REBA NEWS

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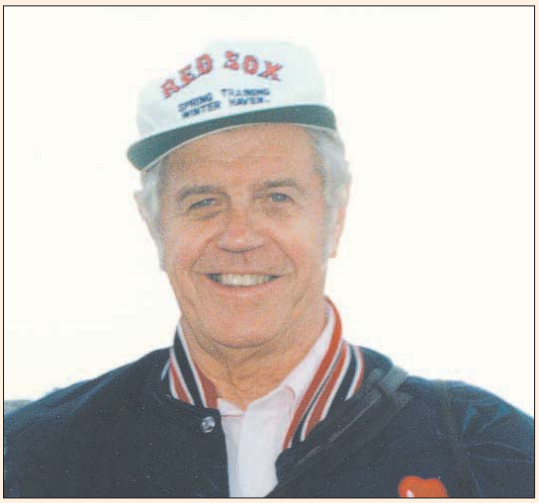
The Newsletter of the
Real Estate Bar Association for Massachusetts



IN MEMORIAM
Norman P. Byrnes
Dec. 15, 1922 - July 9, 2009
Page 9

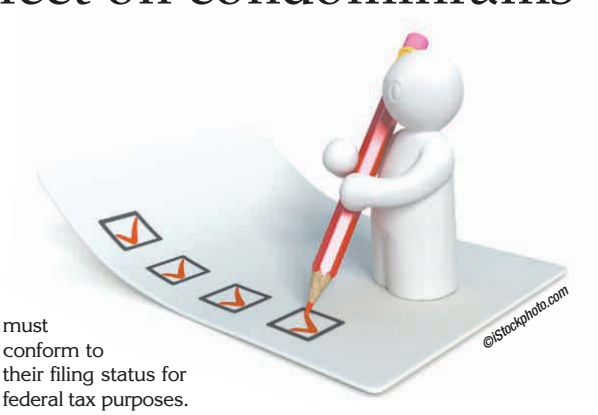
Changes to the tax code and their effect on condominiums

By Matthew W. Gaines

Recent changes to Massachusetts tax policy will have a sweeping affect on condominium and homeowners associations.

On July 3, 2008, the governor signed into law An Act Relative to Tax Fairness and Business Competitiveness, which includes major corporate tax reform provisions.

Included in these reforms are new "check the box" entity classification rules. Previously, business entities, including condominiums, could have different classifications for federal and state tax purposes. The act eliminates these differences, and for tax years beginning on or after Jan. 1, 2009, the filing status for condominiums in Massachusetts must conform to their filing status for federal tax purposes.



At the federal level, all condominiums, including unincorporated condos, file a corporate tax return. However, the Federal Tax Code recognizes that corporate tax law principles do not apply to condominiums. A condominium files either a Form 1120 as a member organization or a Form 1120H as a homeowners' association. In either case, condominiums are afforded certain protections and exemptions under Internal Revenue Code Sections 277 and

Continued on page 16

Robert T. Gill joins REBA Dispute Resolution panel of mediators

Robert T. Gill, a partner in the Boston-based law firm of Peabody and Arnold, has joined the panel of neutral mediators of REBA Dispute Resolution, an affiliate of The Real Estate Bar Association.

"Bob Gill brings a new dimension to our panel of neutrals," said REBA Executive Director Peter Wittenborg. "He has spent his professional life representing and defending lawyers and others in the professional liability context. Bob is ideally suited to handle every type of professional liability situation."

"We welcome Bob Gill to our panel," offered REBA/DR President Mel Greenberg. "With Bob, REBA Dispute Resolution has the capacity to handle every level of professional liability dispute resolution."

Over the last 30 years, Gill has handled a wide range of complex litigation matters. He has represented lawyers, accountants, investment advisors, bankers, insurance professionals, town officials and officers and directors of corporations in professional liability claims.

Gill successfully represented a law firm in a recent case believed to be the longest malpractice trial in Massachusetts history. He also represented a lawyer in the largest attorney defalcation case ever reported in the state.

Gill has served on the American Arbitration Association's panel of arbitrators and was a hearing committee member for the Board of Bar Overseers of the Supreme Judicial Court.

Gill has been frequently selected as one of the state's "Super Lawyers" in a joint survey by the publishers of Law & Politics and Boston magazines, as part of "The Top Attorneys in Massachusetts" publication.

Gill graduated from Union College in 1969 and from Boston College Graduate School of Arts & Sciences in 1971. He received his JD from Boston College Law School in 1973.

REBA offers enhanced lawyer professional liability insurance

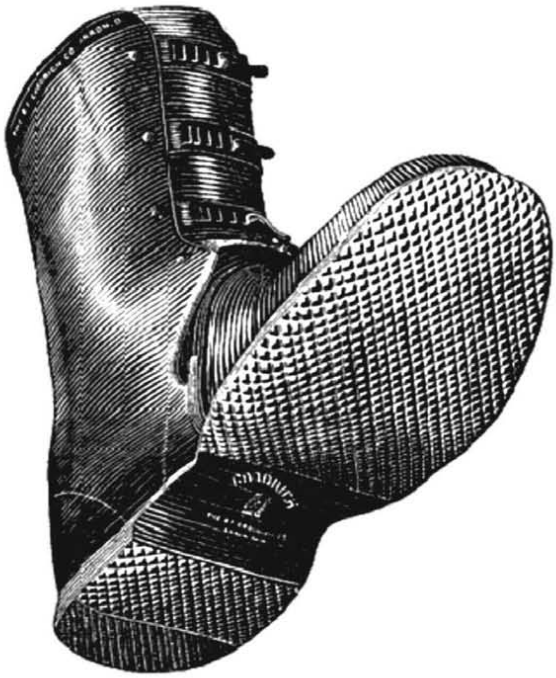
The Real Estate Bar Association is launching an enhanced member benefit with two new premier affinity partners, Ironshore Insurance as underwriter and First Indemnity Insurance Group as agent. The program offers exclusive, member-specific, lawyers' professional liability coverage precisely tailored to the needs of REBA's growing membership.

"We are so excited about this new member offering," said REBA President Steven M. Edwards. "The Ironshore product offers all REBA members, regardless of the size of their

Continued on page 19

What's in this issue…

Been booted yet?



Have you been let go by your title insurance underwriter? Will you be next?

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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.

From the President's desk

By Stephen M. Edwards

Any of you who served in the Navy will share memories (maybe not so fondly) of "damage control training."

I had mine one cold March in Newport, R.I. It consisted of a class on shoring and bracing leaks suffered by a ship during combat, followed by exercises in which teams were placed in a replica of a typical ship's space below the water line while Narragansett Bay water (very chilly in March) was pumped forcefully through various types of ruptures and gashes in the space.

The objective of the team was to shore and brace with items at hand (mattresses, tables, etc.) and to stop the flow of rising water using equipment stowed nearby (pipe banding, wrenches), thereby stabilizing the space. It required quick assessment and spontaneous planning, level heads, coordination, some plain elbow grease and the ability to function in the discomfort of the cold water. It was not fun, but important work.

Lawyers and other helping professionals know that growth, learning and seasoning continue throughout a lifetime of work, and are usually most keenly forged through the most difficult challenges. Sometimes those challenges are difficult because of their complexity; other times because they are painful, and because the outcome is uncertain. Sometimes it is both. But through them we grow and are seasoned, personally and professionally, in ways we otherwise would not be.

Whether it is the down economy, the evolution of law or challenges to the practice of law itself, all of these hurdles are best faced when we muster our combined strength, insight and determination on behalf of the greater good of our colleagues, the practice and the citizenry of the commonwealth.

One of REBA's most important functions is to bring Massachusetts lawyers together, to share with one another the burdens and the fruit of these difficult and important experiences. It happens at conferences and committee meetings, in hallways and over the phone, by e-mail and on sidewalks.

Members share questions and input, share experiences and work together to address issues and problems important to us all. Sometimes it may mean rallying together to shore and brace against difficult conditions and forces; sometimes it is to look ahead and design a solution to an evolving problem. REBA's ongoing mission is to foster these relationships and this work of sharing and collaboration in order to make the substantive law and the practice of law affecting real estate in Massachusetts function in the best way possible under ever varying circumstances.

REBA is as strong as the best efforts of our membership, and we are fortunate to have such a strong and steady cadre of dedicated members. We will be keeping our members posted on REBA's programs and opportunities, and, of course, on developments in the NREIS litigation as it transitions from the trial to the appellate phase, throughout this autumn. In the meantime, we hope to see many of you at REBA's Annual Meeting and Conference on Nov. 9 at the DCU Center in Worcester.

We also are counting on our members to renew membership for 2010 and to encourage others to join in REBA's important ongoing work. In times like these, all hands are needed on deck. The surprising truth, found to be wise in many quarters, is that when we pull together under challenging circumstances, on behalf of one another, through it all we find ourselves stronger, closer, and better than we were before.

Steve Edwards is counsel in the real estate practice group of WilmerHale in Boston, where he focuses on commercial conveyancing and retail development. He has represented clients in a broad range of local and national commercial real estate matters including acquisitions and sales, leasing, development, financing and construction. Steve authored the chapter on leases and tenancies in MCLE's Crocker's Notes on Common Forms. From 1987 to 1990, he served as a lieutenant in the U.S. Navy Chaplain Corps with the Fleet Marine Force of the U.S. Marine Corps. Steve can be reached by e-mail at Stephen.edwards@wilmerhale.com.

