the earlier statement.

However, a secured creditor that sends a payoff statement containing an understated payoff amount may not deny the accuracy of the payoff statement as against any person that reasonably relies upon the understated payoff amount.

Section 203 requires the secured creditor to submit for recording a satisfaction of security instrument within 30 days after the creditor receives full payment or performance of the secured obligation. If the secured creditor does not provide the satisfaction by the end of the 30-day period, the secured creditor will be liable to the landowner for $500 and any reasonable attorney's fees and court costs.

Note, however, that Section 205 provides that a secured creditor is not liable under this act if it:

(l) established a reasonable procedure to achieve compliance with its obligations under this Act;

(2) complied with that procedure in good faith; and

(3) was unable to comply with its obligations because of circumstances beyond its control.

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A former president of the Association, Joel Stein chairs the Title Insurance and National Affairs committee of REBA. He practices with Friedman & Stein, P.C. in Braintree.

REBA plans paralegal, environmental law committees

The REBA Strategic Planning Committee, chaired by former President Dick Keshian, is exploring the launch of two new sections or committees as a part of the Association's ongoing strategic plan for growth.

A number of REBA's non-lawyer members, known as associates, have asked for a committee that would focus on the professional needs of real estate paralegals in both small and large law firms. The proposed committee, to be chaired by a real estate paralegal, would be open to all REBA members or associates and would host educational programs targeting the needs of the real estate legal assistant.

In addition, several REBA members have sought an Environmental Law Committee that would be separate from the Association's popular Land Use and Zoning Committee chaired this year by Jim Burgoyne of Fletcher Tilton & Whipple, P.C. The new environmental law committee would be co-chaired by leading environmental law practitioners.

Like other REBA sections, these proposed groups would be open to all REBA members and associates and would meet eight to 10 times a year at venues and times convenient to each committee's constituency.

If you are interested in participating in either of these proposed new committees, please contact Nicole Cohen, REBA's administrative assistant, at cohen@massrelaw.org.

REBA Membership Application

☐ **New 2004 Membership** ☐ **Renewal of Existing Membership for 2004** ☐ **Change of Address/ Telephone/Fax Only**

NAME: _____

FIRM: _____

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CITY/TOWN: _____ COUNTY: _____ STATE: _____ ZIP:_____

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Check Membership Category:

☐ $ 195 Member (Attorneys admitted to Massachusetts Bar)
Year Admitted to the Massachusetts Bar _____ And BBO# _____

☐ $ 125 Member (Attorneys admitted to Mass Bar w/i last 3 years)
Year Admitted to the Massachusetts Bar _____ And BBO# _____

☐ $ 195 Associate: Paralegal, Librarian, Title Examiner, Surveyor;
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☐ $ 75 Full-time Law Student
(Include photocopy of current student ID card.)

☐ $ 10 Optional: Imprinted 3-ring binder.
Large enough to hold all of the REBA Standards & Forms

_____ Enclosed is my check for $_____

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Card No: _____

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Please send this completed application with appropriate fee to:

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Website: www.massrelaw.org

REBA
THE REAL ESTATE BAR ASSOCIATION
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REBA News is an official publication of the Real Estate Bar Association for Massachusetts.

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Mission Statement

To advance the practice of real estate law by creating and sponsoring professional standards, actively participating in the legislative process, creating educational programs and material, and demonstrating and promoting fair dealing and good fellowship among members of the real estate bar.

Mentoring Statement

To promote the improvement of the practice of real estate law, the mentoring of fellow practitioners is the continuing professional responsibility of all REBA members. The officers, directors and committee members are available to respond to membership inquiries relative to the Association's Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Association members is not, of course, a legal opinion.

Endorsement Statement

While the Real Estate Bar Association for Massachusetts accepts advertising in its publications and educational offerings, it endorses no products or services.

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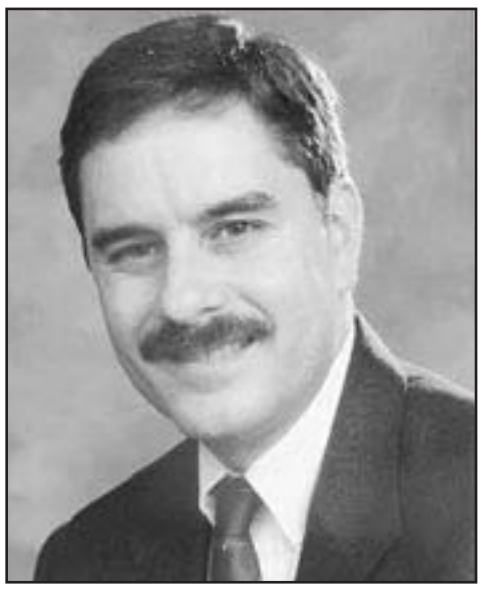
From the President's desk

By Daniel J. Ossoff



We enter the new year in unfamiliar territory – the Red Sox are World Champions and anything now seems possible.

At REBA, the officers, directors and staff are energized and focused on continuing to implement the strategic plan that was envisioned and put into place by our recent presidents – Kathleen O'Donnell, Greg Peterson, Dick Keshian and Chris Kehoe. Our mission is a simple one: To be the bar association of choice for every lawyer involved in any aspect of the practice of real estate law in Massachusetts.

We are excited about the enthusiastic reception that has greeted our newest committees in the areas of real estate finance, litigation, and affordable housing. Also, the Leasing Committee and Land Use Committee formed in recent years have allowed REBA to serve real estate practitioners in areas that were not previously served on a regular and consistent basis by this association.

Meanwhile our newly formed Real Estate Conveyancing Committee has allowed the Board of Directors of REBA to communicate more effectively than ever with the conveyancing bar at a time when national trends are creating new and difficult challenges for the conveyancing attorney.

In future columns, I will report to you on the activities of our many committees and the opportunities available to REBA members afforded by those committees. Whether you are a long-time REBA member or a brand new member we welcome – and need – your involvement. It is only with the participation of all segments of the real estate bar, which includes large firm attorneys and solo practitioners, residential conveyancers and commercial leasing lawyers, environmental attorneys and real estate litigators, that we can fulfill our mission and best serve our members.

I hope that many of you had the opportunity to attend our annual meeting in Westborough in November. Those present were very fortunate to hear our keynote speaker, Michael Greco of Kirkpatrick & Lockhart in Boston and the incoming president of the American Bar Association address the challenges that confront lawyers in this country today. Mike made very clear to those in attendance that forces are at work seeking to marginalize lawyers and diminish our role in today's society. The process perhaps began with the seemingly harmless proliferation of lawyer jokes and is now culminating in attacks from Washington, D.C. and elsewhere on the legal profession.

On the one hand, various forces are being brought to bear to chip away at the attorney-client privilege – a privilege that, as Mike pointed out, is the cornerstone that allows each of us to serve our clients. Meanwhile, efforts are being made in various quarters to redefine, in a more limited fashion, the "practice of law" in order to allow unlicensed, uninsured and unregulated entrepreneurs to perform functions traditionally reserved to lawyers.

Mike Greco left us all fully aware that lawyers are under attack in this country, and pledged to dedicate the ABA, during his term as president, to protecting and preserving the role that lawyers have always played in our great democracy. We are grateful to Mike for sharing with us his thoughts, concerns, and aspirations, and I know that he will serve all of us well during his term as ABA president.

Those of us practicing in the area of real estate are not immune from the attack the legal profession in general is facing. As reported elsewhere in this issue of REBA News, House Bill No. 180 has been re-filed for the current legislative session. That bill, if enacted into law, would allow corporations to engage in any number of activities traditionally reserved to lawyers in this state, including:

- the drafting of deeds, mortgages, and leases in connection with sales or lease transactions;
- the representation of lenders as their closing agents; and
- the issuance of title certifications and title insurance policies.

No distinction is made between large or small transactions, residential or commercial transactions, or refinancing or purchase transactions.

Every real estate practitioner in the Commonwealth would be affected by the passage of this bill into law. More importantly, the general public, whose interests are protected by having an attorney at the closing table, would lose that protection if the large out-of-state corporations that are the sponsors of this legislation are allowed to control and monopolize the real estate closing process in Massachusetts.

We owe it to our clients and to our profession to defeat this particular attack on the role of attorneys. Rest assured that REBA will be doing all that it can, not only to continue to communicate to our elected representatives on these issues but also to let our members know what each and every one of them can do to assist with this effort.

We will be successful in defending the role of attorneys – not only in the short term but also over the long haul – only if we re-dedicate ourselves to defending our chosen profession. I know of no profession that gives more of itself in more different forums to service the public – at times for little or no compensation – than lawyers.

It is time for each of us as lawyers to step forward and let the public know of all the good that we do. Use the next telling of a lawyer joke as an opportunity to share a story about the young couple you protected by clearing up a title problem with their first home while the moving truck was waiting in the driveway. Or let your audience know about the part that you played in developing much-needed affordable housing for the community.

Or educate your friends and neighbors about the critical roles that lawyers play re-developing Brownfield sites, and protecting pristine meadows and woodlands with conservation restrictions.

Our profession is a noble one and is critical to the protection of the rights and economic well being of the public. We have a story to tell that must be heard, and each of us must do our part to tell that story.

