Legal implications of social networking
PAGE 5

Fast as you can: the merits of quick draw arbitration
PAGE 8

U.S. POSTAGE
PAID
BOSTON, MA
PERMIT#: 1323

WWW.REBA.NET
REBA news
THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
MAY 2013
Vol. 10, No. 3
A publication of The Warren Group

REBA may offer mandatory Practicing With Professionalism course in 2014

BY CHRISTOPHER J. ALPHEN

There has never been a continuing legal education requirement for lawyers practicing in Massachusetts, until now. The Supreme Judicial Court recently approved Rule 3:16, which requires that all persons admitted to the bar of the commonwealth complete a one-day, in-person "Practicing with Professionalism" course. However, if you are currently a practicing attorney, you can breathe easy; you won't have to take any mandatory courses. The rule only applies to lawyers who are admitted to the bar after Sept. 1, 2013, and as a second-year law student who won't be admitted to the bar until 2014, that's me.

Following the approval of Rule 3:16, the Real Estate Bar Association has applied to be a provider of this one-day course, and has filed with the SJC a written proposal outlining how REBA would present such a course to newly-admitted lawyers. I helped REBA draft this proposal, in which we were able showcase the association.

We offered a course that emphasizes the importance of continuing education and the considerable number of resources available to lawyers. REBA's course, if approved by the SJC, will help educate newly-admitted lawyers on subjects such as ethics, the court system and professionalism in the workplace. Other topics will include managing client funds, *pro bono* obligations, social media and office management. REBA will present the course in a way that stresses the aspects of being a transactional lawyer.

Many of REBA's members, as well as volunteers from the judiciary, will present materials to the course's attendees. The course experience will give newly-admitted lawyers some practical insight into the career of being a lawyer as they begin their careers.

As someone who will eventually have to spend an entire day in this course, I believe this pragmatic approach will be both informative and rewarding. This course may be the commonwealth's first step in implementing mandatory continuing education for lawyers, which many would agree is a step in the right direction. The course is appropriately aimed at newly-admitted lawyers, as they are more likely to make mistakes in practice. The course

See MANDATORY COURSES, page 4

Wyman v. Ayer Properties, LLC

A leveled playing field for condominium trustees

BY JAMES KOSSUTH

JAMES KOSSUTH

The Massachusetts Appeals Court recently made a significant change to the economic loss doctrine as it pertains to claims for negligence by condominium trustees, which will benefit condominium trustees seeking damages for construction defects. The long-standing rule in Massachusetts and elsewhere had been that a party could not seek damages in negligence for purely economic harms; those harms were compensable only as contract or warranty claims. Now, however, the Appeals Court has held that a condominium unit owners' association may recover damages in tort from a builder or vendor for negligent design or construction of common area property when the damages are reasonably determinable, when the association would otherwise lack a remedy, and when the association acts within the statute of limitations or statute of repose.

Prior to this decision, the law was well-established that, unless there were some personal injury or other physical damage to property, the negligent supplier of a defective product would not be liable in tort for simple economic loss. This principle applied to any product, be it a widget or house. Redevelopers could then rely on the economic loss doctrine to avoid liability entirely in many instances where condominium trustees sought damages for construction defects.

One of the theories underlying the principle was that, absent some addition-

See WYMAN, page 10

Parks, urban renewal, and the public trust

PAULA DEVERAUX

BY PAULA M. DEVEREAUX

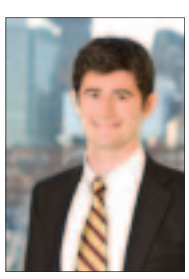
In the case of *Sanjoy Mahajan v. Department of Environmental Protection,* 464 Mass. 604 (2013), the Supreme Judicial Court answered interesting questions about a parcel of land at the end of Long Wharf in Boston involving the interplay of urban renewal actions by an urban renewal authority under MGL c. 121B, parkland issues under Article 97 of the Amendments to the Massachusetts Constitution, and the issuance of a Chapter 91 license by the Mass. Department of Environmental Protection (DEP).

Decided by the SJC on March 15, 2013, *Mahajan* focused on an area at the end of Long Wharf in Boston containing an approximately 33,000-square-foot plaza area, including a portion of the Harborwalk along the water's edge,

See URBAN RENEWAL, page 8

MassDEP proposed revisions attempt to streamline permitting procedures

BY GREGORY R. BRADFORD AND MATTHEW H. SNELL



GREG BRADFORD

MATT SNELL

Over the past decade, the Massachusetts Department of Environmental Protection (MassDEP) has seen significant reductions in budget and staffing while its mandate to protect the environment has increased. As it seeks to maintain its high standards of environmental protection and enforcement, MassDEP is attempting to streamline its regulatory and permitting activities to better allocate its reduced capacities. Several proposed reform packages to existing regulations have been made available for public review and comment, with the comment period ending May 10, 2013. The proposed revisions are wide ranging across most MassDEP programs including air, water, wetlands, solid waste and hazardous waste.

Of particular importance to commercial real estate professionals are efforts to restrict MassDEP's jurisdiction over certain activities. MassDEP has proposed eliminating its Sewer System Extension & Connection Permit Program (314 CMR 7.00), which in some projects is the only state agency permit

See MASSDEP, page 11

To hold or not to hold?

That is the question when your client asks you to be an escrow agent

BY ROBERT T. GILL AND JENNIFER L. MARKOWSKI

Nearly every real estate transaction needs an escrow agent who, by definition, neutrally administers her responsibilities. Before accepting the role, an attorney should consider that as escrow agent she could find herself in a dispute between her client and the other party over who is entitled to the escrow funds. As such, the attorney should fully advise her client of the consequent limitations on the representation insofar as the handling of escrow funds is concerned. If, after proper disclosure, the client consents to the attorney serving as escrow agent, the attorney should reduce the disclosure and client consent to writing and prepare an escrow agreement which describes the escrow agent's obligations, the conditions under which disbursements will be made, and the procedure for resolving disputes (including who will pay the associated costs).

THE ESCROW AGENT'S DUTIES

An escrow agreement consists of the delivery of money by one party and a promise by the other to hold it until the performance of a condition or the happening of a certain event. The escrow agreement, which need not be in writing, binds the escrow agent to follow the principals' instructions. In a real estate transaction, the escrow agent owes fiduciary duties to both the buyer and the seller. Those duties attach upon receipt of the funds to be held in escrow, and exist as long as the funds remain, undisturbed, in the escrow agent's account.

When something goes awry in a real estate transaction, the proper disposition of the escrow funds is often disputed with both the buyer and seller demanding them. The escrow agent has an obligation to maintain neutrality and ensure the funds are disbursed in accordance with the principals' original instructions (the escrow agreement). Where a dispute has arisen, the escrow agent should not disburse to either party and should pursue corrective action such as an interpleader action pursuant to Mass. R. Civ. P. 22, 365 Mass. 767 (1974).

Even though the escrow agent is not advocating for one party or the other, the resolution of the dispute will inevitably require the escrow agent to expend both time and money.

DISCLOSURE OF THE DUAL ROLES OF ATTORNEY AND ESCROW AGENT

One party's counsel may act as an escrow holder so long as the parties agree that in this capacity counsel is to serve not as the agent of either of the parties, but as a fiduciary of both of them.

Because the attorney's role as escrow agent prohibits her from advocating on behalf of her client relative to the disbursal of funds, before accepting escrow responsibilities, an attorney should advise the client in detail as to the scope of her role as escrow agent and the potential limitation on her representation of the client. She should also advise the client that she can best and most fully serve the client's interests if a third-party is selected as an escrow agent. If, with a full understanding of the limitation, the client still wants the attorney to serve as escrow agent, the attorney should reduce the disclosure to a writing which is acknowledged by the client so, if a dispute arises, there is no question proper consent was given.