Advice from the Man Cave

Paul F. Alphen

Because I am old, I sometimes receive questions from younger attorneys. I answer as many questions as I can, but there are a few with which I have had difficulty.

With the NFL season upon us, the Man Cave has reopened in my basement, and I decided to see if my fellow cave men could answer some of the difficult questions. The advice of Chip, Skip, Lumpy, Dougie, Fumbles and the boys may be completely inaccurate, but it is advice nonetheless.

Paul Alphen is a frequent commentator in the pages of REBA News. When not fishing in East Falmouth and following local sports teams from the Man Cave, he practices law in Westford. He was REBA president in 2008 and currently serves on the executive committee.

Question: Times are tough and I feel tempted to not renew my bar memberships until the economy improves. What should I do?

Answer from the Man Cave: A bar membership is like being on a team. You get the benefit of coaches, workouts, training camps and practice fields, not to mention the collegiality of the club house. Players who take a year off always seem to lose some of their "stuff." The dues work out to be less than $7 a week. To save money, do what the fans do at Oriole Park at Camden Yards — brown bag your lunch once a week.

Q I keep getting requests for free legal advice from friends, neighbors and casual acquaintances. Although I recall a professional liability insurance seminar where I was told that over 50 percent of the claims made arise from free advice, I find it hard to refuse the requests.

A Professional ball players frequently donate their time and money to charity events, but they never take the field in a professional competitive event without being properly compensated, and nobody would expect them to. As fans we expect our ball players to negotiate the best terms they can, and to be properly compensated for their work.

Q What do I do when the planning board strongly suggests that my client donate a fire engine, off-site improvements or other contributions to the community that are not directly related to the requirements of the project proposal?

A What?!? They can't do that … can they? Well, first follow all of the rules or you can be suspended from some games. Then, perhaps you have to consider it a sacrifice fly. Dustin Pedroia can hit a lot of home runs, but sometimes with men on base, it is better to hit the sacrifice to bring home the run rather than risk it all with a swing for the fences.

Q With the decline in the number of real estate closings and the attempts to bump lawyers out of the closing room, I am thinking of giving up the practice. What should I do?

A Remember a few years ago when Jonathan Papelbon wanted to become a starter after a sensational rookie season as a closer? It would have been a mistake to allow one of the best closers in baseball to change positions. He has had injuries, and he has some bad outings. But he has remained as a closer, and over time he has become one of the best in baseball. The Sox, and the sport, are better with Pap in pen.

Q Will the Boston College football team ever win the ACC Championship?

A We refuse to answer that question on the grounds that the Cave Master may ban us from the Man Cave.

New legislation streamlines timeshare condominium lien forfeiture

By V. Douglas Errico

In this climate of heightened concern for consumers caught up in the fallout from questionable lending practices, the general focus of legislative, regulatory and judicial efforts with regard to foreclosure has been to limit, curtail, invalidate or delay.

One might be surprised to learn of pending consumer legislation that seeks to facilitate forfeiture procedures concerning real property interests as a means of affording relief to consumers in the commonwealth.

House Bill 1287, "An Act Relative to Time-Share Ownership," attempts to provide relief to the owners of interval and timeshare weeks in Massachusetts' many timeshare resorts by allowing non-judicial forfeiture of time-share rights. The bill, in a nutshell, obviates the requirement that a timeshare association or lender file a complaint in court in connection with the forfeiture of a timeshare interval in order to relieve the association from the costs associated with securing the forfeiture and allowing the interval to be put back to productive and dues-paying use.

Once considered a smaller segment of the hospitality industry, the timeshare and vacation ownership sector is one of the fastest growing segments of the industry in the US. In fact, timeshare and vacation ownership products are available in most mixed use hospitality developments nationwide.

The American Resort Development Association reports that there are currently 47 timeshare resorts offering approximately 3,000 total units operating in Massachusetts, supporting an estimated $270 million of annual consumer spending, 8,000 full and part time jobs and over $3 million in annual property tax revenues.

These timeshare resorts are almost exclusively held in the condominium form of ownership. This means that interval owners share the expenses for the management and maintenance of the common area.

Unlike full-ownership residential condominiums, which also benefit from a super-lien, intervals do not have a significant enough value in most circumstances to justify the cost and expense associated with pursuing forfeiture.

Current Massachusetts law does not create a statutory lien on a timeshare interest that may be forfeited through a non-judicial forfeiture process for failure to pay assessments. Such non-judicial remedy is essential as the costs incurred by the association to pursue a judicial forfeiture against a specific timeshare interest are excessive when compared to the value of the real estate being forfeited — these costs, including filing and court expenses, publication costs, and lawyers fees, cannot be rationalized on a year to year basis. For example, a typical forfeiture could cost well over $2,500 for a timeshare interest that is only worth $300 in the resale market.

As resorts age — and Massachusetts has a large number of older resorts — some timeshare owners stop paying their pro rata share of assessments. When some owners stop paying, an increasingly smaller number of the timeshare owners must pay 100 percent of overall assessment obligations. As their individual shares mount, a spiral effect is created that causes associations to defer maintenance and repair expense, potentially decreasing the value of the entire resort development.

This effect also causes some owners to simply walk away from their timeshare interests, unwilling to subsidize a disproportionate share of assessment obligations. On Cape Cod, there are three documented cases where an own-

Continued on page 19

Douglas Errico is a partner at Marcus, Errico, Emmer & Brooks. His practice concentrates primarily in real estate transactions, real estate development, condominiums, timeshare and other resort communities, and zoning. A copy of H. 1287 can be obtained on the Legislature's website at www.mass.gov/legis/ or by e-mailing Errico at derrico@meeb.com.

Wetland permit appeals – building a record for survival

By Gail E. Magenau Hire

When is the right time to seek legal advice regarding the issuance of wetlands permits? Some recent decisions suggest the sooner, the better.

Building a solid record before the permitting agency and documenting a reasoned decision are critical factors to the success or failure of subsequent appeals. An understanding of this unique permitting process is essential.

To develop or perform other activities in or near wetland resource areas, an applicant must seek local conservation commission approval. Commissions consider notices of intent under standards supplied by the Wetlands Protection Act , G.L.c. 131, § 40, and wetlands regulations at 310 CMR 10.00. In addition, where municipalities have also adopted local wetland bylaws or ordinances, NOIs must satisfy local standards. Depending on the scope of the proposed project, either or both of the following avenues of appeal exist:

1. If a decision was based on WPA standards, appeals are considered by the Massachusetts Department of Environmental Protection in a de novo review. DEP's superseding order of conditions may then be appealed within DEP to an adjudicatory proceeding. Further appeals of a DEP final decision may be brought in Superior Court pursuant to G.L.c. 30A, § 14. The court determines essentially whether the decision is supported by the administrative record.

2. If a decision was based on a local wetland bylaw, an applicant or party harmed by the decision may file a certiorari action (G.L.c. 249, § 4) in Superior Court or Land Court. The standard of judicial review is similar to a Chapter 30A appeal and the appeals are decided based on a review of the record of proceedings before the commission.

Gail E. Magenau Hire has been an associate at Mackie Shea O'Brien since 2003. Her environmental law practice concentrates on transactional and permitting work for businesses and individuals, including wetlands permitting, as well as litigation and enforcement defense. Prior to becoming an attorney, she was an environmental engineer and consultant. Gail can be contacted at gemh@lawmso.com.

The recent case *Healer v. DEP*, 73 Mass. App. Ct. 714 (2009), in which the commission issued permits to a town for a sewer collection and treatment system, was the subject of two appeals. The case highlighted the unusual dual appeal process.

In one appeal, the Superior Court upheld the commission's order of conditions based on a bylaw; the Appeals Court affirmed. In the other, DEP's superseding order based on the WPA was appealed to DEP's office of administrative appeals, with the DEP commissioner's final decision going to Superior Court.

The Superior Court initially found the DEP lacked jurisdiction to issue an order under the WPA because the local bylaw was more stringent than the WPA. The Appeals Court disagreed, ruling that because the order was based on the WPA, the Superior Court could review the order under the standards of the WPA.

In the past year the Appeals Court rejected two conservation commission denials under local wetland bylaws of permits for construction of single-family homes. In *Pollard v. Conservation Commission of Norfolk*, 73 Mass. App. Ct. 340 (2008), the Superior Court's reversal of a denial was affirmed.

In *Conroy v. Conservation Commission of Lexington*, 73 Mass. App. Ct. 552 (2009), the Superior Court's affirmation of a denial was instead remanded to the commission. In each case, the Appeals Court concluded that the commission's decision was unsupported by the evidence.

The commission's denial decision in *Pollard* stated, but did not explain, why Pollard's unchallenged expert opinion evidence was "not credible" and how the plaintiffs "failed to sustain their burden" of proving that the proposed work had a greater impact on protected resources than allowed by the bylaw.

Noting that a commission does not need conflicting expert evidence to disagree with one expert's opinion, the Appeals Court found that the absence of any basis in the record for rejecting the applicant's expert's evidence (which the Superior Court judge found "overwhelmingly" contrary to the commission's determination) led to a decision unsupported by substantial evidence. The commission's denial was reversed.