Those who would demean lawyers and who are driven, by greed, to diminish the role of lawyers will be heard. We fully expect them to be heard in the battle to take over the real estate closing process in Massachusetts. It is time for each of us, as lawyers, to be heard. The officers and Board of Directors of REBA will do its part. We look forward to being joined in this effort by our members throughout the state.

It is a new year full of hope and opportunity, but there is much work to be done. Let's roll up our sleeves and get started.

Daniel J. Ossoff served as a long-time member of the Association's board before becoming REBA's 2005 president. He chairs the real estate practice group at Rackemann, Sawyer & Brewster, P.C. and lives in Andover.

Tribute

Judge Robert Cauchon: Varied interests, vital mind

By Leon J. Lombardi

On Sept. 28, 2004, former Land Court Chief Justice Robert V. Cauchon passed away suddenly at his home in Cotuit. At the time of his death, Judge Cauchon was recuperating from hip surgery.

Judge Cauchon's death came as sad and shocking news to all who knew him, whether during his years on the bench or at other times during his productive life. Although he had reached the mandatory retirement age of 70 in1996, Bob was far from a "retiring" type.

Even to a casual observer, Bob's drive and enthusiasm were readily apparent. Born in Warwick, R.I., Bob graduated from Yale University with a degree in economics at the age of 20. Having been in the Naval Reserve Officer Training Corps, Bob earned a commission as an ensign upon graduation. Active duty followed from June 1947 to August 1949 and included nine months in China.

Following his discharge, Bob entered the Jordan Marsh executive training program for a period of time. By 1951, Bob had accepted a position with a Hartford insurance company and enrolled in the University of Connecticut Law School. The Korean War interrupted what might have been the beginning of a distinguished Connecticut legal career. The Navy called Bob back to active duty, and Bob served for a second two-year stint.

Bob moved to Medford after his Korean War service and started to work in real estate. It was not long before Bob resumed his legal studies. He entered the evening program at Suffolk University Law School and worked during the day as executive secretary of the Back Bay Association of Boston.

While a student in law school in 1954, a friend told Bob about a fellow running for the Governor's Council who could use a hand in his campaign headquarters. The candidate was Endicott Peabody.

Bob volunteered his services that year and soon advanced from addressing envelopes to managing the headquarters. With Bob's help, Peabody won a seat on the Governor's Council, which began a long association that proved important to the careers of both men.

A taste for politics

After graduating from Suffolk University Law School in 1957, Bob worked on unsuccessful Peabody campaigns for Attorney General in 1958 and Governor in 1960. Bob himself was bitten by the bug and made a run for public office in 1960. Though he and his wife, Betty, had moved to Marshfield just the previous year, Bob came in a respectable second in a race for Selectmen in his new town. A significant new chapter in Bob's life, however, was soon to open.

In 1962, Bob worked again on Peabody's campaign for Governor, but this time the outcome was different. In the contest against Governor John A. Volpe, the voting results were so close that a statewide recount occurred. The responsibility to oversee the recount process on behalf of the Peabody campaign fell on Bob Cauchon, and Peabody prevailed by 5,431 votes out of 2.1 million ballots cast. Bob commemorated that margin of victory by displaying license plate, P5431, on family

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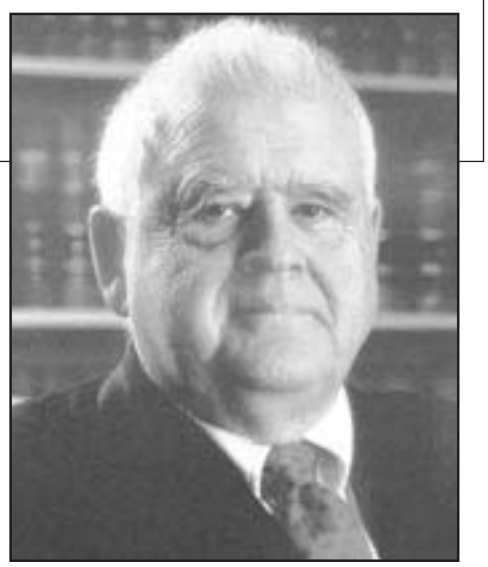

Judge Robert Cauchon

Leon J. Lombardi is an associate justice of the Massachusetts Land Court.

Greco: Profession must fight hard to beat back assault on attorney-client privilege

[Editor's note: The following is a transcript of keynote remarks by Michael S. Greco, president-elect of the American Bar Association, at the November 2004 meeting of the Real Estate Bar Association in Westborough.]

Thank you very much for inviting me to join you, and for giving me the opportunity to share a few thoughts.

I visited with you back in April in Boston, but that was before Boston became home of the World Champion Red Sox. It is even more pleasant to be with you now.

In April, I talked about the unauthorized practice of law, and the legal profession's challenge to provide a universal and accepted definition of the practice of law that will serve to protect the public in this age of easy access to information, misinformation, and services.

Today I want to address another controversial and troublesome issue facing our profession: the threat to the attorney-client relationship.

Recent regulatory policies and activities of federal governmental agencies are threatening to destroy the attorney-client privilege.

One example is the proposed amendments to federal sentencing guidelines for corporations, associations, unions and other types of entities. One such amendment would authorize the government to urge organizations to waive the attorney-client privilege and work-product protections. Such a waiver would be urged so that the entity could thereby demonstrate its "thorough" cooperation with the government, qualifying for a reduction in the culpability score under the sentencing guidelines.

Another policy – one that directly affects the real estate industry — comes from the USA Patriot Act. The federal government has proposed rules to combat alleged money laundering and terrorist financing in real estate transactions — transactions that normally are governed by state and local law.

The ABA Section of Real Property, Probate and Trust Law is concerned that the imposition of the Bank Secrecy Act's

ABA President-Elect Michael S. Greco

anti-money laundering program requirements on lawyers would adversely affect the attorney-client relationship, particularly the duty of confidentiality.

As we in this room know full well, a client's trust in the confidence of his or her communications with their lawyer is necessary for the effective representation of the client, including advising the client, if necessary, to refrain from wrongful conduct.

Unless and until evidence of attorney criminal conduct is produced, the presumption should be that the sanctity of communications between client and lawyer must be preserved.

Several bar-related organizations around the country (including the Florida State Bar's Real Property Section) have taken the position that anti-money laundering regulations should not be imposed on real estate attorneys, because such imposition may force these attorneys to breach important ethical obligations in order to comply with federal real estate regulations. As we lawyers know, this would have a chilling effect on the lawyers' role in assisting client compliance with the law.

Another example includes lawyers who provide advice and assistance concerning tax shelters. What the IRS had begun,

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Homestead exemptions: An update of Massachusetts law

By Robert J. Moriarity Jr.

Conveyancing attorneys should be aware of recent activity in the area of homestead exemptions – both in the Legislature and in U.S. Bankruptcy Court decisions. This article is intended to provide information with respect to these recent developments so as to keep our members informed in an area that is always of interest and concern to our clients.

Legislative

The first of these developments is the enactment of Chapter 218 of the Acts of 2004, which raised the amounts of the homestead exemption under M.G.L. c.188, §§1 and 1A from $300,000 to $500,000. The bill was signed by Gov. Romney without an emergency preamble and took effect on Oct. 26, 2004.

The Act provides that it is retroactive and applies to declarations filed or recorded prior to the effective date of the Act, except that the increased amount will not apply to "any lien, right or interest recorded or filed for registration before the effective date of this act." There is no need to file a new declaration to take advantage of the increased amount.

The limitation that the Act does not apply to previously recorded liens is not expected to have a serious impact on the effectiveness of the increase in the amount of the exemption in large part because in the Bankruptcy Court the homestead is given priority over unperfected liens, regardless of the sequence of filing.

Bankruptcy cases

In Re Hildebrant (Docket No. 03-44401), decided by U.S. Bankruptcy Court Judge Henry J. Boroff, is a case of first impression in Massachusetts. Boroff held that a deed terminates a homestead exemption unless there is an express reservation.

In 2000, Brian Hildebrandt and another person (Renaud) acquired a residence as tenants in common. Later that year Hildebrandt recorded a Declaration of Homestead.

Subsequently in April 2003, Hildebrandt and Renaud jointly executed a deed to Hildebrandt, who filed for bankruptcy. The bankruptcy trustee filed an objection to the exemption.

Hildebrandt argued that he didn't lose the homestead and that it was enhanced by his obtaining the remainder of the interest in the residence.

But Judge Boroff disagreed and upheld the trustee's objection to the exemption. At least at first blush it would appear to go against the general proposition of *Dwyer v. Cempellin*, 424 Mass. 26, that Chapter 188 should be "liberally construed in favor of the debtor" since a deed from Renaud to Hildebrandt, without Hildebrandt as a grantor, would have had the same effect. Judge Boroff's decision has been appealed and it will be interesting to follow this case to see if it is upheld.

By any analysis, this case is a warning to practitioners that they must consider the consequences of any transfer property between related parties. This can become an issue where, for example, a lender has required that title be vested in a particular manner because of credit concerns. Sometimes unintended consequences can result from a transfer from one party to another and then a subsequent transfer back. A prior existing homestead may have been unintentionally terminated.