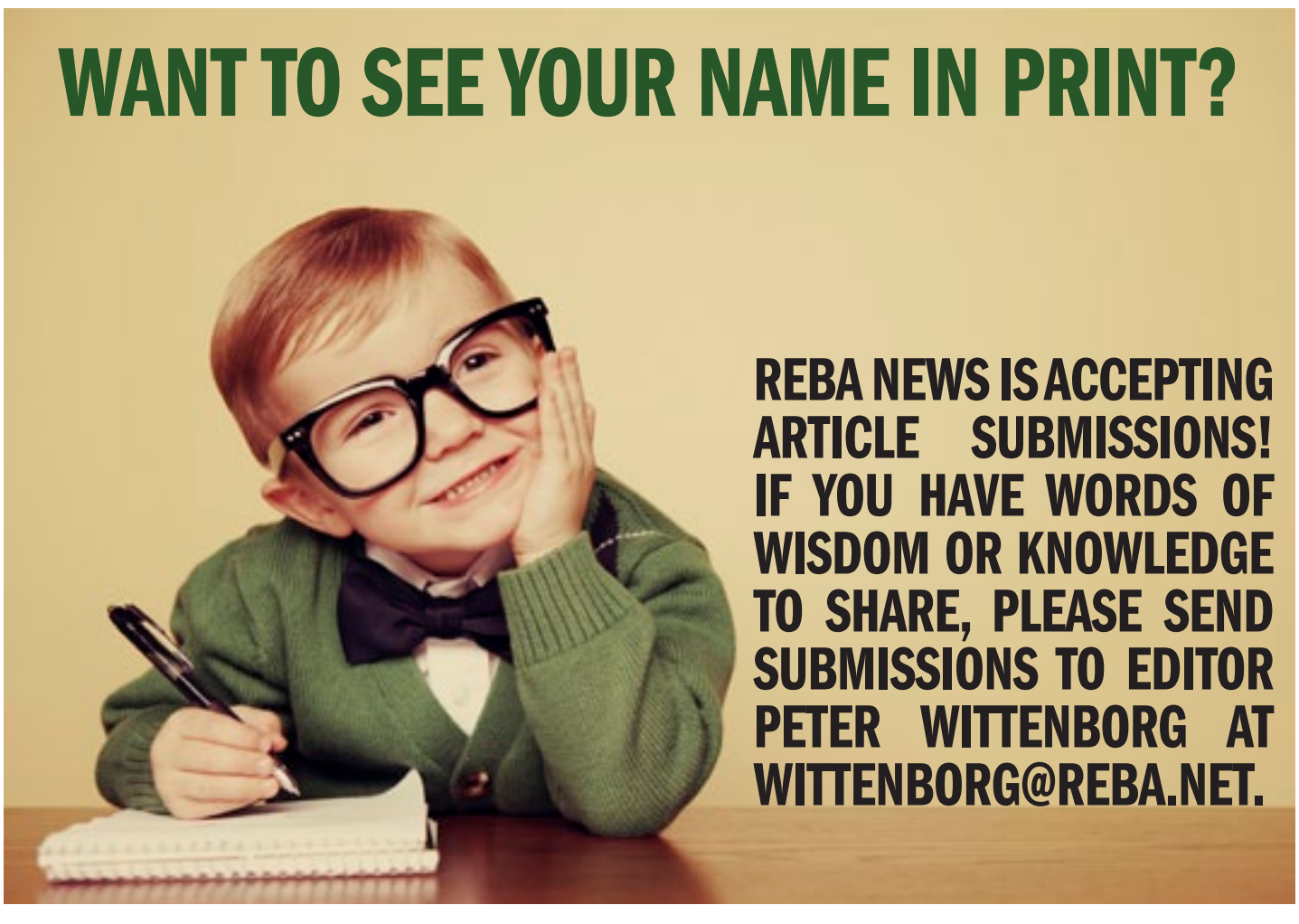
One party's counsel may act as an escrow holder so long as the parties agree that in this capacity counsel is to serve not as the agent of either of the parties, but as a fiduciary of both of them.

MEMORIALIZING THE TERMS OF THE ESCROW AGREEMENT

If, after full disclosure, the client waives the conflict and the attorney accepts the role, the attorney should draft an escrow agreement that explains the escrow agent's role and obligations as well as the conditions upon which the funds are to be disbursed. For example, is written permission from both parties required before disbursing the funds? Further, the agreement should address how the escrow agent should proceed if a dispute arises between the buyer and the seller. Will the parties mediate, arbitrate, file a court action or some combination thereof? Who will pay the escrow agent's reasonable legal fees and costs associated with such a proceeding? Will it be paid out of the escrow funds? Will they be paid by the losing party? How will a reasonableness determination be made? REBA's Standard Form No. 33 is a helpful resource for determining how to address these issues in a written escrow agreement.

If an attorney is going to serve as escrow agent, it is worth the initial investment of time to develop good working forms that can be adapted to various transactions. Reducing the conflict disclosures and consent and escrow agreement to explicit writings provides guidance to everyone involved in the transaction and prevents unnecessary ambiguities from arising when a disagreement develops. So, the next time you agree to hold the escrow funds, explain the role and its obligations and consequent limitations and do it in writing.

Bob Gill and Jen Markowski are partners at Peabody & Arnold LLP and co=chairs of the association's ethics committee. Bob can be reached at rgill@peabodyarnold.com and Jen can be reached at jmarkowski@peabodyarnold.com.



REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

50 Congress Street, Suite 600
Boston, Massachusetts 02109-4075
www.reba.net

President:
Michael D. MacClary
mmacclary@burnslev.com

President Elect:
Michelle T. Simons
msimons@legalpro.com

Immediate Past President:
Christopher S. Pitt
cpitt@rc.com

Treasurer:
Thomas Bhisitkul
tbhisitkul@haslaw.com

Clerk:
Susan B. LaRose
susan@dandllaw.com

Executive Director, Editor:
Peter Wittenborg
wittenborg@reba.net

Legislation Counsel:
Edward J. Smith
ejs@ejsmithrelaw.com

Unauthorized Practice of Law Counsel:
Douglas Salvesen
dsalvesen@bizlit.com

Managing Editor:
Nicole Cunningham
cunningham@reba.net

Assistant Editor:
Andrea M. Morales
morales@reba.net

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 inquires relative to the Association Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Associations members is not, of course, a legal option.

© 2013 The Real Estate Bar Association for Massachusetts. Materials for March can not be reproduced without permission.

Standard bulk postage paid at Boston MA, 02205. Postmaster: Send address changes to REBA, 50 Congress St., Boston MA, 02109

THE WARREN GROUP
Real Estate & Financial Information Since 1872

280 Summer Street, 8th Floor
Boston, MA 02210-1131
(800) 356-8805
www.thewarrengroup.com

COMMENTARY

Success has many fathers

BY PAUL F. ALPHEN

PAUL ALPHEN

We witnessed a few good economic indicators the past few months. They may not be valid, but they work for me.

First, there was the boat show. Not only did my local dealer announce that it was his most successful boat show ever, but in general boat manufacturers have decided to admit that boating is suppose to be fun. There were fewer hardcore fishing machines on display and more boats loaded with drink holders, lounge pads, built-in coolers and comfortable seating, including pontoon boats with tiki bars. (Try telling the marine patrol "Nope, no one drinking on board, officer.")

Then there was the New York International Auto Show. Since the start of the recession, large crowds have been attracted to the likes of Hyundai, Kia and other low-priced brands. This year, those displays were nearly vacant of customer traffic. But there were huge crowds around the new Stingray, Camaro, Shelby Raptor, Power Wagon, Viper, BMW M Series and every Mercedes at the show. You couldn't get near the six Mustangs at the Ford display although, the basic architecture of the car has been around for over six years. The auto industry is optimistic, because the average car on the road these days is 12 years old, and they will need to be replaced soon.

I hope the economic upturn is real, and that it will soon be reflected in the residential real estate development market. I admire those developers who have been able to keep going during the past five years.

I was on the road today and stopped by a restaurant to grab lunch. Proudly displayed behind the cashier within glass frames were proclamations from the House of Representatives and the Massachusetts Senate congratulating the restaurateur on its new location.