In *Conroy*, the commission denied the permit because it was not persuaded that the proposed project would sufficiently protect wetland resources. It applied a "clear and convincing evidence" standard (found in the commentary to

Continued on page 17

Ramblings of a conveyancer: What a strange, strange trip it's been

By Michael P. Krone

Nobody – I mean nobody – decides as a kid that they want to be a real estate conveyancer. I was no exception.

Perry Mason convinced me that criminal law was the way to go, or so I thought, until my second year of law school, when I realized midway through my criminal law class that I would probably have to represent criminals.

None of Perry Mason's clients were ever guilty, so this came as a shock. I know — pretty old to be that naïve in my second year of law school, but I was.

What caught my fancy was my real estate law course. I thought it was pretty cool to hang out at the Registry of Deeds and search people's lives through their real estate transactions and probate records. This love for adventure in real property carried over to my foray into private practice.

Perhaps a few who read this can remember the day when conveyancers would actually research records at the Registry of Deeds or Probate. It was actually fun dealing with the antiquated system in Suffolk or the sassiness of the Middlesex Registry crew. Perhaps you may have enjoyed a jab or two, as I did, from "The King" in the Land Court Registry. Don't you remember the fun dealing with the desk staff in Norfolk? How about having to get Jimmy to retrieve book 9 in the Suffolk Registry because the floor in that room was unsafe? (I always wondered about that.)

You hadn't lived until you were forced to do a 7:00 a.m. closing with Hector Scull and then have him yell at you for taking too much time explaining the documents to your clients. There was no greater excitement than to see Alan Mason lose his temper with a buyer. More than anything, I loved going to the Land Court in Boston and have Margaret Cronin bless my condominium documents – that was pretty cool, considering that if she didn't I was screwed.

There was a time in conveyancing, and in the practice of law in general, when things were simpler, people were friendlier and camaraderie amongst the bar was the norm, not the exception.

* * *

Then came the secondary mortgage market and it all went to hell.

What was once a quaint and profitable area of practice soon became a cut-throat, all out battle for survival. There are many to blame: lenders, title insurers, the bar. Yet, blame seems a bit harsh. It was really like a booze cruise, where everyone slowly gets drunk but no one can get off the boat, and before you know it insults are flying, civility is put to bed and the other guy is trying to steal your date. It can be a fun time to a point, but then you see it's the cruise from hell.

Perhaps I wax too nostalgic, or critical, but, after all, these are my ramblings, so think about the following:

Don't you wish that First American was still holding those crazy huge parties?

Why doesn't Stewart Title Insurance offer environmental hazard coverage anymore?

Don't you miss the old 60/40 split days with your title underwriter … or maybe not?

Can't the lending industry figure out that sending the closing figures and documents 3 minutes before the closing pisses off their customers – and us?

Whatever happened to the days when your bank actually cared that you put millions into your IOLTA account - or even remembered who you are?

I miss the days when I could go to the REBA conference, stay for the luncheon and not worry that something bad was happening back at the office.

When did we stop going to lunch with our colleagues and staff?

When did we stop going to lunch?

What happened to the trips the title insurers used to hold? I miss seeing my colleagues and spending time with them.

What the heck is a "local agency" offered by some of the title insurers ?

When did conveyancing stop being the practice of law?

Isn't it great when the buyer shows up to close with a personal check for $15,000?

Don't you wish that you made 5 percent of the purchase price as your fee ?

Don't you love it when everyone looks over to you when the buyer says at closing that they want someone to pay the seller for the refrigerator that they thought they were getting in the deal?

How did we start doing closings at 8 p.m. at McDonalds?

Isn't it great when the buyer says they were advised that they don't need title insurance because the house has been in the seller's family for 40 years?

Don't you love hearing the fight at the closing table over the missing dining room chandelier, or the missing rose bush in the front of the house, or the junk piled high in the garage … and you are not the attorney for buyer or seller?

I miss Peter and Rhonda.

When did a title agent sending $15,000 in remittances become expendable by a title insurer?

Isn't it great when the seller doesn't have a deed to buyers at closing, in the Registry, at 3:00 on a Friday, on Labor Day Weekend, in Bristol?

What would happen if the closing attorney didn't show up to the closing ?

Isn't it great when you call the other attorney in a real estate transaction and they actually know something about conveyancing?

Don't you enjoy getting the title abstract 30 minutes before closing and finding four outstanding liens you didn't know about, then you learn they abstracted the wrong parcel – is that a relief or an "oh sh— " moment?

Ever get a plot plan that showed a sewer easement running under the house 10 minutes before closing?

How about the guy that took a chainsaw to half his deck so it wouldn't violate zoning any longer – is that a real story?

Or the woman who showed up pretending to be the wife of the seller … and she wasn't. That one is real and it scares me.

How about trying to get tax information from a collector's office when you haven't ordered an MLC?

Don't you love being able to rundown title on the registry website? Why can't the Probate registries do the same thing?

Enough of my foolish ramblings — you get my point. Conveyancing is not an easy profession and sometimes not very lucrative, but it's what we have and I'll keep it. Perhaps foolishly, perhaps not, I just jumped back in and I have to admit I am enjoying it again. It's not as much fun as watching Perry Mason get his client off the hook every week, but it's what I know, and I am going to give it my best shot. Anyone want to do a 7 a.m. closing for old times' sake?

Michael Krone is vice president and COO of KrissLaw , a former member of the REBA Board and a residential real estate conveyancer since 1979. He can be contacted by e-mail at mike@krisslaw .com.

Why I joined Massachusetts Attorneys Title Group

By Douglas K. Snook

Like many of you reading this story, I have seen the volume of my real estate closings dwindle over the past couple of years. Whether it is because of the economy, witness closings or affiliated business arrangements, I had to make some major adjustments at my office.

It was not easy, but I had to cut costs, which meant laying off some good employees and finding a way to increase business.

During this time, I reflected on what was happening in the conveyancing field and what the future may look like. First, I realized that I was not alone in this predicament. Many of my colleagues and friends were experiencing the same problems.

That's when I started to pay more attention as to what was happening in the business side of conveyancing.

As a REBA member, I knew that they were fighting witness closings: they had a suit going on in federal court; they were again trying to defeat the TAVMA legislation that would allow non-lawyers to do real estate closings; and this was just the tip of the iceberg. REBA was doing all those things, as always, to help us in our practice.

That's when I realized that I must do more than just be a member of this great association.

I discovered MassATG, a bar-related entity. It was created to help raise money for REBA without asking anyone to dig into their pockets for a donation. I did my homework and discovered that if I became a title insurance agent for CATIC through MassATG, I could donate to the cause without feeling the pain. I could keep my share of the title premium and MassATG would be paid by CATIC, with the profits of MassATG going to REBA.

©iStockphoto.com

This was a no brainer. REBA is the one organization looking out for the consumer and protecting the practice, and MassATG is structured to assist it financially.

I joined, and I am happy that I did. Tom Bussone, who runs the program, and his able assistant Kevin Atwood, are great to work with. The application process is simple, and if we have any problems, they are right on top of it and get the results that I need. The folks at CATIC also are great. The underwriters there are very friendly, helpful and knowledgeable. We have made them our alternative title insurance underwriter. They do not need a minimum and we know they will never cancel us for low volume.

And I feel good knowing that with each policy I remit to them, I am helping REBA help me.

Douglas Snook is a principal at Erickson & Snook in Weymouth. He can be reached by e-mail at douglas_snook@hotmail.com

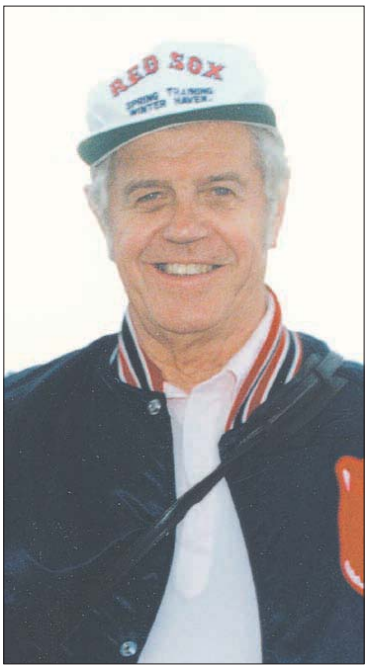
In memoriam

Norman T. Byrnes died on July 9, 2009.

He was born on Dec. 15, 1922, in Waterville, N.Y., a short distance from Utica. His father, who was a baker, died when Norman was a sophomore in high school. One of 11 siblings, he belonged to a family where money was short but love and support were abundant.

Norman received a full scholarship to Harvard College. He worked as a waiter in a college dining hall and hitchhiked home on vacations.

Following his graduation in 1944, Byrnes joined the Army, serving as a combat infantryman in France, Germany and Austria and earned a Battlefield Commission, Purple Heart and Bronze Star. He graduated from Harvard Law School in 1948.



In 1948 Norman married Sally Richards, a high school classmate, with whom he went on to raise three sons. Sally died in 1988. In 1989 he married Elizabeth Norris, known as Bette, a widow who had been his legal secretary many years earlier.

Norman and Bette lived in Boston and Clearwater, Fla., until the last few years when Norman was unable to travel to Boston. He is survived by Bette, his three sons, Tom, Tim and Doug, as well as two stepchildren, five grandchildren, one great-grandchild, three siblings and many nieces, nephews, grandnieces and grandnephews.

Norman had a very distinguished legal career. He served as President of REBA's predecessor, the Massachusetts Conveyancers Association, in 1981 and 1982, and in 1986 received its highest honor, the Richard B. Johnson Award.