Another case, *In re DesRoches* (Docket No. 03-44855), received wide spread coverage. But the case may not stand for what it might appear to say on first impression.

The case was reported by Massachusetts Lawyers Weekly, with a focus on statements in Judge Boroff's decision relying on Massachusetts being a title theory state and that a mortgage without an express release of homestead contained within it would act as a release under Section 7.

In fact, the decision that Judge Boroff reached was "because the homestead is *subordinated* (emphasis added) to the

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Robert J. Moriarty Jr. is president-elect of the Real Estate Bar Association. He is a founding partner of Marsh, Moriarty, Ontell & Golder, P.C. in Boston.

'Boat anchors' and ASPs: Getting up to speed with new computer technology

By Michael P. Krone

Do you have any "boat anchors" in your office? I'll bet that you do. In technology parlance a "boat anchor" is what you call a piece of technology hardware that's over three years old.

Many small practitioners (and quite a few large firms) find themselves with this dilemma: Is it time to purchase new computer equipment?

The rule of thumb is that anything older than three years should be replaced. The reasons are numerous, but the most important one is that new software works better on more advanced hardware. Computers take quantum leaps in technology from year to year. The Pentium III 750 MHz computer with a 5 Gigabyte hard drive you purchased for $1,400 three years ago can be replaced for a third of that cost with a machine that is five times faster, more stable and is optimized to work in the current technology environment.

Upgrading your existing computer hardware is senseless given the low cost of replacement hardware today. A recent review of the Dell Website found a 2.4GHz Pentium 4 processor with 512 MB of RAM and a 17-inch monitor for under $500. This computer is setup for the network and office environments and comes with Windows XP.

Dell is not the only place to find deals like this so this price is not unique. The point here is that cost should not be the motivating factor. Efficiency should be. Newer hardware and operating software work better, faster and with fewer problems. Windows XP has so many diagnostic functions that it can often fix problems before you see them.

How does the small practitioner begin the process of upgrading the office computer system? The computer savvy may be able to accomplish this task themselves if the office is small enough. Otherwise the engagement of a computer consultant is essential.

The thing to remember is not to be oversold. Don't buy bottom of the line, but don't buy top of the line either. With a useful life of two to three years spending more than you need will never pay back.

The other thing to remember is that the technology environment changes by the

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Cost should not be the motivating factor. Efficiency should be. Newer hardware and operating software work better, faster and with fewer problems.

Attorney Michael Krone is vice president and special counsel for First American Title Insurance Company and is chair of the REBA Technology Committee.

New statute extends Massachusetts tax liens

By J. Patrick Walsh

On Aug. 9, 2004, Gov. Romney signed into law Chapter 262 of the Acts of 2004. ("Chapter 262"), which makes numerous changes to existing tax laws.

Of particular interest to REBA members are Sections 26, 29 and 70, which will soon extend and otherwise amend the time limits of general Massachusetts tax liens to conform them to provisions relating to general federal tax liens.

A comprehensive list of the taxes included in the general lien provisions can be found at §783, Crocker's Notes on Common Forms, 8th ed. (MCLE 1995 & Supp. 2003).

J. Patrick Walsh is regional counsel for Chicago Title Insurance Company in Boston. He is a member of the REBA Title Standards Committee and the Legislation Committee.

The last two sentences of M.G.L. c. 62C, §50(a), which were in effect until Jan. 1, were concise and simple:

"The lien shall arise at the time the assessment is made or deemed to be made and shall continue until the liability for the amount assessed or deemed to be assessed is satisfied. Said lien shall in any event terminate not later than six years from the date it was created."

These sentences are amended by Section 26 of Chapter 262, which reads as follows:

"Section 26. Subsection (a) of section 50 of said chapter 62C, as so appearing, is hereby amended by striking our the last 2 sentences and inserting in place thereof the following 6 sentences: The lien shall arise at the time the assessment is made and shall continue until: (1) the liability for the amount assessed or deemed to be assessed is satisfied; (2) a judgment against the taxpayer arising out of such liability is satisfied; or (3) any such liability or judgment becomes unenforceable by reason of the lapse of time within the meaning of section 6322 of the Code.

Notwithstanding section 65, the lien created in favor of the commonwealth for any unpaid tax shall remain in full force and effect for: (i) a period of 10 years after the date of the assessment, deemed assessment or self-assessment of the tax; or (ii) for such longer period of time as permitted by section 6322 of the Code, in effect and as amended from time to time, and as construed or interpreted either by the regulations or other authorities promulgated under section 6322 of the Code by the Internal Revenue Service or by any federal court or United States Tax Court decision.

If, by operation of said section 6322 of the Code, a tax lien in favor of the commonwealth would extend beyond its initial or any subsequent 10-year period, the commissioner shall be authorized to refile his notice of lien. If any such refiled lien is filed within the 'required refiling period', as that term is defined in section 6323 (g)(3) of the Code, the lien in favor of the commonwealth shall relate back to the date of the first lien filing. Otherwise, any such refiled lien shall be effective from the date of its filing. The commissioner of revenue shall promulgate such rulings and regulations as may be necessary for the implementation of this subsection."

Subparagraph (i) of Section 26 of Chapter 262 amends M.G.L.c. 62C, §50 by extending the lien for Massachusetts taxes from six years to 10 years.

In addition, subparagraph (ii) of Section 26 ties the time period of the general Massachusetts tax lien to that of the general federal tax lien by referring to Section 6322 of the Internal Revenue Code as governing the interpretation of the Massachusetts lien.

26 USC §6322 reads as follows:

"Period of lien. Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by lapse of time."

Note the provision in Section 26 that states that the Massachusetts tax lien shall remain in force and effect "...for such longer period of time as permitted

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Sellers wise to get legal advice before conveying property

By Mike Dunning

Caveat emptor. Let the buyer beware. This is the ancient adage warning a *buyer* to be cautious when entering into a transaction.

While this saying is well known, and reminds us of the perils of purchase, the fact is that in this day and age there are a multitude of perils awaiting the unwary *seller* as well, especially in real estate transactions.

While the stakes are high and the obligations and complications associated with selling real estate are much greater than ever before, many sellers fail to see the need for legal representation and believe that all they have to do is to appear at the closing and pick up their check.

Mike Dunning practices with Dunning & Kirrane LLP in Mashpee. He has recently concluded a three-year term on the REBA Board of Directors.

There are four stages to a seller's real estate transaction: the listing agreement; the offer; the purchase and sale agreement; and the preparation for the closing itself.

Listing agreement

An inexperienced seller may assume that the real estate commission in non-negotiable. The fact is that the common residential commission rate, 6 percent, can often be reduced to 5 percent or lower.

A seller may not realize that he can exclude from the listing agreement sales that he generates himself, such as sales to family members, neighbors and others who might be interested in the property.

A seller often fails to recognize the potential liability of the common listing agreement, which may provide that liability for the accuracy of information relating to the property shall be the sole responsibility of the seller. We see cases every year where a seller improperly describes his residence as a four-bedroom residence, whereas in fact, it was originally designed as a three-bedroom unit, and the septic system was designed for a three-bedroom layout.

When the Title V report is complete, this fact is discovered, with adverse consequences for the unwary seller, often requiring expensive upgrades to the septic system that could have been avoided, to say nothing of unexpected delays. What the seller tells the broker will often become a representation, which may survive the closing and create future liability. These statements should be reviewed by counsel prior to execution.

Offer

It is often overlooked that a signed offer is an enforceable contract. A seller can be compelled under an action for a specific performance to convey the property according to the terms of the offer. The pitfalls at the offer stage include an extremely low deposit. A deposit should bear a reasonable relation to the sale price and often indicates the financial strength of the buyer. Remember, the deposit cannot be unilaterally raised at the purchase and sale stage.

A seller is obligated to convey a "good and clear record and marketable title of record." Theoretically, a seller may be obligated to clear the title of title encumbrances he believed would be assumed by the buyer, such as a lien for municipal betterments.

Often, the offer is accompanied by an addendum which, when signed, becomes an obligation, imposing additional burdens on the seller.

If the sale is to be in "as is" condition, it should be stated in the offer. If fixtures are excluded, such as the dining room chandelier, it should be explicitly stated.

In sum, the offer is an important and enforceable agreement. Yet it is treated in a light and informal way, on the assumption, which may be incorrect, that any disagreements can be worked out at the purchase and sale agreement stage.

Purchase and sale

Most of the time, the Boston Board of Realtors standard form purchase and sale agreement is used. It is often modified by the broker, or by a buyer's attorney.

One item to aware of is a "municipal betterment assessment." Virtually all buy-

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Revocation of will by marriage: Potential pitfalls for the conveyancing attorney

By David N. Hellman

Who would think (other than knowledgeable lawyers) that a widow could lose half of her devised estate simply because she married the man who left her everything in his will?

I recently confronted this potential problem in the course of a real estate closing. My clients were receiving a deed from a surviving spouse. The property had been conveyed in 1977 to the decedent and our grantor, who were not married at the time, as tenants in common.

The decedent executed a will in 1990 that stated essentially, "I make no provision for my issue as I have provided for them previously and I leave all the Residue to my friend____", (his tenant in common who later became his wife and our sole grantor).