I had to laugh. I knew a little about the five-year process required of the landlord to obtain the permits to build the building. The developer spent the better part of two years going to Planning Board and Conservation Commission meetings, and running a parallel gauntlet with MEPA, MassDOT and the DEP. After paying surveyors, architects, engineers, botanists, experts and a throng of peer review consultants, the Planning Board denied the plan.

The developer had to renegotiate the deals with the landowners a few times, redesign the project a few times, appear before the Land Court, start the process over again with the Planning Board and finally go to the Appeals Court. Then he had to come up with enough tenants and money during the middle of the Great Recession before he could break ground, only to discover that he had purchased a giant parcel of solid granite.

I've been to more than my fair share of ribbon cuttings populated with officials who had come to congratulate themselves and eat some donuts or finger sandwiches. In my younger days I was among those donut-eating officials.

The contractors worked day and night, through the heat of the summer and the cold of the winter, until it was time for the grand opening. At the grand opening celebration there were attaboys for everyone, including a band of government officials that had been invisible during the developer's worst moments.

I've been to more than my fair share of ribbon cuttings populated with officials who had come to congratulate themselves and eat some donuts or finger sandwiches. In my younger days I was among those donut-eating officials. I have been to numerous community meetings wherein municipal leaders have taken credit for the tax revenue generated by new development, notwithstanding that the municipal leaders had nothing whatsoever to do with the development, and they were oblivious to the fact that one or two boards in the town had tortured the developer during the permitting process.

It's worse than your local financial advisor taking credit for an upswing on Wall Street (and the advisor was nowhere to be found during the crash).

Just once I would like to hear a town father get up on the floor of Town Meeting and say something like: "I would like to take this moment to express our appreciation to Mr. Smith. Mr. Smith invested his talent and money to purchase the old deserted plaza on Main Street, and after spending two years before the local boards, he spent considerably more money to construct a first-class, mixed-use project on the land. The new buildings contain shops and businesses that will both employ and serve local residents, and it will contribute $120,000 per year in tax revenue, money that is deeply needed by our school department. I would also like to publicly thank Smitty for his kind donation of new town ball fields and the new side walk in front of Town Hall. I hope you will all join me with a round of applause for Smitty and his company, not only to express our appreciation, but to send a message to the Planning Board and the Conservation Commission that is OK to work with responsible developers who bring improvements and tax revenue to our town."

REBA's president in 2008, Paul Alphen currently chairs the association's long-term planning committee. A frequent and welcome contributor to these pages, he is a partner in Balas, Alphen and Santos, P.C., where he concentrates in commercial and residential real estate development and land use regulation. Paul can be reached at paul@lawbas.com.

PROFESSIONAL LIABILITY INSURANCE FOR:

NEW AND ESTABLISHED FIRMS | HARD-TO-PLACE FIRMS | ALL AREAS OF PRACTICE
PART-TIME, EMPLOYED AND MOONLIGHTING LAWYERS | NEWLY-ADMITTED ATTORNEYS

WE ARE PROUD TO BE THE EXCLUSIVE AFFINITY PARTNER OF THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS

TO OBTAIN A PREMIUM INDICATION COMPLETE OUR ONLINE QUESTIONNAIRE:
WWW.LANDY.COM OR CONTACT US BY CALLING 800.336.5422.

LANDY
"Insurance for Professionals"

THE HERBERT H. LANDY INSURANCE AGENCY, INC. · 75 SECOND AVENUE · NEEDHAM, MA 02494 · 800.336.5422 · WWW.LANDY.COM · WWW.LANDY.BZ

Unique business needs deserve unique banking services

How to find the bank that's right for your firm

BY EDWARD J. SKOU

ED SKOU

The real estate conveyance industry is now more competitive than ever. Attorneys need to work harder and be more creative to attract new business. More frequently, billable hours are being sacrificed to retain clients. How do real estate conveyance firms manage these challenges and still grow? Through managing expenses and reducing time spent on non-income producing activities.

Your bank can and should help you save time and reduce expenses. Most real estate attorneys consider branch location, deposit products and service provided to be the top three attributes in choosing a bank. While these attributes are worth consideration, today's economy demands that a bank be so much more. A banking relationship should be customized to meet the real estate attorney's unique banking needs, helping you grow your client base and save money. A relationship based on location alone will not help you attain these goals.

Every bank claims they have what you need. Large commercial banks promote convenient locations and sophisticated online banking platforms. Community banks promote personalized service. Both of these models have benefits, but do not meet all the unique service requirements of a real estate conveyance firm.

Your bank should offer a unique banking package which addresses the servicing requirements you have. This would include such services as remote deposit capture, online wire services, reporting, and a dedicated, experienced service team.

Banks with a focus on real estate conveyance invest heavily in online banking platforms to manage wires. They implement efficient processes with internal controls to reduce user errors and fraud. They have automatic, system generated email alerts to notify you when your wires have been sent or received.

They have remote deposit capture (RDC), which allows you to scan checks for deposit and send the images through a secured Internet connection. In most cases, deposits can be made until 6 p.m., or later, and funds are available the next business day. RDC also eliminates the need to travel to the bank, saving time and money. If physical documents are required, your bank should have a courier service available to eliminate wasted time and travel.

Banks specializing in servicing real estate conveyance firms should also provide a dedicated service team. Today, most real estate attorneys need to work with multiple departments or contacts at a bank to manage their business. For example, they have a contact for the wire room, an 800 number for online assistance, and a branch contact. These contacts are not coordinated and are not necessarily familiar with the specific needs of the firm. Banks that specialize in real estate conveyance firms provide relationship managers and a dedicated client service team who are knowledgeable, familiar with the firm's needs and able to assist in all servicing aspects of the relationship.

Having developed a real estate conveyance banking package at Belmont Savings, I have seen firsthand how this model benefits our real estate conveyance customers. The personalized service far exceeds any other service model I have encountered and the industry specific offerings save our clients time and money.

Joe Keyes, partner at Larkin & Keyes PC, says, "I have been a customer of the bank for over a year and Belmont Savings Bank provides a superior service experience. My office receives personalized service through their client service team and my relationship manager has made the move to Belmont easy. The technology Belmont provides makes it completely, effortlessly easy to manage my day-to-day activities related to wire transfers, and make deposits from my desktop computer. These services provide me the ability to bank with Belmont Savings with my office located in North Reading."

If you are not working with a real estate conveyance banking group at your bank, ask if they have one. If not, consider a bank that specializes in real estate conveyance banking. You will save time and money by working with a bank that has understands your needs and has invested in an infrastructure and service model to service your unique requirements. This will free your resources to concentrate on growing your business.

Ed Skou is a senior vice president at Belmont Savings Bank. Ed manages the Business Banking group that specializes in law firm banking, municipal banking and property management banking for Belmont Savings Bank. Ed can be contacted at edward.skou@belmontsavings.com

At a combined meeting of REBA's litigation and condominium law and practice committees, Tom Moriarty (far right) discussed *Wyman vs. Ayer Properties LLC*, a significant Appeals Court case from last December which decided that the economic loss doctrine does not apply to condominium unit owners associations.

REBA MAY OFFER MANDATORY PRACTICING WITH PROFESSIONALISM COURSE IN 2014

CONTINUED FROM PAGE 1

will cover much practical material that is rarely taught in law school.

This mandatory course, however, does not come without some criticism. In first learning of the course, some of my classmates expressed their displeasure about having to attend additional courses after they pass the bar. Others were quick to point out how they were sure this was not just another mandatory class, but also another mandatory fee they had to pay to become a lawyer. My ethics professor mentioned the new mandatory course and called it "an insult to ethics professors," asking, "What is my job for, then?"

To be honest, when I first heard about the course I shared some of the same skepticism as my classmates and professors, but as I became more involved with creating REBA's version of the proposed course I realized its potential value. REBA's course will not only be educational but inspirational. The course faculty will provide young lawyers with a sense of direction and focus at the launch of their careers. As I helped create this course for REBA, I became increasingly impressed by the educational resources REBA can provide. And although I tried to lobby for a longer lunch period, the day-long program will undoubtedly be a key steppingstone into our careers. Mandatory or not, REBA has created a course that I wouldn't miss.