He was on the MCA strategic planning task force in the early 90s that resulted in

Continued on page 18

Wiley Vaughan served as president of REBA's predecessor, the Massachusetts Conveyancers Association, in 1963 and 1964. Syd Smithers was president in 1987; Henry Thayer was president in 1988. Peter Wittenborg, currently serving as REBA executive director, was president in 1990.

BREAKOUT SESSIONS

A Funny Thing Happened on the Way to the (Usual) Forum: the BLS Option for Real Estate Cases

Making Short Sales Work

Real Estate Fraud: Identifying and Avoiding Fraudulent Transactions

Understanding Your Professional Liability Policy

HUD's RESPA Reform Effort-The Top Ten Things You Need To Know

Planning Ahead for Growth and Development

Legislative Update of Recent and Pending Legislation: Summary and Highlights

Recent Developments in Massachusetts Case Law

CONTINUING EDUCATION COMMITTEE

Sophie Stein, Esq., Co-Chair
Michael D. MacClary, Esq., Co-Chair

CLE CREDITS

New Hampshire:

REBA is now a NHMCLE Annual Sponsor and the 2009 REBA Annual Meeting & Conference is approved for up to 4 general credits / 0 ethics credits

Rhode Island:

Subject to Supreme Court Rule IV.3 the 2009 REBA Annual Meeting & Conference has been approved by the Rhode Island Mandatory Continuing Legal Education Commission for up to 4 credits, 0 of which are ethics credits.

For information on becoming a sponsor or an exhibitor please visit www.reba.net.

Please visit the lounge areas, both located on the third floor of the DCU Center, across from the Grand Ballroom and across from the Junior Ballroom. Refreshments will be served.

EXHIBITORS Registered So Far...

1031 Investment Services, LLC
All States 1031 Exchange Facilitator, LLC
Apsley-Bolton Computers, Inc.
Bradbury Promotions
CATIC
Citibank
Citizens Bank
Chicago Title, Ticor Title, Lawyers Title, Commonwealth
Dakota Homestead Title Insurance Company
Direct iT Corp.
Exchange Authority, LLC
Fidelity National Title Insurance Company
First American SMS
First American Title Insurance Company
First Indemnity Insurance Services, Inc.
Kasparnet, Inc.
Massachusetts Lawyers Weekly
MassATG
Perfect Balance Bookkeeping, LLC
Real Estate Law Office Solutions
Standard Solutions, Inc.
Stewart Title Guaranty Company
Uni Comp, Inc.

REBA
THE REAL ESTATE BAR ASSOCIATION for Massachusetts

2009 Annual Meeting & Conference

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REGISTRATION for REBA'S Annual Meeting & Conference

Complete this registration, include the appropriate fee and return to REBA Foundation, Attn: 2009 Annual Meeting & Conference, 50 Congress Street, Suite 600, Boston, MA 02109-4075, or fax to: (617) 854-7570.

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	By 11/2	After 11/2
❑ YES, please register me. I am a REBA member in good standing.	$ 195	$ 220
❑ YES, please register me as a guest. I am not a REBA member.	$ 235	$ 260
❑ NO, I am unable to attend, but would like to purchase the Conference materials and a CD of the sessions. (Order by 11/11/09. Please allow four to six weeks for delivery.)	$ 190	$ 190
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❑ I have enclosed a check for the total amount listed above

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SELECT YOUR LUNCHEON:

❑ Petite Filet Mignon ❑ Parmesan Encrusted Chicken ❑ Baked Scrod Mornay ❑ Sweet Tomato Tarte ❑ No Lunch

BREAKOUT SESSION PREFERENCES:

Please rate (1-8) the order of your session preference. This information will help us to determine the most popular programs for space considerations. Registrants are not required to pre-register for sessions. Feel free to attend any session at any time.

_____ *Real Estate Fraud: Identifying and Avoiding Fraudulent Transactions (Flynn, Jenkins, Markowski, Stone)*
_____ *The BLS Option for Real Estate Cases (Donovan, Foley-Bousquet, Hinkle, Looney)*
_____ *Understanding Your Professional Liability Policy (Berman, Fredericks, Gill)*
_____ *Making Short Sales Work (Brecher, Zuretti)*
_____ *HUD's RESPA Reform Effort- The Top Ten Things You Need To Know (Hogan, Martin)*
_____ *Planning Ahead for Growth and Development - Streamlined Local Permitting (Bialecki, Lamoureux)*
_____ *Legislative Update of Recent and Pending Legislation: Summary and Highlights (Goldberg, Smith)*
_____ *Recent Developments in Massachusetts Case Law (Lapatin)*

DRIVING DIRECTIONS

For additional information, please call REBA at (617) 854-7555

FROM BOSTON: Take Rt. 90 W. Get off at Exit 10 (Auburn). After the toll-booth, bear left at the fork. Take Rt. 290E and get off at Exit 16. Left at bottom of the ramp. At 3rd set of lights (Major Taylor Boulevard) the DCU is on your left.

FROM POINTS WEST: Take Rt. 90 E to Exit 10 (Auburn). After the toll-booth, bear left at the fork. Take Rt. 290E and get off at Exit 16. Left at bottom of the ramp. At 3rd set of lights (Major Taylor Boulevard) the DCU is on your left.

FROM SOUTH: Take Rt. 495N and take Exit 25B. Take Rt. 290 W and take exit 16. Right at end of ramp. At 3rd set of lights (Major Taylor Boulevard) the DCU is on your left.

FROM NORTH: Take 495 S and take Exit 25B. Take Rt. 290 W and take exit 16. Right at end of ramp. At 3rd set of lights (Major Taylor Boulevard) the DCU is on your left.

Complimentary Valet Parking Available or Parking validated for the Worcester Municipal Parking Garage and all other garages up to $5.00

SCHEDULE OF EVENTS

7:30 a.m. - 3:00 p.m. Registration and Exhibits Open

7:30 a.m. - 8:30 a.m. Exhibitors' Hour

8:30 a.m. - 1:15 p.m. BREAKOUT SESSIONS

8:30 a.m. - 9:30 a.m.
9:45 a.m. - 10:45 a.m.

A Funny Thing Happened on the Way to the (Usual) Forum: the BLS Option for Real Estate Cases

The Honorable Margaret R. Hinkle; Clerk-Magistrate Michael Joseph Donovan; Assistant Clerk Helen Foley-Bousquet; Thomas M. Looney, Esq.

The Superior Court's Business Litigation Session (BLS), created in 2000, is open to real estate cases that present complex factual or legal issues. Once accepted into the BLS, cases have the benefit of handling by experienced Superior Court judges, early and active case management, and streamlined scheduling. Please join us for an informative program covering the history of the BLS, the types of cases that qualify for the BLS, filing and transfer procedures, special venue provisions, and the suitability of the BLS for complex real estate cases. Our discussion will be led by Superior Court Justice Margaret Hinkle, who serves as both Administrative Justice of the BLS and the presiding justice in BLS Session I. Suffolk Superior Court Clerk-Magistrate for Civil Business Michael Joseph Donovan and longtime BLS Session I clerk Helen Foley-Bousquet will address the role of the clerk's office in the functioning of the BLS. Thomas M. Looney, Esq. of Bartlett Hackett Feinberg P.C., who handles real estate case in both the Superior Court and the Land Court, will offer a practitioner's perspective on the BLS. A question-and-answer period will follow.

8:30 a.m. - 9:30 a.m.
9:45 a.m. - 10:45 a.m.

Making Short Sales Work

Arthur D. Brecher, Esq.; Amanda Zuretti, Esq.

This session begins with an overview of an ordinary short sale involving a distressed seller conveying to a ready, able, and willing individual buyer who intends to hold title to the purchased property and occupy it as a primary residence. This session includes a discussion of short sale abuse, an analysis of short sale "flip" transactions, and guidance on avoiding the errors, questionable practices, unacceptable conditions and illegal acts that can ensnare the uninformed practitioner.

8:30 a.m. - 9:30 a.m.
11:00 a.m. - 12:00 p.m.

Real Estate Fraud: Identifying and Avoiding Fraudulent Transactions

Christine G. Flynn; Carl F. Jenkins, CPA/ABV, CFE, MST; Jennifer L. Markowski, Esq.; Michael J. Stone, Esq.

The increase in real estate related fraud over the last two years has been explosive. According to the FBI, it is estimated that there may be close to 1,200 cases opened in fiscal 2009 compared to 136 for all of fiscal year 2004. What is even more sobering is that 80% of all reported fraud losses involve collaboration or collusion by industry insiders. The panel of real estate veterans with a wealth of knowledge and experience in identifying fraudulent techniques will discuss ways to prevent having clients or their attorneys from getting caught up in fraudulent transactions. While mortgage related fraud is making the headlines, the panel will also discuss other types of real estate related fraud including check fraud, foreclosure rescue schemes, appraisal fraud (property flipping) and the dangers of providing casual advice.

8:30 a.m. - 9:30 a.m.

Understanding Your Professional Liability Insurance

George A. Berman, Esq.; Suzanne Fredericks; Robert T. Gill, Esq.