If the intention of the decedent is to have the will survive the subsequent marriage, it must *explicitly* state in the will that it was made in contemplation of marriage and intended to survive the marriage.

The decedent married our grantor soon after he executed the will and then died the next year leaving his spouse and prior issue. Because the title searchers were overwhelmed by the volume of transactions these last few years, I was first reviewing the title report the morning of the closing, shortly after its arrival.

As you may imagine, I got a knot in my stomach as I reviewed the report. The clients arrived from New York as I was urgently on the phone with attorney John Bien of LandAmerica who was of great assistance. My clients were using an out-of-town lender and the mortgage funds had been wired in. I briefly explained the situation to our clients and sent them for coffee while I worked on a resolution.

Statutory considerations

The relevant statute, M.G.L. c.191, §9, states in pertinent part: "The marriage of a person shall act as a revocation of a will made by him (sic) previous to such marriage, unless it appears from the will that it was made in contemplation thereof."

Also, M.G.L. c.190, §1, which pertains to descent and distribution of property not disposed of by will, states in pertinent part (paraphrased): If the decedent leaves a spouse and issue, the surviving spouse receives the first $200,000 and one half of the remaining real and personal property.

There are relatively few cases reported on whether a will was made in contemplation of marriage.

In *Sughrue v. Barlow*, 233 Mass 468 (1919), the Supreme Judicial Court held

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A REBA Board member and chair of the Ethics Committee, David Hellman is a partner with Hellman Shearn & Knight in Great Barrington.

FTC begins enforcement of federal privacy safeguards law

By Casey Foreman

With the convenience and immediacy of e-mail communication, more attorneys and title professionals are using e-mail as a tool for distributing important information to buyers, sellers, and other parties to a real estate transaction. It's easy and it's fast – it's also not secure.

It's not uncommon for something like the following to be sent via e-mail:

"John, here's a copy of the closing statement listing all the fees and expenses we'll be paying in connection with the sale of your property. Please let me know if you've any questions." <HUD1.attachment>

Ed, XYZ Title Company"

This sort of communication has trouble written all over it.

In an article published in the September edition of Mortgage Banking, the trade journal of the Mortgage Bankers Association of America, Thomas J. Healy, senior vice president of Hanover-Trade, Inc. in Edison, N.J., argued compellingly against the use of e-mail to convey non-public confidential customer information, describing the security lapses and opportunities for intercepting information en route via e-mail.

Healy writes, "[The federal Gramm-Leach-Bliley Privacy Act ("GLB")] requires financial institutions to fiercely and diligently protect consumer privacy. Simply e-mailing your loan level data to your vendor falls far short of the standard established by GLB."

He's absolutely right!

E-mail is insecure, unpredictable, exceedingly difficult to track and vulnerable to external attacks, leaving sensitive information such as loan numbers and social security numbers unprotected.

And while his targeted audience was mortgage lenders who were sending sensitive loan and consumer data via e-mail, the recent enforcement actions announced by the Federal Trade Commission of the Safeguards Rule provision of GLB against Nationwide Mortgage Group, Inc. (Nationwide) and Sunbelt Lending Services Inc. (Sunbelt), a subsidiary of Cendant Mortgage Corp., should now be causes for concern to every service provider (i.e., attorney, closing agent, etc.) and to their mortgage lending clients.

In the case of Sunbelt, the FTC's allegations included that Sunbelt failed to oversee the security practices of its service providers.

In a recent speech given at the American Land Title Association convention in Boston, the speaker (an attorney) responded to a question from the audience concerning the lack of security with e-mail by saying he believed there was no problem with using e-mail to communicate information to the parties in a transaction provided the obligatory confidentiality language was included: "This information is confidential and only for the intended recipient, etc."

Also during the convention and in numerous conversations with attendees that included both attorney and lay real estate professionals, it became clear that there's little to no awareness of this pending threat to a consumer's privacy within the title industry.

This has to change. Both the legal and title industries have to respond as aggressively to protecting consumer privacy as the mortgage industry.

According to the FTC's complaints against Nationwide and Sunbelt, both companies allegedly failed to comply with the rule's basic requirements, including that they assess the risks to sensitive customer information and implement safeguards to control these risks.

In addition, Nationwide allegedly failed to (i) train its employees on information security issues, (ii) oversee its loan officers' handling of customer information, or (iii) monitor its computer network for vulnerabilities. Sunbelt also allegedly failed to oversee the security practices of its service providers and of its loan officers working from remote locations throughout Florida.

Is the title industry ready for such scrutiny? The issue needs an urgent spotlight. The FTC will not wait and more enforcement actions are inevitable.

And while title professionals may be slow seeking out a solution on their own, some mortgage lenders are implementing a zero tolerance policy with their services providers. So compelling is this need, they're even providing the solution at no cost to their service providers.

The time to get serious about protecting consumer information is now, and the cost of compliance is so much lower than the cost of delay.

Casey Foreman began his career in the title insurance industry, managing offices for two national title underwriters before joining First Title Agency, Inc. (Cincinnati, Ohio) as a co-owner in 1989. Casey helped grow that agency into one of the largest and most successful title agencies in southwest Ohio. In 1994, he co-founded the company that is now known as eLynx, Ltd., which provides secure, electronic document delivery in mortgage banking.

New statute extends Massachusetts tax liens

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by section 6322 of the Code, in effect and as amended from time to time..."

An additional change in subparagraph (ii) of Section 26 will permit the extension of a general Massachusetts tax lien when it is refiled in accordance with the provisions of 26 USC §6323 (g)(3). This Internal Revenue Code section reads as follows:

"(3) Required Refiling Period. - In the case of any notice of lien, the term "required refiling period" means -

(A) the one-year period ending 30 days after the expiration of 10 years after the date of the assessment of the tax, and

(B) the one-year period ending with the expiration of 10 years after the close of the preceding required refiling period for such notice of lien."

Section 29 of Chapter 262 amends that part of M.G.L.c. 62C, §65 entitled "Time for collection of taxes," by adding the following subparagraph (ii):

"Taxes shall be collected: ... (ii) within any further period after said 6 year period during which the taxes remain unpaid but only against any real or personal property to which a tax lien has attached and for which a notice of lien has been filed or recorded under section 50 in favor of the commonwealth in accordance with applicable state or federal law within 6 years after the assessment of the tax; ..."

This amendment provides that the commonwealth must record its lien within 6 years of the date of assessment. If this is done, the time for collection of the taxes appears to be extended for as long as the lien is in effect, whether initially for 10 years from date of assessment, or for longer periods as a result of having been properly refiled.

Section 70 of Chapter 262 sets forth the effective date of these revisions and reads as follows:

"Section 70. Sections 26 and 29 shall take effect on January 1, 2005, and shall be applicable to any tax liability, inclusive of penalties, interest, costs, forfeitures, or additions to tax, which remains due and unpaid as of January 1, 2005, or which is assessed on or after January 1, 2005. Any notice of tax lien in favor of the commonwealth recorded on a date making it less than 6 years old as of January 1, 2005 shall, if not sooner discharged as a result of payment of the tax, continue in full force and effect for a period of 10 years from the date of assessment of the tax without the need for any notice of lien re-filing by the commissioner. Thereafter, any further extension of the lien and any lien re-filing requirements shall be governed by section 50 of chapter 62C as amended by this act."

As a result, Massachusetts tax liens that are recorded and have not expired on Jan. 1, 2005 will be extended from six years to ten. However, if a six-year Massachusetts tax lien expires by operation of law between Aug. 9, 2004 and Jan. 1, 2005, it will not be revived by Chapter 242.

It has been held that general Massachusetts tax liens apply to after-acquired property. *Luchini v. Commissioner of Revenue*, 436 Mass. 403, 764 N.E.2d 870 (2000). Under Chapter 262, the time period will now extend for 10 years instead of six. Also, there will be an additional 30 days after the initial 10-year period for the Department of Revenue to refile its lien.

Therefore, as a reminder, in any purchase transaction, it is important to run the names of grantees for general Massachusetts tax liens in addition to federal tax liens. For probate property, the names of devisees and heirs at law also need to be run to check for general Massachusetts (and federal) tax liens.

Mark Your Calendars!

REBA 2005 Spring Seminar

May 9th, 2005
Wyndham Westborough Hotel

National affairs update: Uniform Residential Mortgage Satisfaction Act and a new challenge to 'mark-ups'

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Section 204 deals with the form and effect of satisfaction. The requirements are those we typically see in a discharge, although there is a reference under (a)(3) that the satisfaction should contain a legal description of the real property identified in the security instrument, but only if a legal description is necessary for a satisfaction to be properly indexed.

Article 3 is entitled "Satisfaction by Affidavit."

Section 301 deals with the affidavit of satisfaction if the mortgage lender fails to file the satisfaction. The Act addresses the recording and form of the affidavit, the effect of the affidavit and the liability for filing a false affidavit.

Mark-ups

In prior issues of The Conveyancer and REBA News, we addressed decisions by the 4th, 7th and 8th Circuits that "the text of Section 8(b) clearly and unambiguously does not prohibit mark-ups and that HUD's interpretation of the section to the contrary was either an impermissible one or entitled to no deference."