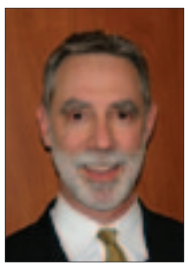
In addition to the course's educational benefits, probably the most important aspect of the course will be its ability to give newly-admitted attorneys their first opportunity to network within the greater legal community. The course will introduce new lawyers to a profession where peers respect each other, help each other, and work with each other to effectively use their skills to make a positive difference. This opportunity will allow new lawyers to join that community, and like I have, I hope many of them join REBA.

A REBA intern, Chris Alphen is a second-year student at New England School of Law/ Boston. He is president of the law school's real estate and land use society. He can be reached at christopher.j.alphen@nesl.edu.

TRANSCENDENTAL LAWYERING

To boldly go where no lawyer has gone before: legal ethics and social networking

BY JAMES S. BOLAN



JIM BOLAN

Google, YouTube, Facebook, Linked-In, Plaxo, Second Life, email, social networks, chat rooms, forums, bulletin boards, listservs, newsgroups and virtual reality sites; these are the forms of 21st century communications among peers, third parties, clients and potential clients. Lawyers are using the web in exponential measure, but such communication does not change a lawyer's duties and responsibilities under real world ethics rules. Henry David Thoreau, meet Dick Tracy. Dick Tracy, meet Philip Rosedale.

Under the Massachusetts Rules of Professional Conduct, lawyers must abide by ethics rules where they are licensed, where they have offices, and where they direct communications, regardless of where the conduct occurs. A lawyer not admitted in Massachusetts is nonetheless subject to the disciplinary authority of this and the lawyer's home jurisdiction if the lawyer provides any legal services here. Providing legal services in a jurisdiction where one is not admitted can result in unauthorized practice of law (UPL) issues.

How does one know where the person online is located, or even how old they are? The possibility that one could engage in unauthorized practice of law when communicating in the ether is real. Protection against UPL should include disclaimers in online communications as to one's licensure and geographic limitation on practice. Do not take on a relationship in a jurisdiction where one is not admitted.

One could, by communicating in cyberspace, unintentionally create an attorney-client relationship. In 2007, the MBA Ethics Committee issued an opinion (2007-01) that, in the absence of an effective disclaimer, a lawyer who receives unsolicited information from a prospective client through an e-mail link on a law firm website must hold the information in confidence even if the lawyer declines the representation.

Communication in cyberspace is subject to bar regulation in many states. ABA Model Rule 7.2 was amended to include internet advertising. See, Massachusetts Rule of Professional Conduct 7.2(a) that includes public media or written non-solicitation communication. Advertising rules may apply even if the site is a non-confidential chat room, thus rendering a lawyer not only subject to disciplinary rules, but risking confidentiality. While websites/pages constitute advertising, is the same true for virtual world or MySpace pages? Are these activities more akin to solicitation than advertising?

While websites constitute advertising, no rules expressly state that online of-

See SOCIAL MEDIA, page 6

Our Commercial Lenders have money to lend...right here for YOUR business.

We offer commercial real estate, construction, and C & I business loans up to **$25 Million**.

Call Tom Henderson, Vice President at 857-524-1625 to discuss your business lending needs.

East Boston Savings Bank® Mt. Washington Bank

Member FDIC I Member DIF

greenfolders®

The Office Management System

The information age has started ...are you on board?

You are if you have GreenFolders! GreenFolders puts your critical business information at your fingertips.

Need to know what work is being acomplished? Need to know the status of a closing file? Need to know who worked on a file? GreenFolders gives you immediate answers to these questions and many more.

Information = Control.
GreenFolders gives you that control.
Contact us today to find out more about GreenFolders.

801.747.2132

www.greenfolders.com • gfsales@greenfolders.com

In Brief

Unauthorized practice of law

Another witness closing company will abide by REBA's *NREIS* decision

In response to an inquiry from REBA, Solutionstar Settlement Services, LLP, formerly known as Equifax Settlement Services LLP, has agreed to comply with the terms of the SJC's decision in *REBA vs. NREIS*, handed down in April 2011.

In a recent letter to REBA's UPL Counsel, Doug Salvesen, Solutionstar's Massachusetts counsel, Jim Fox said, "REBA may be assured that it is Solutionstar's intent to comply with Massachusetts Law regarding the unauthorized practice of law, including those issues clarified in the lawsuit entitled *The Real Estate Bar Association for Massachusetts, Inc. vs. National Real Estate Information Services*."

"We are pleased that another out-of-state settlement services provider has recognized that only a Massachusetts attorney may handle real estate closings in the commonwealth," said Bob Moriarty, co-chair of REBA's Unauthorized Practice of Law Committee. "This includes, of course, holding the settlement proceeds in a Massachusetts IOLTA account."

REBA members are asked to report any instances of possible unauthorized practice of law directly to REBA's dedicated email address, UPL@reba.net.

Mentoring opportunities for REBA members

REBA offers a number of member benefits that are focused specifically on the needs of new members and newly admitted lawyers. This includes the availability of REBA lawyer-staffers to respond in real time to member inquiries, the REBA ethics hotline, and the association's pioneering peer-to-peer mentoring program, to name a few.

Members, particularly newly admitted lawyers, may telephone REBA at (617) 854-7555 with practice or title questions in any area of real estate law, particularly questions relating to the application of REBA's standards and forms. In some instances, member inquiries are referred to the appropriate REBA committee chair for a specialized, in-depth response.

The REBA ethics hotline is a confidential email address, ethics@reba.net, dedicated to handling inquiries, often relating to conflict concerns, and directing them to the three co-chairs of the REBA ethics committee. A REBA lawyer staff member or an ethics committee co-chair will reply by telephone for a brief discussion of a member's concerns and a suggested resolution. The ethics hotline can bring peace-of-mind to a new or newly-minted lawyer with a thoughtful response from a seasoned real estate practitioner.

The peer-to-peer mentoring program has become a popular member benefit of the association and it has grown significantly in the past three years, as so many recent bar admitees have opted to hang their shingle in a solo practice. This program is designed to pair up experienced, dedicated lawyers with colleagues who are seeking occasional guidance and support. The seasoned member serves as a mentor to a less-experienced colleague for a duration of six months, although the term can be extended if mentor and mentee so elect. Our mentors have found this program to be a rewarding professional experience.

To learn more about REBA member benefits, particularly the ethics hotline and the peer-to-peer mentoring program, don't hesitate to contact me at the address below. Additional information can also be found on our website at www.reba.net.

TO BOLDLY GO WHERE NO LAWYER HAS GONE BEFORE: LEGAL ETHICS AND SOCIAL NETWORKING

CONTINUED FROM PAGE 5

fices in "virtual" communities do. In virtual cyberspace, the level of interaction surpasses chat rooms. Some state ethics committees (California and Arizona) have conditionally blessed communication with prospective clients through real-time electronic contact. Others (Michigan, West Virginia, Virginia and Utah) have opined that in-person solicitation rules apply to interactive communications. At least one state (Florida) has decided that a lawyer may not solicit prospective clients through real-time communications. Rule 7.3 of the Massachusetts Rules of Professional Conduct precludes personal communication by electronic device "or otherwise."

If your network page contains comments from clients or colleagues about how fabulous you are (hold the applause!), you may run afoul of testimonial prohibitions in some states. Massachusetts does not expressly prohibit testimonials, but California, New York and others do. And, the Constitution notwithstanding, many states (Kentucky, New Jersey, Florida and Nevada, for example, but not Massachusetts) still have rules requiring filing and pre-screening of ads. Some states (New York) still require labeling of "attorney advertising," which is applicable to Internet activity. Finally, mandatory disclaimers are required in some states.

A number of states are now insisting that social websites or video sharing sites must comply with advertising rules. No matter what, one must ensure that what you say in cyberspace is true and not misleading.

SEPARATION OF FIRM AND TWEET

Keep social network sites and posts separate from your law firm websites.

> Your tweet about a case could disclose information that you would not otherwise think is risky, but the ease and familiarity of use in a society where the pressure is to move fast or die is inherently risky.