An unfortunate consequence of having a busy practice is the possibility that a client, or someone else, might make a claim against you. The incidence of claims in the real estate field is relatively high and substantial sums are often at stake. Accordingly, understanding what your professional liability policy does, and does not, cover is of considerable importance. Among the topics covered will be the definition of "professional services," common exclusions, "claims made" versus "occurrence" coverage, notice requirements, "tail" and "prior acts" coverage and common pitfalls arising from a change of firm affiliation. Presenting will be George Berman, who has represented lawyers on behalf of insurers for over 20 years, and Suzanne Fredericks, Vice President of IronPro Insurance, the carrier for REBA's endorsed professional liability program.

9:45 a.m. - 10:45 a.m.
11:00 a.m. - 12:00 p.m.

HUD's RESPA Reform Effort- The Top Ten Things You Need To Know

Richard A. Hogan, Esq.; Craig J. Martin, Esq.

In November 2008, HUD published the RESPA final rule. The stated purposes of the new rule were to protect consumers from unnecessarily high settlement costs by standardizing the Good Faith Estimate (GFE) to facilitate shopping among settlement service providers; to require that the GFE provide a clear summary of the loan terms and total settlement charges; to mandate more accurate estimates of settlement services charges, and to facilitate comparison of the GFE and the HUD-1/1A. The new GFE and HUD-1 forms take effect Jan. 1, 2010. The panel will provide an overview of the new requirements and offer some practical suggestions to ensure your compliance.

9:45 a.m. - 10:45 a.m.
11:00 a.m. - 12:00 p.m.

Planning Ahead for Growth and Development

Gregory P. Bialecki, Esq.; April Anderson Lamoureux

Secretary Greg Bialecki and State Permit Ombudsman April Anderson Lamoureux will discuss the Executive Office of Housing & Economic Development strategy for growth and development in the Commonwealth. The program will highlight the importance of planning ahead and will include an overview of the Land Use Partnership Act and the Growth Districts Initiative.

11:00 a.m. - 12:00 p.m.

Legislative Update of Recent and Pending Legislation

Michael J. Goldberg, Esq.; Edward J. Smith, Esq.

Members of REBA's Legislation Committee will survey new legislation and topics under consideration by the Massachusetts Legislature, relating to: mortgage originations, the conduct of foreclosures, registered land, registry recording issues, condominium association governance, homestead reform and other timely matters

12:15 p.m. - 1:15 p.m.

Recent Developments in Massachusetts Case Law

Philip S. Lapatin, Esq.

Phil Lapatin draws a huge crowd with this session every meeting. Now, you won't have to stay late to hear him. His timeslot is right before luncheon. His session, Recent Developments in Massachusetts Case Law is a must hear for any practicing real estate attorney. Due to standing room only at previous seminars, we will project a live video feed from Phil's session to a second breakout room. Phil recently received the Association's highest honor, The Richard B. Johnson Award.

1:20 p.m. - 3:00 p.m. LUNCHEON PROGRAM

1:30 p.m. - 1:40 p.m. REBA President's Welcome

Stephen M. Edwards, Esq., President

1:40 p.m. - 2:00 p.m. REBA Business Meeting

2:15 p.m. - 2:45 p.m. Keynote Speaker

Jeffrey C. Fuhrer, Executive Vice President/Director of Research The Federal Reserve Bank of Boston

3:00 p.m. Adjournment

Unlock opportunities that come with change

By Jan Paul von Wendt

In these changing and challenging times, it is more important than ever to be nimble in all aspects of business. This includes three key areas: processes, technology and support.

Processes

The central area to which technology should answer is the key, core processes of your business — not the other way around.

Flexibility is a key and vital characteristic needed in both areas. Changes to the HUD-1 coming into effect on Jan. 1 are very strict and precise when it comes to certain areas within the settlement statement: what fees may or may not change, if they may change, by how much and under what circumstances, and so on.

How does flexibility come into the picture? The very nature of this change requires in practice what time and experience only can prove: inevitably, sooner or later, adjustments will take place to the changes — in effect, changes to changes. Both the processes of your business and your technology will have to adapt as quickly as possible to these changes, and this is where support plays a crucial role.

There is also the transition period itself. While most lenders may opt to rewrite with the new 2010 GFE the terms of their new loans opened up just prior to the new year, others may not. How does one deal with this if or when it were to happen?

Technology

Careful analysis of the regulatory changes point to bigger headaches in its implementation than to the actual changes themselves. How is one to manage this? This is where technology can help serve the process by helping to collate, organize, and calculate, as appropriate, the tolerances, practices and procedures of the lenders that affect the settlement agent.

Another interesting area involves the real estate brokers. As of Jan. 1 they will not be able to estimate lender closing costs for prospective borrowers by providing interim draft HUDs. The GFE can no longer be circumvented or avoided. How does this practice fit in with the new regulations? How does it need to change or adapt, and will the technology support or hinder the change?

As you can see, if the underlying technology is open and flexible to change, it will become a tool working for, not against, the settlement agent's efforts to master and control the inevitable changes that will be forthcoming after the first of the new year.

Together with data encryption, the new 2010 HUD rules represent a major challenge that requires a correspondingly competent response. One wants to be well-prepared and ready for the change, even welcoming to it.

To be well-prepared, we know from our more than 27 years of experience how the technology needs to be designed so that these types of changes are empowering, not disempowering. They represent opportunities for improvement and for further growth.

Support

In the technology world, few vertical markets or niches require more fine layers of customization, even personalization, than the settlement of real estate. You have not only federal and state level business rules, procedures and processes, but also, in some cases: county level rules; special handling for lenders' fees and preferred practices; individual settlement agents' needs and/or preferences; and types of loans, not to mention the reverse mortgages, short sales and state-funded and depressed market products being shaped out of the current shifting industry landscape.

Technology cannot exist in a vacuum. Care for the customer, real support and dedication need to be part of the processes-technology support equation. Without it, technology is void. You need to feel cared for when you commit to a technology partnership regardless of who that partner may be.

Partnerships constitute a very important component in today's interdependent and complex world. Along these lines, Uni Comp Inc. is pleased and honored to be a REBA Affinity Partner, providing REBA members generous software discounts, as well as sharing its processes, technology and support expertise with the REBA community.

To learn more about Uni Comp Inc., its flagship real estate closing system Real°Pac™ and its REBA Affinity Partner offerings, please visit realpac.com.

Jan Paul von Wendt is the president and founder of Uni Comp Inc., a REBA Affinity Partner. He can be reached by e-mail at janpaul@inicompinc.com

A brief history of the Torrens System in the U.S.

By Elisa A. Filman

Introduction

The Torrens System of land registration in the U.S. initially was anticipated to be a fast, simple, inexpensive and highly effective system. Named for Sir Robert Torrens, who authored a registration act in 1858 in South Australia, the system has been used worldwide, with legislation in 21 states and many countries in Asia and Great Britain.

Torrens modeled his system after the ship registry method he encountered working as a customs administrator in Australia. The method provided a certificate of ownership for a ship; when it was sold, the certificate was transferred, thus transferring ownership of the ship. Torrens modified this system for use in land parcels.

In all, 21 states adopted Torrens' legislation, mostly in the period between 1896 and 1907, after the drafting of the model Uniform Land Registration Act by the National Conference of Commissioners on Uniform State Laws. Most of these states have since repealed the legislation, citing cumbersome administrative processes, lack of use and complaints of confusion by officials.

Further, technological advances and duplicative laws have rendered the legislation largely unsuccessful. Only nine states continue to use Torrens in any capacity: Massachusetts, Hawaii, Colorado, Georgia, Minnesota, Ohio, Virginia, Washington, and North Carolina. Most current Torrens statutes provide for a method of voluntary withdrawal from the system. Those that do not are largely unpopulated states with little experience with the system.

At first blush, the Torrens System appears to be merely an alternative recording system in which land is registered by parcel, as opposed to a grantor-grantee index. While this assessment may be accurate, it is important to note that the Torrens approach redefines the role of the government in implementing and maintaining property rights.

Under the approach used extensively in the United States, the government is responsible for defining the legal standards, which affect property ownership, instituting and maintaining a recording system of property rights and continuance of the judicial system that sustains these legal standards. While the predominant approach is owner-oriented, Torrens is tract-oriented. Torrens places a larger burden on government in protecting property interests, assuming responsibility for certification of ownership and recording of most non-ownership interests in the property.

California and voluntary withdrawal

California first enacted Torrens legislation in 1897; however, there was little use of it initially. The 1906 San Francisco earthquake provided the catalyst to make use of a reformed version of the statute. Later, the state revised it, adding a single statewide insurance fund. Notably, Los Angeles claimed the highest use of the system, with 9,000 parcels registered, though this represented less than one percent of all parcels in the county. The administration of Torrens in California has been described as poor, and due to a series of decisions that undermined the reliability of the system, new registrations halted around 1927.

One such case, *Gill v. Frances Investment Co.*, resulted in a judgment for the landowner totaling $48,000. This bankrupted the state insurance fund. With no new registrations to replenish the defunct fund, the state legislature authorized the voluntary withdrawal from the registration system in 1949. Withdrawals were popular, prompting a study to determine the efficiency and necessity of Torrens in the state. The review board recommended abolishing use of the Torrens system, which California did by repeal in 1955.

Illinois

Illinois was the first state to enact Torrens legislation in 1895. When the great Chicago fire of 1871 destroyed most of the county records of ownership, the Illinois legislature took the opportunity to enact Torrens legislation. In this way, the situation was similar to California's: The move was traceable to a singular cause.