However, in September 2004, the 2nd Circuit in *Kruse vs. Wells Fargo* apparently directs the courts to defer to HUD's opinion on this matter.

The class action was brought by plaintiff homeowners on behalf of consumers who obtained loans from Wells Fargo dating back to 1995. The complaint included allegations that the defendants violated Section 8(b) by (1) charging excessive and unreasonable fees for settlement services that the defendants provided directly to the plaintiffs, and (2) marking up fees when charging the plaintiffs for real estate settlement services performed for the plaintiffs by third parties.

In this case, the defendants are alleged to have paid third parties to perform tax services, flood certification and document preparation. In the case of document preparation, the plaintiffs claim that the defendants outsourced this service at a typical cost to the defendants of $20 to $50 and then, without performing any additional services, charged consumers seeking home mortgages $150 to $300 for the service.

As to the issue of overcharging, despite HUD's claim that "unreasonably" high prices for certain settlement services is a violation of Section 8(b), the court concluded that Section 8(b) clearly and unambiguously does not extend to overcharges.

The 4th, 7th and 8th Circuits had previously held that the text of Section 8(b) does not prohibit mark-ups. Their reasoning was that the phrase "no person shall give and no person shall accept" requires that there be both one or more persons who give and one or more persons who receive a settlement services fee other than for services actually performed for there to be a violation of the statute.

In *Kruse*, the 2nd Circuit concluded that because Section 8(b) is not clear and unambiguous with respect to its coverage of mark-ups that "we must determine whether deference is due HUD's interpretation of the statute as expressed in the Policy Statement."

The court concluded that the plaintiffs sufficiently alleged a cause of action and reversed the District Court's dismissal of the plaintiffs' federal claims with respect to mark-ups. The case was remanded to the District Court with the understanding that the plaintiffs would need to establish that the defendants charged fees for services "without performing any additional services."

In November 2004, the court rejected Wells Fargo's petition for a rehearing. Wells Fargo now must choose whether to pursue the case in the U.S. District Court or file a petition for a writ of certiorari before the U.S. Supreme Court. The District Court will need to determine whether Wells Fargo in fact "marked-up" the fees charged by third-party settlement service providers and, if so, whether it performed additional settlement services and thereby earned any mark-up fee.

Currently mark-ups, without the requirement of additional services, are legal in the 4th, 7th and 8th Circuits. Elsewhere, according to HUD, these mark-ups are violations of federal law until courts rule otherwise. Certainly the impetus to be a bundler of services will be less if the bundler cannot mark-up the fees for the various services.

Until the *Kruse* case is settled, companies will need to analyze their mark-up practices and their bundling procedures.

Judge Robert Cauchon: Varied interests, vital mind

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automobiles for the next 40 years.

Following the inauguration of Gov. Peabody, the Democratic State Committee turned to Bob to serve at its executive director. Bob held that position until 1964, when the Governor named Bob as his statewide campaign director. That year also saw Bob attending the first of two consecutive Democratic National Conventions. In September 1964, Gov. Peabody was defeated for renomination by then-Lt. Gov. Francis X. Bellotti.

The next chapter of Bob's professional life opened in 1965, when he joined the Boston law firm of Sullivan & Worcester. For 21 years, Bob specialized in real estate litigation and public utility regulation.

While in private practice, Bob remained active in town affairs and served at various times on the Board of Registrars and the Charter Commission. His love of history led him to become an active member of the Marshfield Historical Society. In his early 19th century house, Bob collected antiques and assembled a vast collection of Civil War books. An autographed portrait of General Sherman and Civil War firearms hung on the wall of his den. Bob was even known to occasionally play Civil War tunes on a violin.

Perhaps most significantly, Bob was a member of the Marshfield Zoning Board of Appeals from 1981 to 1986 and served for a time as its chair. This experience, no doubt, proved helpful to Bob as he began the next phase of his career.

Common sense judge

Recognizing Bob's rich experience in both the public and private sectors, Gov. Michael S. Dukakis in 1986 nominated Bob to be an associate justice of the Land Court. Once confirmed, Bob became the 16th judge in the history of the court since its inception in 1898.

During his 10-year tenure as a judge, Bob wrote over 500 decisions and countless other orders. Boston attorney J. Owen Todd, a former Superior Court judge, described Judge Cauchon as "a study in contrasts." The initial impression of Judge Cauchon, in the words of Todd, "was a large, rangy fellow casually dressed who might be a farmer or tradesman. In contrast, when one discussed a legal issue with him the initial image was transformed. Quickly one formed an appreciation for the facility of his mind and breadth and width of his legal knowledge."

Judge Cauchon presided over a number of notable cases dealing with regulatory takings, zoning, and significant land use disputes. Those cases often involved the competing interests of public versus private property rights.

Because Land Court judges sit without juries, Judge Cauchon wrote approximately 500 decisions during his time on the bench and those decisions were straightforward and devoid of personal bias. He did so based upon appropriate legal precedents mixed with a healthy dose of his unfailing common sense. One case might be viewed as protecting the right of an individual to use his or her land against unfair interference from regulators, while the next decision might uphold the application of a restrictive zoning by-law or ordinance.

One of Judge Cauchon's most memorable decisions came within six months of his retirement. The case, which tested the validity of three-acre zoning in Edgartown, was considered to be of utmost importance to all Martha's Vineyard towns, as well as to other rural and coastal communities throughout Massachusetts.

According to Edgartown's trial counsel. Ronald H. Rappaport, Judge Cauchon handled the 21-day trial with his "usual firm hand and wrote a thorough and well-reasoned opinion upholding the town. What most characterized him to me was his ability to get to the heart of the matter to arrive at a fair result."

On appeal, a unanimous Supreme Judicial Court upheld Judge Cauchon's judgment in *Johnson v. Edgartown*, 425 Mass. 117 (1997).

Not the 'retiring' type

At age 70, Bob stepped down from the bench in June 1996. At that time, the Boston Globe wrote that Judge Cauchon's knowledge "has transformed [the] Land Court from the back waters of the Massachusetts trial court system to the court of choice for high-profile land use cases." In the article, Bob was quoted as saying "[t]he thing you develop is the ability not to be on any side. You find out there are two sides when you listen and often the side you thought was wrong, is right."

After the death of his wife in 2000, Bob relocated from Marshfield to a home next to Lovells Pond in Cotuit. Having the pond a few feet from his back door gave Bob the opportunity to indulge in fishing, one of his many interests. Bob developed plans for how he wanted his new residence to look, including room for his vast library and stamp collection. The large basement also proved to be an ideal space for Bob to spend time on another hobby. Bob took some initial steps to set up a massive model train layout that, upon completion, would have been the envy of all.

Being "retired" on Cape Cod, however, did not mean Bob was inactive as a legal professional. Bob, in fact, began a few new ventures. Putting to use his experience and sense of practicality, Bob became a mediator with REBA Dispute Resolution. When called upon by a number of attorneys, Bob became a consultant and, at times, an expert witness at trials. On a few occasions Bob served as co-counsel on some land use cases. So much for retirement!

It is difficult to do justice to the range of Bob's interests and activities. In addition to the activities already mentioned, Bob one day might be hiking the White Mountains or the next day canoeing on the North River.

In earlier years, Bob was an avid photographer. Often, his children would find him sitting in a comfortable chair in Marshfield playing "loudly" his classical music recordings. Bob loved old maps and took great enjoyment in exploring new locales and finding different ways to get to familiar spots.

As a reward to his children who often accompanied him on his excursions, such as to Bash Bish Falls in Mt. Washington, Bob would often end up at favorite an ice cream stand in Whitman. On more than one occasion, a law clerk to Judge Cauchon would stop with the judge at that same ice cream stand as part of their route when taking a view.

Bob possessed a keen mind and an encyclopedic memory. Those traits coupled with the rich diversity of his life experiences made him a lively raconteur. He told his stories with humor and youthful energy. Once Bob started to tell a story, you better be ready to put aside whatever you were doing for awhile and enjoy his colorful tale.

On a personal note, I considered Bob Cauchon a mentor and, above all, a friend. On behalf of all who knew Bob, I can say without fear of contradiction that he will be greatly missed.

Judge Cauchon is survived by his daughter, Barbara, his two sons, Rich and Tom, and four grandchildren. Barbara is the guardian of a number of scrapbooks that chronicle not only Bob 's successful career, but also his rich life. The Cauchon family is most fortunate to have this treasure that preserves for future generations the memories of this most accomplished individual.

Homestead exemptions: An update of Massachusetts law

Continued from page 6

Mortgage, the Debtors have no equity in the Residence. The Motion (for Relief from Stay) must be granted."

In this case, the debtors owned a residence in Chicopee subject to a first mortgage. In February 2000 the debtor filed a declaration of homestead and in October 2000 the debtors granted a mortgage to a BankNorth predecessor entity to secure the business debts of two closely held corporations.

The mortgage did not contain a specific release of the homestead nor did it contain any reference at all to the homestead. The debtors filed for bankruptcy protection, but were not able to effect a reorganization. BankNorth filed for relief to permit it to foreclose.