Twitter is no different from the conversation in the courthouse elevator. Attorneys need to make sure that when they post on a blog or on Twitter that they aren't revealing any attorney-client confidences. Your tweet about a case could disclose information that you would not otherwise think is risky, but the ease and familiarity of use in a society where the pressure is to move fast or die is inherently risky.

Be careful who you give access to in your network. The rule was always, if you don't mind seeing what you write or say on the front page of the *Herald*, then fire away!

Facebook and LinkedIn and other sites allow anyone to peruse fellow members' networks and connections. Letting someone into your network means your data can be mined. That may be fine. But, not if it contains information about clients or contacts that you do not want someone else to use or misuse.

Notwithstanding First Amendment protections, one can imagine a bar complaint filed by an "aggrieved" person for statements made by a lawyer in a blog, a listserv, a chat room or a virtual world. A missive in cyberspace belies the discretion borne of patience found in old-fashioned letters. Note that lawyers are subject to regulation for conduct occurring in one's private, as well as professional, life.

VIRTUAL WORLD RIGHTS AND DUTIES

Second Life is a virtual online community, in which "residents" are represented by avatars that can communicate, socialize, buy, sell, barter and provide services. Virtual (and real) law firms "exist" in such worlds. Some lawyers are using Second Life to recruit real-world clients. By chatting, advertising and participating in virtual activities, lawyers are looking for potential clients in this alternative medium. Advertisement or solicitation will generate real world oversight. In one instance, lawyers used social networking sites to gain information to defend a criminal client. They then posted a story online explaining how they used social networking sites with success, thus running the risk of advertising or other violations in some states.

Some state bar associations believe that virtual activity that is "sufficiently game-like" might avoid bar scrutiny even if it generates real work. Some bar officials have stated, informally, that regulation of such "game-like" activity in a virtual environment might not even be worth undertaking.

But, misconduct even within a virtual site runs the risk of bar regulation, as well as disgorgement of ill-gained fees, civil exposure and certain potential criminal exposure (UPL, for example). Non game-like activity in cyberspace is increasingly attracting the attention of real world regulators and prosecutors. Lawyer complaints won't be far behind!

The risks and rewards in cyberspace parallel conventional world activity. "Boldly go" where lawyers have not gone before, but look before you leap!

Jim Bolan is a partner with Brecher, Wyner, Simons, Fox & Bolan, LLP, with principal offices in Newton, and offices on Cape Cod and the North Shore. He represents lawyers and law firms in Board of Bar Overseers and malpractice matters, partnership breakups, departures and law firm litigation. Jim can be contacted at jbolan@legalpro.com.

If a tree is growing through the middle of your roof, it may be abandoned

BY PAUL F. ALPHEN

The Carver, Mass. zoning by-law says, "A nonconforming use or structure which has been abandoned, or not used for a period of two years, shall lose its protected status and be subject to all of the provisions of this zoning by-law."

In the recent Land Court decision in *Gomes v. Collins*, Gomes owned a nonconforming structure in Carver and the buyer wished to raze the structure and construct a new one. The buyer was denied a building permit on the grounds that the building was not a protected pre-existing, nonconforming structure.

Judge Grossman found that the building has lost it nonconforming status, as it had not been used for over 46 years and, "in point of fact, the structure lacks those basic elements that would permit one to characterize it as a residential structure. It is, at best, a modestly sized, deteriorating shell with a tree growing up through the roof and through the lone front dormer. The front portion of that roof and the dormer, which are readily visible in at least two of the photographic exhibits, are in a state of near collapse appearing to be held up by the tree, thereby leaving the structure entirely open to the elements. The windows and doors are gone, having been boarded up. The photographic exhibits indicate that the plastered ceilings are largely gone; the wall studs are plainly visible as well. Moreover, the structure is devoid of those critical elements that one would ordinarily associate with a residence or single family dwelling. In this regard, the photographs disclose the that there are no kitchen or sanitary facilities, no sleeping accommodations, no plumbing or electrical service."

This case took three years to reach this conclusion.

Show your support for REBA

Advertise in REBA News and promote your business!

Get your message in front of the REBA membership,
plus all subscribers of Banker & Tradesman.

Quick draw arbitration – when time is of the essence

BY SANFORD F. REMZ

As lawyers and clients know all too well, real estate litigation is an often arduous process that exhausts both sides financially and otherwise. Often clients and their lawyers see no alternative to slogging it out until one or both parties collapse from exhaustion and financial strain. In the end, many a client who has "won" asks whether the win was truly a victory.

More important than winning is securing a clear resolution within a timeframe and at a cost consistent with the parties' business objectives. This result is especially vital in real estate disputes, where certainty of ownership of property is critical.

Let's assume a buyer balks at closing on a purchase of a commercial property, the purchase and sale agreement does not have an arbitration clause and the seller seeks to force the buyer to consummate the transaction. The buyer sues for specific performance in Superior Court, facing years of litigation while the status of the property hangs in the balance. At this point creative lawyers may explore an alternative solution, such as "quick draw' arbitration, to reduce the risk and expense for their clients. With apologies to Coach Lombardi, sometimes winning is not the only thing, even in litigation.

A CASE STUDY OF 'QUICK DRAW' ARBITRATION

Buyer and seller enter into a P&S agreement for the sale of a commercial building for several million dollars. The agreement includes a closing date and standard time of the essence provision, as well as various closing conditions. Perhaps out of seller's remorse, the seller asserts that one of the closing conditions had not been met and gives notice that it would not attend the closing. The buyer disagrees and attempts to preserve its rights by proceeding towards closing.

After seller's non-appearance, the buyer begins an action for specific performance in Superior Court. The buyer also obtains a *lis pendens*, effectively tying up the property until the conclusion of litigation. A final resolution in Superior Court will likely take two to three years, not including appeals.

Given the *lis pendens*, the seller cannot sell or refinance the property. The seller faces protracted litigation with an uncertain outcome. An adverse order of specific performance following years of litigation could be costly. Because the property could appreciate during the course of the litigation, the seller could be forced to sell at far below market. However, even a win in litigation, that is a denial of specific performance, could be costly. The market could suffer a downturn and the seller would then be stuck with a less valuable property, compared to the original sale price.

To avoid these risks, seller's counsel suggests "quick draw" arbitration. Seller then proposes that litigation be stayed and the parties proceed directly to binding arbitration, despite the lack of an arbitration clause in the P&S agreement. The parties will negotiate a customized arbitration agreement designating a single arbitrator and a one-day hearing to occur within 30 days. Discovery will be limited to an exchange of transaction files. Given its similar interest in certainty and a speedy resolution, the buyer agrees. Importantly, the parties readily agree on the arbitrator, an individual both parties trust as fair and experienced.

More important than winning is securing a clear resolution within a timeframe and at a cost consistent with the parties' business objectives. This result is especially vital in real estate disputes, where certainty of ownership of property is critical.

The arbitration hearing occurs within a month. At the hearing, the parties present their cases within one full day. As the testimony develops, it becomes clear that seller is unlikely to prevail. At the close of evidence, the arbitrator verbally renders a reasoned award: specific performance for the buyer.

Having perhaps experienced seller's remorse once, will the seller now suffer further remorse over the result of arbitration? While the seller would have far preferred an award in its favor, it ends up in an acceptable position with little remorse about the process. At closing the seller receives the original several million dollar purchase price after a delay of no more than a month and after spending a modest amount in legal fees. It could have been much worse.

Would the seller would have been better off litigating in court, with far more time to develop its case through discovery? Rather than spending much time and money in litigation in the hope of obtaining a different result, we believe that seller is much better off learning of the weaknesses in its case sooner.

Of course, quick draw arbitration and other alternative dispute resolution mechanisms may not be appropriate in every situation. Lawyer and client must consider the circumstances of each dispute to determine what path is best. Indeed, before a dispute even arises, lawyers negotiating a P&S agreement should consider including a quick draw arbitration provision designating an organization such as REBA Dispute Resolution, Inc. as the arbitration provider.