The initial legislation allowed the registrar to make findings with regard to title status. The constitutionality of the law was tested twice in Illinois, resulting in modification of the system. With the approval of the state Supreme Court, the Torrens system gained footing in Cook County; by 1937, about one-fifth of all land was held in this system.

By the 1950s, many companies began to computerize its title records, while the Torrens registration office did not. This failure to adapt meant that when Cook County experienced an influx of condominium development and the number of title certificates multiplied, the registrar's office could not keep up. This failure, coupled with industry trends requiring owners to purchase duplicative insurance of title, rendered Torrens obsolete in Illinois.

The Torrens Repeal Law, effective 1992, provides that no additional land can be registered in Cook County. When registered land is conveyed, the registrar places into record the "registrar's certification of condition of title," removing the property from the Torrens registration system. Accordingly, all registered land becomes unregistered, and a new chain of title results.

New York

Like Illinois, New York's experience with Torrens resulted in the termination of its registration statute. Due to pressures from area real estate developers and brokers, New York adopted Torrens legislation in 1908. As with most other states, this was initially seen as a great accomplishment; however, by 1938, the claimed benefits of Torrens had yet to materialize, and there was already scholarly discourse on its long-term viability.

In the original 1908 version of the statute, title owners were not permitted to remove their land from the registration system. This was modified in the 1910 version of the statute, which introduced the option of voluntary removal to the state. In 1916, the provision was retracted.

In 1931, when a provision was added that seemingly reinstated the voluntary removal option, there remained confusion as to whether this was the correct interpretation of the law. In *Application of Carns*, the New York Supreme Court affirmed in holding for the landowner that voluntarily removal was indeed permitted.

Concerns about Torrens remained long after the *Carns* decision. This can be traced in part to the administrative overlap the system provides with other statutory land transfer principles. Thus, in 1991 a New York state senator recommended that the system receive a massive review where determination as to the continued practicality of the system would be at issue. The result was the abolition of the system in 2000.

The termination procedures in New York largely mirrored those in Illinois. The fact that the two states have similar abolition statutes is remarkable because it provides guidelines to other states considering the abolishment or modification of the Torrens statute.

Massachusetts

Keeping with the trend, Massachusetts adopted Torrens legislation in 1898. The first record of official statement with regard to the potential use of the system can be traced to an address made by Gov. William E. Russell.

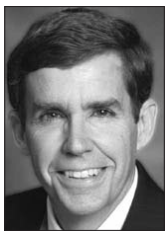
In 1891, Russell spoke to the state Senate and House of Representatives, calling Torrens "the longest step that has yet been taken anywhere towards that freedom, security and cheapness of land transfer which is conceded to be so desirable in the interest of the people."

Russell suggested that the Legislature adopt the system in response to the general public's dissatisfaction with the time and expense of dealing with the traditional system of registration of deeds. Further, he said that the delays could be attributed to the rise in population, specifically in Middlesex and Suffolk counties, where the number of volumes

Continued on page 16

Elisa Filman is a REBA intern and third-year student at Suffolk University Law School, where she won the award for Best Oral Advocate in her legal practice skills section. She can be contacted by e-mail at eafilman@suffolk.edu. This article is a condensed precursor to an article to be published in 2010.

Deed indexing standards and local practice



By Richard P. Howe Jr.

This fall marks the 10th anniversary of the Massachusetts Deeds Indexing Standards. Promulgated by the Massachusetts Registers and Assistant Registers of Deeds Association, these rules were written with the intention of standardizing the indexing of documents in all of the commonwealth's registries of deeds.

The first edition, known as version 2.1, took effect on Jan. 1, 2000. Subsequent editions were issued on Jan. 1, 2006 (version 3.0) and on Jan. 1, 2008 (version 4.0).

While there is no timetable for the issuance of a new edition of the standards, I suspect that the next version will be released in late 2010 or 2011. In addition to routine updates and amendments, the new edition should address electronic recording, which has been activated in four of the state's registries — Hampden, Middlesex North, Middlesex South and Plymouth — with more expected to come in the coming months.

Here in Middlesex North we began recording documents electronically in June 2005. Since then, nearly 16,000 documents — about 12 percent of our overall volume — have been recorded this way. Of the 5,218 electronic documents processed during the first eight months of 2009, there were 167 deeds, 1,045 mortgages, 3,039 discharges and 967 documents of other types. The technology has increased the efficiency of the recording process and any problems encountered with electronic recording have been rare and easily remedied. Still, electronic recording does present some challenges.

When a customer walks up to the recording counter to record a document, the registry clerk is able to ask questions, such as, "Are you sure you want this mortgage on record before the deed?" or point out potential problems or omissions, e.g. "Did you notice that the deed doesn't specify a particular type of joint ownership?"

Because electronic recording lacks an equivalent type of instant communication between the recording clerk and the customer, it is essential that both parties to the transaction follow a clear and comprehensive set of guidelines that establish how the document is to be indexed.

But indexing standards alone cannot eliminate every instance of unpredictability that comes with recording a document. Factors such as a lack of standardization in the drafting of documents and the unique practices that have arisen over long periods of time at each registry and across the local legal community guarantee that registry-to-registry differences will persist. Consequently, each registry of deeds should document its own local rules and practices in a form that is easily available to its customers. Here in Lowell, we use a variety of methods to inform customers of our local practices. Basic information on our website, www.lowelldeeds.com, is supplemented by daily posts on our registry blog, www.lowelldeeds.blogspot.com, which doubles as a source of answers to frequently asked questions.

Because many of our customers are now using social networking sites to promote and operate their businesses, we have our own Twitter feed, www.twitter.com/lowelldeeds, and recently created a Middlesex North Registry of Deeds page on Facebook, where new "fans" are always welcome. For those who prefer older methods of communication, our customer service personnel will answer your questions by phone at (978) 322-9000 or in person during normal business hours.

Glancing back over our blog from this past summer, I have identified some examples of issues that have not made it into the statewide indexing standards. We now scrutinize acknowledgements much more closely after reading *In re Giroux*, a May 2009 bankruptcy case which held that failing to add the mortgagor/signor's name to the acknowledgement clause invalidated the mortgage.

Another issue involved a death certificate issued by the town of Falmouth that was printed on special anti-copying paper. The original document was completely legible to the eye, but when the registry scanned it, the resulting image had the word "copy" imbedded throughout the resulting image, making the information contained in the document impossible to read. Whatever the purpose of this anti-reproduction feature might be, if this type of paper becomes more widely used it will seriously degrade the quality of the land records we are able to maintain.

Foreclosure deeds also have presented a reproduction problem. Our scanners are fixed at a darker setting to ensure that both document text and any signatures (which tend to scan lighter than the text) are both captured in a crisp, legible image. In one instance, the mortgagee's notice of sale that was clipped from the newspaper and taped to a page of the document had much less contrast between the text and the newsprint; thus, the resulting scanned image looks like a series of jagged black streaks, not at all readable.

This type of problem requires us to manually change the scanner settings and rescan the document. Not only does this take more time, but it increases the risk that an error will be made. Allowing the drafters of foreclosure deeds to affix a clean photocopy of the notice of sale to the document would make the registry's tasks much easier to accomplish.

The cases described above are just a small sampling of the issues that regularly arise at the commonwealth's registries of deeds. While it is natural to desire a one-size-fits-all rule to apply to each of these situations, I have found that such an approach usually causes more problems than it solves. Such was our experience with statewide document formatting standards. Our first attempt resulted in a set of rules that had precise measurements for margins and fonts. Even though all were based on existing standards in other jurisdictions, strict enforcement would have caused registries to reject close to 40 percent of the documents that are regularly recorded. Recognizing the absurdity of that result, the Registers Association instead adopted a rule that says if the document can be "legibly reproduced on standard registry scanners" then it is OK to record.

As future versions of the Deed Indexing Standards are released, please remember that a well-known and well-publicized local practice is often preferable to an unreasonable, unenforceable statewide standard.

A frequent commentator to REBA News, Richard Howe has served as register of the Middlesex North District Registry of Deeds since 1995. Beginning in 2003, Howe, together with assistant register Tony Accardo, have written a blog on registry operations and real estate news. Howe can be reached by e-mail at Richard.howe@sec.state.ma.us.

New HUD RESPA rule will take effect on Jan. 1

By Joel A. Stein

Key provisions of the November 2008 RESPA Rule, including the new HUD-1/HUD-1A and the new GFE, will take effect on Jan. 1, 2010.

In response to numerous inquiries, HUD has issued two sets of "frequently asked questions," with the promise of more guidance to come. The 25-page "New RESPA Rule FAQs," issued on Aug. 28, includes ten pages of questions and answers regarding the preparation of the HUD-1. This article will concentrate on the materials that impact the preparation of the HUD-1/HUD-1A settlement statement.

Joel Stein co-chairs the REBA Title Insurance and National Affairs Committee and recently received REBA's Richard B. Johnson Lifetime Achievement Award. He practices in Norwell and can be contacted by e-mail at jstein@steintitle.com

The first eight questions concern the HUD-1 generally, and provide the following information:

1. Courier and overnight delivery fees are to be considered fees for administrative or processing services. They may not be itemized separately. For a settlement agent, this charge should be shown on line 1101.

2. It is permissible to prepare separate HUD-1 settlement statements for the seller and buyer. The lender must be provided with copies of both when the seller's and buyer's copies differ.