The debtors argued that BankNorth was subject to the homestead since it was on the record at the time of the mortgage that did not contain a release of the homestead, which clearly would have acted as a subordination under Section 6.

Judge Boroff analyzed recent Massachusetts decisions on "title theory" and concluded that the Supreme Judicial Court would continue to determine that Massachusetts is a title theory state and that the mortgage conveyed title and thus was a release under Section 7.

Judge Boroff stated: "Under our title theory, it (the Mortgage) constitutes a deed of conveyance which has transferred title to the bank . . . and *subordinated* (emphasis added) any homestead he possessed to the mortgage lien."

What is important to note in this case is that the debtor had no equity in the property if the BankNorth Mortgage had priority over the homestead, the result that I believe most would expect. Most practitioners would have been very surprised to find that this mortgage was subordinate to the homestead, either on the basis that it was subordinated under Section 6 or that it was released under Section 7, either result being the same where there was no equity after the mortgage. The result and the wording of the decision might have been different where there was equity in excess of the mortgage.

The result is that Judge Boroff ruled that the homestead was subordinate to the mortgage and did not reach the decision of whether the homestead would have been released if there were additional equity. Conveyancers are left without an answer to this question and with a little more doubt. What is clear however from the emphasis on the lack of subordination of the homestead in the mortgage is that a mortgage with a release of the homestead will act to subordinate the homestead to the mortgage.

The better practice continues to be not to record an additional homestead after a mortgage, with the caveat that counsel to the borrowers should make certain that there is a release in the mortgage. This avoids the issue of reviving the priority of existing debts while still maintaining the homestead protection.

In *In Re Jackson* (Docket No. 02-12120), U.S. Bankruptcy Court Judge Joan Feeney held that debtors could sue their attorney for malpractice based on a failure to ascertain whether they had a homestead exemption on their property prior to filing bankruptcy and ensuring one was recorded.

The debtors owned a home in Plymouth County which was partially encumbered by a secured mortgage, but in which they also had equity of somewhere between $12,000 and $132,000 based upon various amended filings in the case. They had not filed a homestead and their initial counsel did not claim an exemption in the home.

The Jacksons were required to repurchase the equity in their home pursuant to their confirmed plan at a cost of approximately $67,000 to satisfy their creditors. Shortly after confirmation of the plan, they commenced an adversary proceeding against their initial counsel for malpractice.

The lawyer filed a motion to dismiss the adversary proceeding, which was denied by Judge Feeney. She found that the claim was an asset of the bankruptcy estate, and that its resolution was ripe for determination as a part of the case.

The sad part for the Jacksons is that they will only benefit to the extent that the damages (if it is determined that there are no other valid defenses to the action) exceed the amounts due to the creditors.

The rest of us need take warning that the failure to insure that a debtor has a valid homestead may likely lead to a claim of malpractice.

Conclusion

The area of homesteads continues to cause consternation and confusion. The amount of the exemption has been substantially increased and conveyancers need to be always cognizant of the implications of a real estate transaction on the homestead exemption. The Real Estate Bar Association will continue to work with other bar associations and the Legislature to amend Chapter 188 to resolve any ambiguities that may exist. The people of the Commonwealth deserve certainty when concerned with the largest asset most will ever posses.

Greco: Profession must fight hard to beat back assault on attorney-client privilege

Continued from page 5

Congress completed with the recent enactment of the JOBS Act. Now, when a lawyer provides counsel to a client concerning certain designated tax shelters – even if the lawyer did not assist in the creation of such a shelter – he or she must disclose to the government the name of the client and, more troubling, the nature and substance of the consultation.

While the ABA agrees with the overall objective of cracking down on the unscrupulous few who would undermine the integrity of the profession by exploiting attorney-client protection, a lawyer should not be held criminally liable, nor threatened with criminal liability, nor intimidated in any way, if he or she has violated no criminal law, and has only rendered independent legal advice.

The ABA has been working with the SEC to ensure that the lawyer ethics rules mandated by the Sarbanes-Oxley Act of 2002 do not harm the confidential attorney-client relationship. Section 307 of the Act instructed the SEC to adopt a new federal rule requiring all lawyers appearing and practicing before the agency to report misconduct "up the ladder" to the company's senior management, and if necessary, to its board of directors.

Although the ABA generally supported the SEC's "up the ladder" reporting rule – both in its written comments to the Commission and by formally changing its own Model Rule 1.13 to mirror the agency's new rule – the ABA strongly opposes the SEC's so-called "noisy withdrawal" rules.

Under these proposed rules, if the corporate client fails to take appropriate remedial steps after being informed by the lawyer of illegal activity, the lawyer would be required to withdraw from representation and disaffirm any tainted documents and the lawyer – or the company – would be required to notify the SEC of the withdrawal.

In the ABA's view, the noisy withdrawal proposals, though well intentioned, would destroy companies' trust and confidence in their lawyers, and would encourage companies to avoid consulting their lawyers on close issues or withhold necessary facts when they do consult lawyers.

Fortunately, the SEC is taking a second look at its "noisy withdrawal" rules.

Another example is what the FTC did two years ago in issuing regulations following passage of the Gramm-Bleach-Bliley Act, by mystifyingly including lawyers in the Act's definition of "financial institutions", and requiring lawyers to provide information confusing to clients, and inconsistent with the attorney-client privilege.

The ABA sued the FTC when it refused to respond to our request to correct the regulations, and the federal trial court enjoined the FTC. We have word that the FTC will file an appeal in early December. The ABA is prepared to continue to fight this issue in the appeals courts and in Congress.

These proposed rules and similar others – either inadvertently or intentionally – would severely weaken the attorney-client confidential relationship between companies and individuals and their lawyers. They would harm not only the clients, but also the investing public and society.

In response to these threats, the ABA has formed the Task Force on the Attorney-Client Privilege (on which Boston attorney Stanley Keller of Palmer & Dodge is serving).

The Task Force's mandate is to examine:

- The purposes behind the privilege and its exceptions;
- The circumstances in which competing objectives are currently being asserted by governmental agencies and others to override the privilege; and
- The extent to which the correct balance is being struck between these competing objectives and the important policies underlying the privilege.

The protection of communications between client and lawyer is a bedrock principle of the American justice system. It is vitally important that federal regulators and policymakers strike the right balance between compliance with the law and protection of the public. And it is our task – mine and yours – and one that the ABA Task Force has undertaken to help those regulators and policymakers get it right.

It is not merely a matter of good business, but of serving the public's interests. Even more important, it is about protecting the independence of the legal profession.

I believe firmly that any effort to undermine the lawyer's role in society, to marginalize or diminish the lawyer's role, to interfere with the traditional confidential relationship between lawyer and client, will harm not only the profession, but the people, and in the end, our democratic form of government.

Why do I say this?

Historically, it has been the lawyers who helped to found this republic, who drafted the sacred documents – the Declaration of Independence, the Constitution, and the Bill of Rights – and who for 225 years have been protecting the rights guaranteed every citizen in America by those documents. The people look to their lawyers to protect their rights, and we cannot fail them.

Attacks on lawyers are attacks on the profession whose main purpose is to protect those guaranteed rights, and to protect the people from the excesses of their government, including the federal agencies that are now targeting the attorney-client privilege.

William Shakespeare hit it on the nail when he said that the way to create chaos in society is to begin by killing all the lawyers.

Today the effort is death of lawyers by more subtle means. It is the role of the lawyer, the standing of the lawyer, the lawyer as protector of fundamental rights, the lawyer as trusted problem solver, the lawyer as respected citizen-statesman in society that some are trying to kill. And we must not let it happen, because the ultimate victim would be democratic society.

The American Bar Association is committed to the fair administration of justice. Our motto, "Defending liberty, Pursuing justice," says it all. We believe that lawyers are called on to make that motto a truth, and that is our goal every day, in every community in this great country.

We work to establish fairness and justice, particularly when disputes or problems rise to the level of entering the justice system. Lawyers have the ability to right wrongs, and to ensure that equitable treatment within the law is our guide.

It is part of our professional code of conduct: civility, independence, learning and public service. Increasingly in recent years the legal profession has been under unrelenting attack. Interest groups yearly spend millions of dollars on shameless and unfair advertising campaigns attacking not only lawyers, but also judges and our justice system.

Such negative attacks distort what lawyers do, and wrongly blame lawyers in order to cover mistakes or misconduct by others in society, including that of some unethical and unlawful members of the business community.

As lawyers, we take our share of hits – the lawyer jokes, and the negative criticism that lawyers and lawsuits drive up costs. While misguided and inaccurate, those charges are particularly popular in election years, as they have been in this one. Attacking lawyers has become a popular sport, particularly among those in society who are uninformed, misinformed, ignorant, or just plain mean-spirited.

But it is a sport, Shakespeare reminded us, that is dangerous to the continued health and stability of our society. It is a sport being played to a large degree by those who stand to profit the most by a crippled or ineffective legal profession.

To be sure, disdain for our profession has existed for a long time. A Yale commencement speaker, Timothy Dwight,

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once warned against the evils to be found in the legal practice. He accused our profession of meanness and deception, of needless litigation, of postponing trials to glean the last coin from a client's pocket, and he urged the graduates to shun a career as a lawyer like "death or infamy."