Sanford Remz is managing shareholder of the Boston-based business litigation firm of Yurko, Salvesen & Remz, P.C., which has served as long-time counsel to REBA. He concentrates on business litigation matters, including real estate, securities, shareholder and corporate control and partnership disputes. Sandy can be contacted by email at SRemz@bizlit.com.

PARKS, URBAN RENEWAL, AND THE PUBLIC TRUST

CONTINUED FROM PAGE 1

and 3,430-square-foot pavilion building.

This case had its beginnings in 1964, with the adoption of the Downtown Waterfront – Faneuil Hall Urban Renewal Plan by the Boston Redevelopment Authority (BRA), an urban renewal agency and authority under MGL c. 121B §§ 4 and 9. One of the strongest powers given to an urban renewal agency is the power of eminent domain under c. 121B §§ 11 and 45. Long Wharf was taken by the BRA by eminent domain in 1970, in accordance with the Urban Renewal Plan, and remains in BRA ownership. In 2008, the BRA sought to lease a portion of the plaza area and pavilion for use as a restaurant in order to enliven this area. The pavilion would be expanded by approximately 1,225 square feet for the restaurant use.

Due to its proximity to the water and its location on filled tidelands, this area is subject to the licensing requirements of MGL Chapter 91. The Department of Environmental Protection (DEP) issued to the BRA a Chapter 91 License allowing this use. Ten citizens appealed DEP's issuance of the Chapter 91 license, arguing that the issuance of a Chapter 91 license constituted a disposition or change of use that required legislative authorization under Article 97 of the Amendments to the Massachusetts Constitution. Article 97 requires a two-thirds vote of the Legislature for a change of use or disposition of land or easements acquired for public purposes.

The questions regarding the interplay of the Chapter 91 license and Article 97 would only arise if the area was a public park protected by the provisions of Article 97. Superior Court Judge Elizabeth Fahey found this area was subject to the protections afforded by Article 97. The SJC first looked at the language of Article 97 and then at the history of the takings made by the BRA for Long Wharf, as well as the Urban Renewal Plan, and determined that the takings and actions by the BRA did not result in the dedication of the area in question as a public park.

Even though the area is open to the public, the SJC determined that when the area was taken by the BRA it was not taken or later designated as parkland for Article 97 purposes. Even though the Urban Renewal Plan designated some areas within the plan as "open space" and sought to provide public access to the water, the SJC held that the BRA actions were not taken for Article 97 purposes.

The court found that "although as a practical matter, certain aspects of an urban renewal plan may accomplish goals similar to those outlined in Article 97, the overarching purpose for which land is taken is distinct from Art. 97 purposes."

In short, using the areas as open space and providing public access are not equivalent to a full dedication of the area as a park entitled to Article 97 protection.

This case also contains an interesting discussion of an opinion issued in 1973 by Attorney General Robert Quinn regarding the applicability of Article 97 to land taken by a municipality or agency that may be used for public purposes. The SJC found that the focus should be on the purposes for which the taking was made and declined to adopt the more expansive interpretation of Article 97 put forward in the 1973 opinion. The court found that the BRA could take land for Article 97 purposes and could subsequently restrict the use of land for Article 97 purposes, but unlike the finding in this case, the intent would have to be clear.

The SJC could have ended the discussion once it found that the area was not a park for Article 97 purposes. Instead, it went on to answer the question of whether the issuance of a Chapter 91 license is a "disposition" triggering compliance with the requirements of Article 97. The court held it was not – the issuance of a Chapter 91 license is akin to other approvals that a project would have to obtain, like zoning – and the change of use would not occur until a project obtained all other approvals and undertook "an actual change in use, not mere preparations for that change." The disposition triggering compliance with Article 97 would be the disposition by the BRA – not a granting of a license to the BRA.

This case illustrates the powerful rights granted to an urban renewal agency and the long-term ramifications of urban renewal. Urban renewal under MGL c. 121B remains a powerful tool in a city's arsenal in dealing with economic development and revitalization, even if over time the needs of a particular neighborhood (or parcel) may change.

A member of the association's board of directors, Paula Devereaux has a broad practice in all areas of commercial real estate and land use law. A partner in the Boston firm of Rubin & Rudman LLP, she can be contacted by email at pdev@rubinrudman.com.

Your advertisement goes right here.
REBA
For advertising opportunities call (617) 896-5344 or email advertising@thewarrengroup.com

SCAM CITY

What you don't know will hurt you

BY JAMES S. BOLAN

Internet check scams are on the loose. Be afraid. Be very afraid!

SCAM ONE: WHO IS THAT DOGGY IN THE EMAIL (ON THE OTHER SIDE OF THE WORLD)

JIM BOLAN

You get an email from a lawyer asking you to take on a matter in your locale to (a) collect a debt; (b) pay a debt; (c) arrange for a contract; (d) deal with a lease issue – whatever! The reason given for the referring lawyer to make this referral varies – illness, not her area of practice, not a matter in his jurisdiction, etc. So, you do what everyone does – you look up the lawyer and see if he/she is a real person. He is. You send a reply email. Sure, we'd be glad to assist. You run a conflict check on the name of the prospective client and the other company. They are real companies.

Per your usual (and soon, perhaps, to be mandatory) protocol, you email out an hourly fee agreement for review and execution. It is signed and sent back with a retainer check. You write back a thank-you.

The client, a [fill in the nationality] corporation, sends you a cashier's check (often drawn on Citibank) in glorious color, with an elegant cover letter indicating that it is an anticipated payment on an outstanding contract to be paid to the other company for [fill in the blank] services rendered. The client wants to go through a lawyer in case there are any issues to resolve and negotiate.

You deposit the check into IOLTA. You confirm on the bank's website that the funds are not on hold and are available. You then get an email from the client indicating that they would like you to wire out the money ($256,342.29, for example) in the name of the other company. The check has cleared. You wire out the funds. Eight days later, your bank calls or sends you the good word – the check bounced. The account it was drawn on is no good. WHAT? Sorry. You are out $256,342.29, in someone else's money, drawn on your IOLTA account.

If you think this will not happen to you, think again! It has, it just did, it will again. There are several things you can do to prevent such a theft:

- Call the "referring" lawyer. His email account had been hacked. He didn't send it.
- Call the client, even if it is in Australia. They have been hacked, as well.
- Call Citibank and ask them whether the account is valid. It won't be.
- Ask yourself, what are doing for so little work? Why does someone need a lawyer?

SCAM TWO: SMARTPHONES, DUMB LUCK

At a real estate closing, seller gets a proceeds check, leaves with it and a few minutes later comes back and asks if closing counsel would, instead of a check, wire the proceeds to seller's account. Seller returns the proceeds check and closing counsel obliges and sends the wire. It turns out that the seller had used a smartphone app to deposit the check wirelessly to his account and then returned the already negotiated check to closing counsel. Upon receipt of the wire, seller was, cleverly, paid twice! Closing counsel now has to explain to everyone, bar counsel and insurers included, how a double payment was made, let alone try to recapture that excess amount.