3. Fees paid outside the closing should be shown on the HUD-1 and marked POC with a note as to whether the items were paid by the borrower, seller or other party.

4. Payments by the seller or real estate agent that are for settlement services included on the GFE should be listed in the borrower's column with an offsetting credit reported in lines 204-209 of the HUD-1. If the seller is paying for a charge that is on the GFE, the charge remains in the borrower's column on the HUD-1. A credit from the seller to the borrower should be listed in lines 506-509. For a charge paid by the real estate agent, the name of the party paying the charge must be listed.

Title services and title insurance

1. The term "title services" includes the service of conducting a settlement and any service involved in the provision of title insurance, including, but not limited to:

- title examination and evaluation
- preparation and issuance of commitment
- clearance of underwriting objections
- preparation and issuance of policies all processing and administrative services required to perform these functions (e.g. document delivery, preparation and copying, wiring, endorsements, and notary);

2. Line 1101 of the HUD-1 settlement statement is the total of the charges for "title services and lender's title insurance" which includes: all charges for conducting a settlement (Line 1102); any premiums paid for lender's title insurance and its related endorsements (Line 1104); all charges for title searches and examinations; and charges for all other services itemized in the 1100 series if those services are included in the definition of "title service." The total on Line 1101 should not include the amount of any premium for owner's title insurance and its related endorsements, which must be listed in the columns on Line 1103.

The charge to the borrower for conducting the settlement must be included in the total stated in the borrower's column on Line 1101 of the HUD-1. In addition, the total in the borrower's col-

Continued on page 19

Changes to the tax code and their effect on condominiums

Continued from page 1

528, respectively, that eliminate and/or limit tax implications with regard to "income" in the form of excess common area fees and net worth.

While condominiums must file federal corporate tax returns, they are not taxed as true corporations. But now, in Massachusetts, since condominiums file corporate tax returns at the federal level, they will be taxed as corporations at the state level — and possibly are subject to a new corporate tax.

We are working with CAI member Kenneth Bloom in seeking further guidance from the Massachusetts Department of Revenue as to the full extent of these changes on condominiums. However, we have been able to determine the following possible implications:

All condominiums will now be subject to the minimum corporate tax of $456.

All condominiums will now have to file state Form 355, a significantly more detailed form than the previous Form 3M.

As it pertains to taxable income, which is generally interest income, the new tax rate on Form 355 is 9.5 percent (the rate on the old Form 3M was 5.3 percent). The new forms must generally be filed electronically.

Perhaps the biggest impact is that funds maintained in operating and reserve accounts could be included in the calculation of net worth, thus subject to additional tax. For those condominiums maintaining large reserve accounts, this could be a major impact.

As we continue to review these changes and work with DOR to determine the impact on condominiums, we will provide additional information in the coming months.

If you have any questions as to how these changes might impact your association, please do not hesitate to contact our office for more information. You may also view additional information on this topic on MEEB's website, www.meeb.com.

Matthew Gaines is an associate with the Braintree-based form of Marcus, Errico, Emmer & Brooks. Prior to joining the firm, he was chief of staff and legislative director to Sen. Brian A. Joyce, D-Milton. Gaines currently serves on the Outreach Council of Heading Home, a nonprofit focused on ending homelessness in Boston. He can be reached by e-mail at magaines @meeb.com.

A brief history of the Torrens System in the U.S.

Continued from page 13

of registry was in the thousands.

He cautioned that these numbers indicated a potential for rapid growth, and the problem of providing room for the new records of the future was a matter of "serious concern." The governor also noted in his address that pending the successful adoption of Torrens, participation on the part of each individual landowner ought to be voluntary, therefore ensuring that "no one loses any right which he now possesses."

Heeding the request of the governor, the Legislature enacted The Registration Act, codified today as G.L.c. 183, which created what is known today as the Land Court. The Massachusetts system was viewed as so successful that almost identical versions were adopted by the Philippines in 1902 and Hawaii in 1903.

However revolutionary Massachusetts' adoption of Torrens appeared to be to the Legislature and governor at the time, it has proven not to be the cheap and speedy remedy to land registration issues that it was intended to be. In fact, today the process to register one's land is more likely to be viewed as cost-prohibitive and slow.

While the law adheres to the key principles of Torrens in creating a specialized court with jurisdiction of land issues including registration, Massachusetts set itself apart from many of the other Torrens states. Accordingly, in order to register land here, an owner must petition the court via the recorder. The complaint must include a description of the land, including the names and addresses of the owner and all adjoining owners and occupants. A statement must follow that a petition for registration has been filed, including the date and place of filing. All original muniments of title are to be included in the complaint. The court may require a further survey of the land for purposes of determining boundaries, the cost of which is to be covered by the petitioner.

Upon registration, the recorder is to make a memorandum that there is a complaint, and forward it to the register of deeds for every district interested. Then, the recorder publishes notice of the complaint in a newspaper published in the district where any part of the land lies. Within seven days of publication, a copy of the notice is to be sent to every person whose name appears in the complaint via registered mail. The sheriff is to place this notice on a conspicuous place on the land.

After a hearing, the court may find that the land is eligible for registration and confirm it as such. Upon this binding confirmation, the title of the land is quieted and the judgment of the court cannot be reopened, nor the land removed from the registration system, with a few exceptions.

Given its role as guarantor of title, it is no surprise that the Land Court requires these complex procedures for registration. However, these procedural hurdles render the potential benefits of the registration system seemingly unattainable. In mid-2007, the Land Court had 1,560 cases awaiting registration. Sixteen complaints were entered in 2008, bringing that year's caseload to 1,576. Only 25 of these cases were resolved in 2008, leaving 1,551 awaiting registration at year's end. Thus, in 2008, the caseload was reduced by nine. Given the few new registrations, it is logical to conclude that the registration system is not popular among landowners, and that it does not provide the cheap and speedy remedy to questions of ownership predicted in 1891.

Dealing with registered land poses similar procedural blocks when attempting conveyances. If attempting to convey less than all of the plots described in the certificate of title, the landowner must file a plan. Prior to the conveyance, the court must approve this plan. Then, a new certificate is to be issued for the new plot, and the conveyance noted on the original certificate. These procedures are true for mortgage interests as well; a mortgage can be filed only if it appears in the plan on file. This is a cumbersome process that makes alienation of registered land difficult.

This is not to say that the registration system within the commonwealth ought to be abolished; rather, the best possible compromise would be to allow for voluntary removal of land from the system.

As mentioned, there are very few exceptions to the rule that states that once land is registered, it is binding and the registration runs with the land. One such exception is for land owned by public entity; another is for land on which a condominium is declared that its title has both registered and unregistered land. In these cases, the law provides for voluntary removal from the registration system. Voluntary removal statutes have been popular in many other states, which also dealt with inefficient registration systems.

The adoption of voluntary removal procedures for land that does not fall into the current exceptions would potentially solve procedural inefficiencies without doing away with the system for those who appreciate its benefits. By this change, governor Russell's view would be maintained: No landowner would lose a right that he currently possesses.

Conclusion

The application of the Torrens system in the U.S. has not been as successful as originally anticipated. While many of the first states to enact legislation expected a greater organization of records than the traditional method, none of the examined states have had that positive experience. Some states have abolished Torrens legislation entirely; others have enacted a voluntary withdrawal provision from the system. Given the state of the registration system in Massachusetts, the best solution to the ailing system would be to allow for voluntary removal of land.

While Torrens legislation had been anticipated to offer a fast, simple, and inexpensive method for keeping track of land ownership, administrative issues, technological advances and duplicative title insurance laws have rendered the system largely obsolete in most of the original states in which it was implemented.

Wetland permit appeals – building a record for survival

Continued from page 6

rules adopted pursuant to the wetland bylaw), rather than the less stringent "preponderance of the credible evidence" standard in the town's bylaw.

The decision cited publications on which the commission relied to support its denial. These citations may have avoided a reversal in the applicant's favor. Instead of finding that the applicant met the evidentiary standard and reversing (as it did in *Pollard*), the Appeals Court remanded for the commission to apply the less stringent standard. It suggested that "administrative decisions containing more thorough explanations will aid courts immeasurably in any subsequent appellate review."

The Land Court recently upheld a commission's denial of a wetlands permit relating to a large subdivision as substantially supported by the evidence. The case is under appeal

In *DeCarolis v. Townsend Conservation Commission*, *Misc.*, No. 351173 (Land Ct. 2009), the land court agreed with the commission that the permit seeker's submissions lacked information adequate to show that wetlands and buffer zones would be protected, and failed to respond to information requests. Although the court found that five of the 24 separate grounds for denial were unsupported by substantial evidence, the remaining 19 had ample support in the record.

These cases show that courts are scrutinizing the actions of commissions and DEP in issuing wetland permit decisions, perhaps more so than in the past., and demonstrate the value of thorough written decisions. Applicants should submit proposed decisions to the issuing authority.

Commissions and the DEP should include specific findings, especially in a denial when an appeal is likely. Most importantly, only a thorough and complete record will survive judicial review. The extra costs to perfect a written record are worthwhile because oral testimony may not be well recorded in meeting minutes.

In wetland permit appeals, the courts' scrutiny falls on the evidence in the administrative record. Therefore, applicants, opponents, commissions and the DEP alike need to ensure that the administrative record supports their position on a proposed project. Engaging a seasoned attorney to interpret standards and focus the presentation of evidence may save time and avoid lengthy appeals.