Interestingly, Mr. Dwight delivered his remarks in July 1776, a time when most of the signers of the Declaration of Independence and drafters of the Constitution were lawyers – men so high in stature and quality that Thomas Jefferson referred to them as "demi-gods."

While concern about the decline of respect for the legal profession in the minds of some may be interesting, the more important issue is the impact on the public's trust and confidence in our system of justice, and on the public's understanding of the critical role of lawyers in ensuring the Rule of Law.

While lawyers may not win a popularity contest, lawyers, despite the criticism, have always enjoyed a special status – and indeed a special place – in the hearts and minds of Americans.

I believe this is so because, notwithstanding the criticism, deep down the public knows that the legal profession has a mission that is bigger than the business of practicing law.

The people understand the concept of the lawyer as protector of rights and problem-solver, and the concept of the "lawyer-statesman," which combines practical wisdom and statesmanship to advance not only a client's interests but also those of society.

Simply stated, lawyers protect and serve the public. And the people know that.

But because lawyers are always in the news, because lawyers are at the center of commercial and social activity, and involved in highly controversial trials and issues – civil, criminal and transactional – we are easy targets for criticism.

Let me be clear. I am not advocating that a lawyer, no more than any other professional, no more than the President of the United States, is above the law. Lawyers, like everyone else, must be punished or disciplined for proven violations of criminal laws or ethical standards.

What I firmly do advocate is that lawyers not be held criminally or ethically liable for giving independent legal advice to a client, and not be held liable for a *client's* criminal conduct if the lawyer did nothing more than that which lawyers have done since the founding of our republic: giving legal advice after confidentially learning all the facts from a client, which the attorney-client privilege ensures that the lawyer will learn from that client.

It is the attorney-client privilege that enables the lawyer to serve best his or her client, by learning the worst from the client, which the client willingly communicates because of the protection of confidentiality. When the lawyer serves the client thusly, so are the public interest and society served.

I conclude these remarks by reminding the lawyers of America, and the people whom we serve, that the attorney-client privilege is fundamental to our system of justice and to our democracy, and that we must all vigorously protect it.

I don't need to tell you that lawyers have never been more important to society than now, because you know it as well as I do.

Your important work with the Real Estate Bar Association complements well our work at the American Bar Association.. I urge you to join us in our common missions, particularly in helping to protect the attorney-client privilege – a privilege that belongs to, and protects, the people.

Thank you for your kind attention.

Revocation of will by marriage: Potential pitfalls for the conveyancing attorney

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that the marriage revoked the will under the following circumstances.

Albert orally proposed to Helen, (his widow), promising that if she would marry him he would leave everything to her. The court stated, "She accepted his proposal according to its terms." 233 Mass. at 469. Albert then executed a will before marriage leaving Helen essentially everything and then they married subsequent to the will.

The SJC was unsympathetic to Helen's plight. The court said, "The words of the statute [which are essentially identical to M.G.L. c.191, §9] are precisely applicable to the facts of the case at bar. The will conveys no indication whatever by any of its words that it was made in contemplation of marriage and was intended by the testator to be operative notwithstanding his marriage." Id. at 470.

Alas, poor Helen received nothing even though the court, in dicta, said the marriage took place in consideration of a promise to make a will in her favor.

Fortuitous residency

As you can see, we had a serious issue before us, which I am glad to report was fortuitously resolved. The decedent was a New York resident at the time of making his will and the time of his death. His will had been submitted to probate in New York and to probate in Massachusetts as a foreign will and allowed in each instance.

Ryan v. Warden, 345 Mass 773 (1963), was remarkably on point to our situation. In 1959 while unmarried, the decedent executed a will in New York while a New York resident in which he left the residue to his dear friend and fiancée, the defendant Warden. The decedent then married defendant Warden six months after making his will. Four months later the decedent died.

The will was allowed in New York and as a foreign will in Massachusetts. As the decedent was domiciled in New York at the time of his death, his will was construed in accordance with the laws of New York where under the controlling section of the Decedent Estate Law (now the Estates, Powers and Trust Law), the will was not revoked by the testator's subsequent marriage.

Our circumstances were virtually identical to *Ryan v. Warden,* enabling us to close in a timely manner to the great relief of our anxious buyers who by then had consumed a quart of coffee each.

So what can we glean from all this besides the importance of obtaining our title reports well in advance of closing? First and foremost, if the intention of the decedent is to have the will survive the subsequent marriage, it must *explicitly* state in the will that it was made in contemplation of marriage and intended to survive the marriage. Second, the conveyancer must be aware of the (i) potentially devastating consequences to the devisee and the devisee's title and (ii) effect of marriage on a previously executed will.

If all else fails, pray the decedent was from the right jurisdiction.

REBA continues active legislative agenda as new session open

Continued from page 1

There appears to be a consensus for an approach by which the mortgage servicer or other party providing a pay-off letter, as well as the record holder of the mortgage, would be given notice, at the time of the pay-off, that the person paying off the mortgage will discharge it by affidavit if a discharge is not received within a specified period of time. The idea is that by giving the parties in interest advance notice, the law should allow for a far simpler discharge-by-affidavit mechanism than is now possible.

Other highlights of REBA's legislation include:

- Lender must provide a written payoff statement within five business days of request;
- Recording fee for the discharge would be prepaid as a part of the initial mortgage recording fee;
- Lender must provide to the settlement attorney a recordable discharge with all assignments and supporting documentation, including evidence of a non-record mortgage holder's authority, within 45 days of payoff;
- Realistic penalties for lenders who fail to comply;
- New provisions to simplify M.G.L. c.183, §5B affidavits, including to permit discharge by recordation of a paid note in place of a discharge, and also comply with Gramm-Leach-Bliley privacy requirements;
- Reduction in 50-year statute of limitations for old mortgages; and
- Reliance authority for a recital of corporate succession from a holder of record, without further evidence of corporate merger, consolidation, etc.

The bill failed when time ran out in 2004, in large part due to lender opposition to proposed penalties for non-compliance. An improved draft has been introduced for 2005-06, with no fewer than nine legislative sponsors in the House and Senate. This legislation will continue to be a high priority of REBA.

Other bills supported by REBA in 2004

S.6, another REBA bill, would make consistent the execution authority for agents of a mortgage holder to sign certain documents on its behalf, including instruments of subordination or powers of attorney that authorize action under the terms of the mortgage.

The bill proposes the same liberal authority requirement that applies to a discharge or assignment of mortgage instead of execution by two specified officers of the corporation. Passage of this bill before the end of 2004 was a REBA goal.

Another 2004 year-end goal was to pass S.983, which was a product of the Joint Land Court-REBA Committee on Guidelines for Registered Land. The inspiration for this bill is M.G.L. c. 156B, §115, which permits third parties acting in good faith to rely on instruments executed on behalf of a corporation.

Although no evidence of corporate authority or corporate existence or even of the identity of the officer signatories is necessary to record or register the instrument, there is no Land Court Guideline that explicitly authorizes this in the case of registered land. What this legislation seeks to do is to hold harmless the Land Court's Assurance Fund by making null and void any registered land instrument executed on behalf of a corporation by a person falsely purporting to be the president, vice president, treasurer or assistant treasurer. As a result, an instrument affecting registered land that is sufficient under G.L.c. 156B, §115 could be accepted for filing without any risk to the Assurance Fund.

Other bills on 2005 agenda

At the end of the 1998 legislative session Gov. Paul Cellucci pocket vetoed

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'Talking points' in opposition to bill allowing non-lawyers to handle real estate transactions

Below are general "talking points" to use when discussing with legislators reasons why House Bill 180 (H.180) should not become law.

H.180 – which was filed in the 2003-2004 session – would allow corporations or agents of corporations to draft legal documents (i.e., deeds, mortgages, leases, purchase and sale agreements), examine title, resolve title issues, represent lenders and issue title policies. The bill has been refiled for the 2005-2006 session and has not yet received a bill number.

Precedents

All three branches of Massachusetts government have endorsed the concept that *only* attorneys can draft legal documents and perform those functions H.180 now wants to change.

Legislature

- **M.G.L. c.221, §46.** This is the Massachusetts unauthorized-practice-of-law statute (Note: it is this statute H.180 would amend);
- **M.G.L. c.93, §70.** certification of title by lender's closing attorney.
- **M.G.L. c.183, §63B.** Requires "good funds" to be delivered to lender's closing attorney prior to recording mortgage loan documents.

Courts

- *Opinion of the Justices,* 289 Mass. 607, 613 (1934).
- *Massachusetts Association of Bank Counsel, Inc. v. Closings, Ltd.,* (Suffolk Superior Court, C.A. No. 90-3053-C, (Aug. 30, 1993).
- *In re Burton L. Schafer,* No. 88-21BD (Jan. 17, 1991) (Wilkins, J.) (activities which include delivering deed, reviewing computations of closing figures, and making telephone calls to locate missing mortgage discharge, constitute practice of law).
- *Massachusetts Conveyancers Association, Inc., et al. v. Colonial Title & Escrow, Inc., et al.,* (Suffolk Superior Court, Civil Action No. 96-2746-C) (confirms that the practice of law includes: (1) evaluating and ensuring as part of a closing or otherwise that the parties to a real estate transaction have complied with their various agreements; (2) preparing, drafting or reviewing legal documents that affect title to real estate or affect the obligation of the parties to the real estate transactions; and (3) representing lenders as their closing agents.)