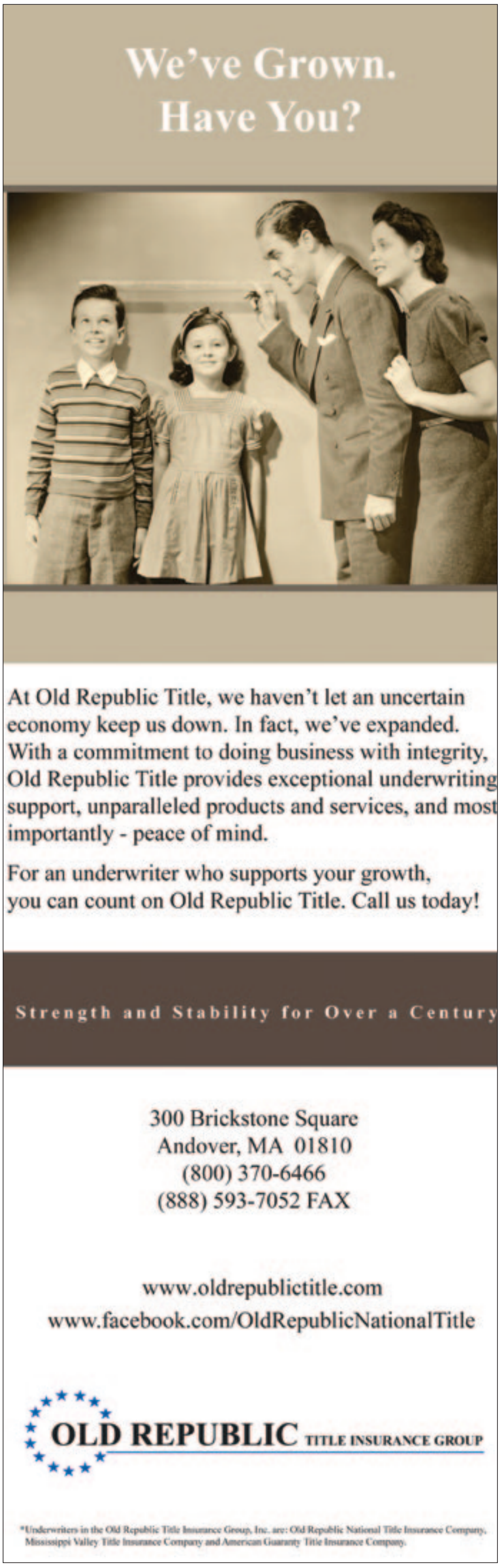
The after the fact advice is:

- Never leave anyone alone with checks
- Never reissue payment once it is made at a closing
- If you do, stop payment first on the issued check if a wire will be used instead.

MORAL OF THESE STORIES

Any of these steps would have prevented these scams. Do not let the either the frenetic pace of practice or any glimpse of easy money lure you into letting down your guard. Take the extra step, and it will save you more than you can imagine.

Jim Bolan is a partner with the Newton law firm of Brecher, Wyner, Simons, Fox & Bolan, LLP, and chairs the firm's litigation practice. He can be reached at jbolan@legalpro.com.



What happens in the cloud stays in the cloud – you hope!

BY JAMES S. BOLAN

JIM BOLAN

News flash: The state-sponsored "Your Tech Is My Tech" Corporation has been accused of hacking into law firms in England! Yipes!! What should you do? Find a good "cloud-based" storage company, like "Clouds 'R I," the newest backup and storage company for law firm data? That will protect everything from hackers. But is cloud-based computing permissible? Does it violate attorney client privilege? Will your data be safe from hackers?

In 2000, the MBA Ethics Committee addressed issues of client confidentiality posed in the use of the internet and remote access capabilities, concluding that a lawyer's use of unencrypted email to engage in confidential communications with a client does not ordinarily violate confidentiality under Rule of Professional Conduct 1.6(a).

In 2005, the committee concluded "that a law firm may provide a third-party software vendor with remote access to confidential client information stored on the firm's computers for the purpose of allowing the vendor to support and maintain a computer software application utilized by the law firm *so long as* the law firm undertakes 'reasonable efforts' to ensure that the conduct of the software vendor 'is compatible with the professional obligations of the lawyer[s],' including the obligation to protect confidential client information reflected in Rule 1.6(a)."

So, in December 2012, the MBA issued an opinion that is a logical extension of the earlier ones and concluded that a "lawyer generally may store and synchronize electronic work files containing confidential client information across different platforms and devices using an Internet-based storage solution, such as Google docs, s*o long as* the lawyer undertakes reasonable efforts to ensure that the provider's terms of use and data privacy policies, practices and procedures are compatible with the lawyer's professional obligations, including the obligation to protect confidential client information reflected in Rule 1.6(a). A lawyer remains bound, however, to follow an express instruction from his or her client that the client's confidential information not be stored or transmitted by means of the Internet, and all lawyers should refrain from storing or transmitting particularly sensitive client information by means of the Internet without first obtaining the client's express consent to do so."

But here's the rub. One day, you read that "Clouds 'R I" has been hacked or sued, having defaulted on its line of credit and the security agreement entitles the lender to grab assets – the servers in the "cloud" holding all of your data! Now what? Who owns the data? Who has control? What if "Clouds 'R I" files bankruptcy and a trustee steps in to claim rights in the assets over the bank? What laws apply? What if they didn't do a backup?

So, even though cloud computing and storage is permissible, before you leap into the air to store or compute, consider the following:

- Is your contract with the provide clear as to who owns the data and that you have access to it at all times, even if the provider files for bankruptcy?
- Is there language that the provider will provide you with at least a week's notice if the provider intends to sign a security agreement or to file for bankruptcy protection?
- If the provider is sold (regardless of the form of the transaction), what are your rights in that event?
- What happens if the provider is served with a subpoena? Will you have an opportunity to be heard in any proceeding? (Under the Stored Communications Act, notice is a requisite.)
- Does your provider do backups and where are they stored? Make sure they are in a separate locale.
- What insurance protection is provided, either through your own carrier or the cloud provider's?
- If the cloud is shut down for maintenance (like your bank on Sundays between 1 a.m. and 6 a.m.), how will you be guaranteed access, regardless?

Jim Bolan is a partner with the Newton law firm of Brecher, Wyner, Simons, Fox & Bolan, LLP, and represents and advises lawyers and law firms in ethics, bar discipline and malpractice matters. He can be reached at jbolan@legalpro.com.

WYMAN V. AYER PROPERTIES, LLC

CONTINUED FROM PAGE 1

al injury – such as personal injury from a defective product, or water damage to personal property caused by a leaky roof – additional damages were hard to quantify. For example, in *Marcil v. John Deere Industrial Equipment Co.*, the plaintiff sought to recover damages for "severe losses in his business and good will" from a defective tractor he purchased from the defendant. The court applied the economic loss doctrine to hold that there could be no recovery for damages caused solely by the faulty product that the plaintiff had purchased.

In *Berish*, the Supreme Judicial Court applied the doctrine to a suit by condominium trustees seeking damages for negligent construction of common areas in a new condominium complex. The court found, however, that the condominium trustees had alleged additional damage to property, which had been caused by the defective construction. For example, improper installation of skylights, chimneys and sliding doors had resulted in water leakage and damage to property within individual units. Therefore, while the economic loss doctrine could have prevented the condominium trustees' negligence claims, the court found that they had sufficiently alleged additional property damage to state a claim for negligence, which claims the Superior Court had incorrectly dismissed based on the economic loss doctrine.

Builders and developers have since used the economic loss doctrine as a "magic bullet" to defeat negligence claims based on construction defects. With these claims unavailable to purchasers of a home or condominium, the purchasers or trustees were limited to breach of contract claims or breach of warranty of habitability claims. However, construction contracts often disclaim liability absent gross negligence, and warranty of habitability claims in condominiums are limited to those defects that involve a "substantial question of safety" or that make the unit "unfit for human habitation." *Berish* Therefore, the economic loss doctrine often foreclosed entirely condominium trustees' claims for negligent construction that did not cause separate property damage or render units uninhabitable.

> This exception, although very narrow, is a boon to condominium trustees. Redevelopers who convert existing buildings into condominiums will now have to engage the negligent construction issue on the merits, rather than relying solely on the economic loss doctrine.

The Appeals Court sought to remedy this problem in *Wyman v. Ayer Properties, LLC*. In *Wyman*, Ayer Properties converted a 19th-century mill in Lowell into condominiums. Ayer Properties was the sole and initial trustee, and, as units were sold, eventually the unit owners assumed control of the condominium trust. Shortly after the unit owners assumed control, however, the trustees became concerned with several aspects of the building's construction and hired a professional engineer to perform a condition survey of the building. The engineer found problems with many windows, the exterior brick façade, and the roof. The trustees then brought suit against Ayer Properties for, among other things, breach of the warranty of habitability and negligence.

The Superior Court dismissed the warranty of habitability claims, because that warranty does not apply to the conversion and renovation of an existing structure. Moreover, because there was never a contract between the trustees and the subcontractors, there could be no breach of contract alleged. The Superior Court therefore applied the economic loss doctrine to the trustees' claims, and limited their recovery to the cost to repair the defects (the roof and windows) which had caused property damage, and found that there could be no recovery for the masonry repairs, because they had not caused any independent property damage.