In memoriam

Continued from page 9

the launch of its dispute resolution subsidiary. He also served from 1984 to 1987 as president of The Abstract Club, an organization of 100 specialists in real estate law founded over a century ago. Byrnes was a charter member of the American College of Real Estate Lawyers. His early career also included a turn as senior vice president of the Federal Reserve Bank of Boston, during which he was instrumental in the development of its present headquarters building. He was a partner in Gaston & Snow and its predecessor firms for many years and served as of counsel at Boyd, MacCrellish & Wheeler, and Nutter, McClennen & Fish. He retired in 2001.

Throughout his career, Norman mentored many younger attorneys and provided distinguished pro bono service in the improvement of Massachusetts real estate law and practice by his authorship and co-authorships of outstanding amicus briefs on behalf of MCA and The Abstract Club. He worked with other leading real estate lawyers in drafting and promoting substantial statutory improvements.

The amicus briefs include those filed in *Kozdras, et. al. v. Land/Vest Properties Inc., et. al.,* 382 Mass. 34 (1980); *Jackson, et. al. v. Knott, et. al.,* 418 Mass. 704 (1994); and *Kelly v. Marx,* 428 Mass. 877 (1999). He co-authored with Beth Mitchell the chapter on Restrictions and Indefinite References in the ninth edition of "Crocker's Notes on Common Forms."

Richard Milstein, founding director of Massachusetts Continuing Legal Education, recalls that from the earliest days of MCLE, Norman had a large part in the planning of its programs and appeared frequently as a panelist. He was the author of the chapter on Massachusetts law firm culture in "Legal Chowder: Judging and Lawyering in Massachusetts," published by MCLE in 2002. That chapter provides an excellent historical account of the development of Massachusetts law firms from the mid-19th century to the present and the passage of the culture from collegiality to the bottom line.

Norman's was a strong, liberal Democrat. He was also a skilled tournament bridge player and took a keen interest in land conservation. In 1977, he co-founded with Harvard Law School classmate Caleb Loring Boston Natural Areas Network, whose mission is to preserve, expand and improve urban open space. In 2006 it became an affiliate of The Trustees of Reservations, the oldest land trust in the world, founded in 1891 by Charles Eliot as a nonprofit organization dedicated to preserving properties of scenic, historic, and ecological value throughout Massachusetts. It now boasts a membership of over 40,000.

Norman was a man of independent mind, with a warm, friendly manner and a great sense of humor and good spirit. Known as "Shorty" Byrnes due to his decidedly un-short stature, he sported as large collection of flamboyant neckwear and headgear, including bowlers. Wiley Vaughan, Norman's Harvard Law School classmate and good friend for 61 years, retains many fond memories of the frequent telephone calls they made to each other over the last few years, in which they exchanged in perfect good humor their political views at opposite ends of the political spectrum, as well as their views on difficult issues of real estate law, on which they were, by contrast, usually in agreement.

Norman leaves his large family and many friends and professional colleagues a legacy of fond memories of a "Man For All Seasons," and a long and generous life well lived. A memorial meeting at the Union Club in Boston was held on Sept. 12.

Herbert W. Vaughan, chairman

Peter Wittenborg

Henry H. Thayer

F. Sydney Smithers

New legislation streamlines timeshare condominium lien forfeiture

Continued from page 5

er's association went bankrupt due to this spiral effect. When the burden became too great, the owners simply stopped paying.

The primary goal behind non-judicial forfeiture is to limit costs to the association (i.e., to the owners who are meeting their obligations) and lenders so that intervals can be recovered and put back into the hands of owners who intend to meet their financial obligations to the association. An added benefit, however, is that it is estimated that the bill will generate up to $11,000,000 in new recording fees for the commonwealth.

As you might expect, REBA has reviewed the pending legislation to evaluate its impact on real estate interests and related legislation. It is my understanding that REBA has conditioned its support of the legislation on amendments which ensure that the bill has no unintended adverse impacts on the Mortgage Discharge Law, which REBA successfully championed in 2006. Proponents of the bill have agreed to revise the bill to address REBA's concerns.

New HUD RESPA rule will take effect on Jan. 1

Continued from page 15

umn on Line 1101 must include any amount for conducting the settlement that was paid by another person on behalf of the borrower. In such a case, an offsetting credit must be shown on page 1 of the HUD-1.

If the seller paid the amount, a credit to the borrower in that amount must be listed in Lines 204-209 and a charge to the seller must be listed in Lines 506-509. If another person pays the amount, an offsetting credit should be reported in Lines 204-209, identifying the person paying the charge.

Any separate charge to a seller for conducting the settlement must be listed in the seller's column in Line 1102. The borrower's charge for conducting the settlement should be itemized outside the borrower's column in Line 1102.

HUD-1 page 3

Page 3 of the new HUD-1 includes a Comparison Chart to compare the GFE to the HUD-1.

1. Lenders are to provide to settlement agents the information necessary to complete the third page of the HUD-1. The settlement agent should not have to refer to the loan documents to obtain this information.

2. The 10-percent tolerance rule applies to the total of all charges shown in the category, "Charges That In Total Cannot Increase More Than 10 percent." A tolerance violation would mean that the total of all the actual charges in this category exceeds the total of estimated charges by more than 10 percent.

3. The HUD-1 column in the comparison chart must include all amounts shown on page 2 of the HUD-1. If a portion of a fee is POC, the entire fee must be noted on the chart.

4. The settlement agent is not required to compare the information contained in the GFE with that set forth in the HUD-1. If the settlement agent becomes aware of inconsistencies it should be reported to the lender. The settlement agent does not have to stop the closing if tolerance violations occur; however, if the lender reimburses the borrower for the overage, a new HUD-1 will have to be prepared by the settlement agent.

5. Page 3 of the HUD-1 does not have to be provided to the seller.

6. Each item included in Block 3 of the GFE must be separately itemized in the "Charges That In Total Cannot Increase More Than 10 percent" section of the comparison chart.

7. If the interest rate can rise, the "Yes" box in the "Loan Terms" section must be checked and the applicable information, including: the maximum interest rate; the date of the first possible interest rate change; the frequency of subsequent changes; the date after which subsequent interest rate changes could occur; the amount, stated as a percentage, that the interest rate could increase or decrease every possible change date; the lowest possible interest rate over the life of the loan; and the maximum possible interest rate over the life of the loan.

Other changes

The percentage of commission paid to the real estate agent has been removed from the HUD-1 and the total dollar amount of the commission will now be listed. If the real estate agent is holding some of the buyer's money that will be applied to the commission, the amount of the deposit and the name of the party holding the deposit must be identified on Line 704 as POC.

In the case of "no cost" loans where "no cost" refers only to the loan originator's fees, a credit equal to the amount shown in Line 801 on the HUD-1 must be given in Line 802 of the HUD-1 so that the adjusted origination charge in Line 803 of the HUD-1 equals zero.

In the case of "no cost" loans where "no cost" encompasses some or all third party fees and the origination charge, a credit should be listed in Line 802 of the HUD-1 to offset all fees encompassed in the "no cost" loan, resulting in a negative number for the adjusted origination charge on Line 803 of the HUD-1. The third-party services covered by this offset must be itemized and listed in the borrower's column.

This new rule will require lenders and settlement agents to work together closely to understand the impact of the many changes. REBA's Annual Meeting and Conference includes an hour-long breakout session on the new rule. For registration information and more about the AMC09, turn to the centerfold of this issue of REBA News.

REBA offers enhanced lawyer professional liability insurance

Continued from page 1

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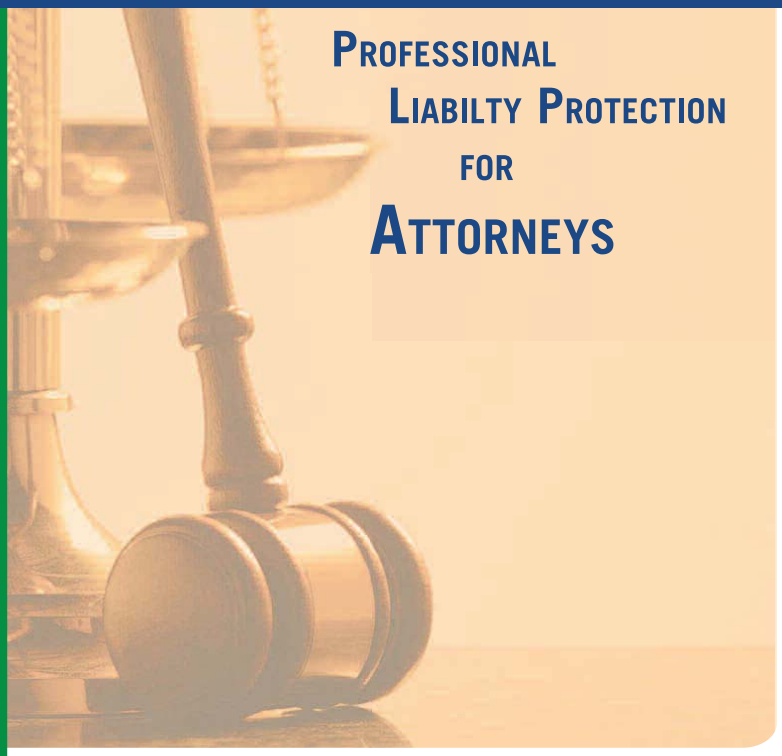

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