Executive/Governor

Executive Order No. 455, §9C explicitly provides that a "Notary Public who is not an attorney licensed to practice law in Massachusetts or who is not directly supervised by an attorney, shall not conduct a real estate closing and shall not act as a real estate closing agent."

Controlling costs

1. Lawyers do not charge higher prices to close real estate loan transactions than non-attorneys.

2. There is no study or data within Massachusetts or in any other jurisdiction to support the contention that attorneys charge more than non-attorneys to close real estate loan transactions.

3. The legal fees charged for a loan closing in the 1970s are approximately the same in 2004 without any adjustment for inflation.

4. There is considerable competition among attorneys in Massachusetts when considering both fees and accessibility to borrowers. There are approximately 3,000 REBA members and approximately 3,000 non-REBA members conducting real estate closings in Massachusetts.

5. In the non-attorney states, competition is *diminishing* as a result of the purchase of the independent, non-attorney closing companies by the national title insurance companies. The result has been increased costs to consumers.

Consumer protection

Lawyers in Massachusetts protect consumers through (i) errors and omission insurance coverage; (ii) bar licensing requirements; (iii) Clients' Security Board funds; (iv) title, practice and educational standards of REBA; and (v) REBA's assistance in legislation to make certain that public interest is considered.

The non-attorney closing company would not be obligated to provide any of the above listed items, nor would it be in its interest in doing so as a for-profit company.

IOLTA

Millions of dollars of accrued interest earned on IOLTA conveyancing accounts is paid to a variety of non-profit entities providing access to justice and other legal services to individuals who can not afford to pay for such services.

The non-attorney closing company would not be obligated to pay any interest earned on its accounts for legal services for those individuals who can not afford to pay for such services. All such interest would accrue to the bottom-line profit of the for- profit, non-attorney closing company.

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legislation supported by REBA (then the MCA) and the Boston Bar Association to enact a good and clear record and marketable title act (Landowners Title Protection Act). While REBA has continued to support this legislation to wipe out certain ancient interests, we have been unable to devote the resources necessary to gain support for passage.

REBA now sees an opportunity to win that support. The BBA has re-filed the legislation for 2005-06.

REBA has re-filed legislation to provide for a 50-year statute of limitations to resolve a hidden interest potentially held by the Commonwealth in certain former railroad property. The need for this bill arises out of G.L. c.40, §54A, which requires written consent from the Executive Office of Transportation and Construction to the issuance of any municipal building permit for construction of any kind on land *formerly* owned and used by a railroad corporation as a right of way, or "land appurtenant to" a former right of way. This 1973 statute has been a trap for the unwary.

REBA re-filed another curative bill, to establish a 50-year limitation on sand rights and other profits à prendre, if the same had gone unused for an extended time, subject to the holder's right to record an extension of the same before the expiration of the 50-year period.

In no case, however, shall any such interest in land expire any earlier than three years from the legislation's effective date. This type of legislation is modeled after current statutes that limit the enforcement of certain restrictions and rights of entry.

The customary 50-year title search would often not reveal the existence of certain sanding rights, for example. REBA feels that to require the holder of the profit à prendre to record an instrument in order to continue such rights in land is a fair balancing of the interests at stake.

'Boat anchors' and ASPs: Getting up to speed with new computer technology

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day. Those of you running computers on Windows 95, 98 and ME have already learned that Microsoft has discontinued supporting those operating systems. This leaves them more vulnerable to viruses and hacking. More importantly, newer software is written for the newer operating systems and new printers. PDAs, scanners and the like are all optimized for Windows XP. Many won't run properly on anything below Windows 2000.

ASPs

ASP – or Application Service Provider – is a term used to describe software programs that are hosted by another company and do not reside on your computer. ASPs are becoming more popular with the advent of access to high-speed Internet connections. The benefits are that you don't house the software, you don't maintain the software and the software generally doesn't interfere with your other software.

The downside (although not really) is that you pay a monthly fee to the ASP to run the software on its server and upgrade it when necessary. You never own the software. Much like car leasing has become as popular, so to will ASPs become as popular as buying and housing your own software. Their true benefit is for those offices that cannot dedicate staff, time or resources to deal with the constant need to upgrade software and deal with the adverse consequences that invariably result when this process takes place.

It's always good to evaluate your office needs, requirements and resources on a regular basis. If you find that your office technology is in need of improvement then act quickly. Many small offices are amazed to learn the true cost of their procrastination when they do finally bring their technology resources up to date.

Now is a good time to review and make changes. Lulls in the conveyancing industry offer the perfect opportunity to get ready for the next boom.

Formal peer-to-peer mentoring program launched

Continued from page 1
months. The program administrator will try to pair lawyers based upon their professional concentrations, personal interests and the geographical proximity of their practices.

Participation in the program will:

- Allow REBA mentors and newer members to address practical issues and concerns common to the practice of real estate law.
- Help newer members develop proper professional and ethical values.
- Refer members to other committees, programs and organizations that may, in some instances, be better suited to address particular concerns and needs.
- Help newer members develop professional and client contacts.
- Encourage newer members to participate in REBA committees and events.

Mentors are active REBA members, frequent lecturers at continuing legal education seminars and highly regarded within their practice area. Some functions are beyond the scope of the mentoring program and mentors will refer the newer lawyer to other appropriate programs, resources and organizations.

These may include the following:

- Addressing specific ethical or substantive legal issues;
- Helping to identify and overcome substance abuse problems;
- Counseling lawyers experiencing financial, domestic, educational and/or psychological problems or issues; and
- Counseling lawyers who are the subject of disciplinary actions;
- Helping with job placement; and
- Establishing a co-counsel relationship with another lawyer.

REBA members who wish to participate in the program, as either mentors or mentees, should contact the REBA Mentoring Administrator Susan Graham at graham@massrelaw.org.

Sellers wise to get legal advice before conveying property

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ers will, when push comes to shove, agree to assume municipal betterment assessments. However, the standard form agreement may result in an obligation on the part of the *seller* to pay off betterments that could easily have been assumed.

Paragraph 10 of the standard agreement is often modified by buyer's counsel or the broker to require the seller to use reasonable efforts to remove defects in title and make the premises conform to the provisions of the agreement. The seller's attorney will routinely amend this provision to provide a cap of several thousand dollars. Without the cap, the seller's responsibility could rise to tens of thousands of dollars.

A seller is routinely obligated to provide all discharges of mortgages at the closing. Needless to say, this is a virtually impossible obligation to satisfy. If a buyer wants to terminate a deal, he can appear at the closing, demand the discharge, thus putting the seller in breach and forcing a return of his deposit.

With respect to condominium sales, the standard agreement provides that condominium reserves go with the unit, and so the seller is not entitled to reimbursement for funds being held by the condominium trust in reserve.

Also, many standard forms provide that if the deal falls through, the broker is entitled to one-half of the commission.

With respect to mortgage contingencies, the unwary seller may accept an unreasonably high mortgage contingency, thus contracting with a potentially weak purchaser with unlikely prospects to conclude the purchase.

Sellers or their counsel often add additional provisions, many of which include seemingly innocuous representations and warranties. The fact is that many properties can be sold in an "as is" condition without any representations at all, especially if the buyer has had a home inspection performed. By agreeing to any representation and warranty, which survives the closing, a seller is incurring unnecessary and avoidable future liability.

Closing

The seller by signing an agreement is undertaking to provide good and clear record and marketable title, subject to possible enumerated exceptions. The pitfalls at this state include the following:

A mortgage that is not discharged is a potential pitfall at this stage of the transaction. A seller is responsible to procure the discharge of all mortgages. In this day and age, with mortgages being assigned and reassigned and with banks merging, many properties have mortgages that have been paid off but not discharged.

Usually, the seller finds out about these missing discharges the day before the closing and moving vans are in action. The pressure is intense on all concerned. If the seller had retained counsel to conduct a title rundown, the problem could likely have been disclosed and resolved prior to closing.

Similarly, there may be outstanding wetlands orders for which certificates of compliance have not issued, waivers of first refusal which have not been procured because the seller wasn't aware of them, or condominium certificates which no one bothered to ask for, etc.

Often, this results in a postponement of the closing, and is no small matter when the seller has obligated himself to buy a new home with the proceeds of the first sale. Being unable to perform, the seller opens himself to potential damage claims from the buyer and also risks losing the deposit on the new house that he is purchasing.

Conclusion

In sum, the fact is that the seller, as much as the buyer, requires competent legal advice at all of these stages. While this is true in each case, it is even more compelling if the seller is an estate, does not have a broker or intends to sell as part of a like-kind exchange. An experienced and competent attorney can provide advice and service leading to a more favorable agreement with the broker, a considered and fair agreement with the buyer, and full performance of the seller's obligations. The fee for such legal services will often be only a small fraction of the commission.

This article does not expressly deal with the related unlawful practice of law issues raised by a real estate broker preparing a contract for execution by other parties, a practice that implies that legal services may be superfluous. Surely, this is a matter for further consideration.

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