The Appeals Court recognized that that approach would leave condominium trustees without any remedy at all in a case like this. As a result, the Appeals Court carved out a very narrow exception to the economic loss doctrine specifically for condominium trustees when the damages are reasonably determinable, when the association would otherwise lack a remedy, and when the association acts within the time allowed by the statute of limitations or statute of repose.

In crafting this exception, the Appeals Court recognized the unique status of condominium trustees that succeed a redeveloper trustee. The successor trustees typically will have had no contractual relationship with the redeveloper's subcontractors, damages might not be available under the warranty of habitability, and, although the damages could be readily ascertainable (such as the cost of repairs), a strict application of the economic loss doctrine would foreclose any recovery and lead to a fundamental unfairness. The Appeals Court found that because one of the bases for the economic loss doctrine was to prevent claims that were based on speculative damages, such as the loss of business and good will claimed in *Marcil v. John Deere*, there could be a recovery when damages are readily ascertainable. Since denying recovery at all in this case would have been fundamentally unfair, the Appeals Court crafted this narrow exception.

This exception, although very narrow, is a boon to condominium trustees. Redevelopers who convert existing buildings into condominiums will now have to engage the negligent construction issue on the merits, rather than relying solely on the economic loss doctrine. The *Wyman* decision will help level the playing field for trustees of renovated and converted existing buildings who would have otherwise been without a remedy for construction defects that do not cause other damage.

A winner on the television game show "Final Jeopardy," James Kossuth was a lexicographer for Merriam-Webster, Inc. before his law career. He practices at Todd & Weld LLP in all areas of civil litigation. James can be reached at jkossuth@toddweld.com.

MASSDEP PROPOSED REVISIONS ATTEMPT TO STREAMLINE PERMITTING PROCEDURES

CONTINUED FROM PAGE 1

that triggers review under the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61-62H (MEPA). Revisions to the Wetlands Protection Act Regulations (310 CMR 10.00) also limit the scope of jurisdiction. The revisions expand the exemption for wetlands that arise as a result of stormwater management systems. Maintenance of existing stormwater management systems may also be improved or modified without triggering further review, provided the changes meet certain basic requirements. Additionally, certain utility installation and maintenance work, roadway improvements, and modifications and improvements to existing residential structures are exempt as minor activities under the revised wetlands regulations.

Where projects are subject to both wetlands and waterways jurisdiction, the proposed revisions attempt to streamline the permitting process by introducing new options such as the Combined Application and Combined Permit.

Where projects are subject to both wetlands and waterways jurisdiction, the proposed revisions attempt to streamline the permitting process by introducing new options such as the Combined Application and Combined Permit. This procedure would allow an applicant to file a Combined Application and receive a Combined Permit from MassDEP for projects subject to at least two of the following regulatory frameworks: the M.G.L. Chapter 91 Waterways Regulations (310 CMR 9.00), the Wetlands Protection Act Regulations (310 CMR 10.00), and the 401 Water Quality Certification Regulations (314 CMR 9.00). When reviewing a combined application, MassDEP would apply the same standards to each regulatory component that would otherwise apply under separate permit applications. However, local conservation commissions would retain their jurisdiction over initial requests for determinations of applicability and notices of intent; a combined permit would only include wetlands requirements if a superseding order of conditions is sought from MassDEP. Additionally, the revisions specify that a combined application cannot include certain Chapter 91 applications for small accessory structures or uses as set forth in 310 CMR 9.07 and 310 CMR 9.10, or the general license procedure set forth under the proposed 310 CMR 9.29.

COMBINED PERMITTING SAVES TIME

Where available, the combined application should lessen the time and cost of obtaining permits for both the applicant and MassDEP. The process allows for joint public notice under the applicable regulations. As an added benefit, the abutter notification requirements under the Wetland Protection Act Regulations have been streamlined and clarified. The revisions also allow for MassDEP to coordinate adjudicatory hearings under the three regulatory frameworks when a combined permit is appealed, subject to certain filing requirements. The proposed revisions do not otherwise appear to affect the separate standards and prerequisites applicable to appeals of each approval contained in a combined permit, and they do not affect or relax standing requirements.

In addition to the new combined permit procedures, the proposed revisions attempt to streamline review of projects subject to MEPA. For example, under the existing regulations, an applicant may initiate coordinated review of a project under MEPA and the Chapter 91 Waterways Regulations, but this coordinated review process can require a fair amount of lead time. The proposed revisions to 310 CMR 9.00 would allow the MassDEP Waterways Program to begin reviewing an applicant's Environmental Impact Report (EIR) before the Massachusetts Secretary of Energy and Environmental Affairs issues its certificate on the EIR. According to MassDEP, this dual review could save up to 25 review days.

Revisions to the wetlands and water quality regulations include a streamlined permitting process for qualified ecological restoration projects. Under the revisions to 310 CMR 10.00, a project applicant can apply for a "general permit," called the General Ecological Restoration Project Order of Conditions, provided the project satisfies eligibility requirements under 310 CMR 10.13. The regulations include six categories of projects that could receive a general permit, including dam removal projects, culvert repair or replacement, and restoration of rare species habitat. The regulations further prescribe the standard conditions applicable to these types of projects, and thereby give an applicant the ability to plan ahead with respect to project design and standards.

Most importantly, even though the current proposals extend this type of permitting process only to ecological restoration projects, the revisions to the 310 CMR 10.00 introduce a broader type of permit called the "General Order of Conditions," indicating that the revised regulations give MassDEP the ability to create new general permit categories in the future. While the current revisions could make this point clearer, a broader range of "general permits" could significantly help streamline and expedite the permitting process while promoting consistency in permitting requirements. The effort to promote general permits is reflected in a parallel revision to the Chapter 91 Waterways Regulations, where MassDEP has proposed a general license certification process for small-scale, water-dependent structures accessory to residential uses. Under this proposed reform, the general license would provide a uniform set of conditions and would operate in lieu of individual licenses for small structures. Unless objected to by local zoning authorities, an applicant would be able to certify to MassDEP that its project is eligible for the General License, and the certification would be recorded at the applicable Registry of Deeds.

MassDEP's proposed revisions are a step in the right direction in providing additional certainty on permitting timeframes and the effort to further streamline permitting. Comments are due to the MassDEP no later than May 10, 2013. Interested parties can review the above proposed revisions as well as other proposed revisions at www.mass.gov/dep/about/priorities/regreform.

Greg Bradford and Matt Snell are associates in the Real Estate and Finance Department and members of the Land Use, Permitting and Development and Commercial Finance practice groups at Nutter McClennen & Fish LLP. Bradford's practice includes transactional real estate matters, as well as permitting, land use and environmental matters. Snell focuses his practice on land use, permitting and environmental litigation, with a concentration in land use, state and local permitting matters and real estate transactions. Bradford may be reached at gbradford@nutter.com; Snell may be reached at msnell@nutter.com.

WFG National Title Insurance Company
a Williston Financial Group company

COMMUNICATE
COLLABORATE
CO-EXIST

WFG is the fastest growing underwriter in the nation because of you! Thank you for trusting us with your business! We are committed to the mission of constant **communication** and **collaboration** in our effort to better **co-exist** with your conveyancing practice. We welcome you to be a part of this process, and to let us know how we can better serve you?

For more information about WFG National Title Insurance Company
find us at www.wfgnationaltitle.com or
40 Salem Street, Bldg. 2, Ste. 5, Lynnfield, MA 01940 | P: (781) 587-0172

EXCHANGE AUTHORITY, LLC

The Experts Other Experts Turn To

Tax Deferred Exchanges for
Income & Investment Property

9 Leominster, Connector, Suite 1
Leominster, MA 01453

P (978) 433-6061
F (978) 433-6261

www.exchangeauthority.com

1031@exchangeauthority.com

Red Flag Alerts
PROVIDED BY THE WARREN GROUP

More than **160,000 tax liens, lis pendens and petitions to foreclose** have been filed in Massachusetts since 2010.

Be the first to know about delinquencies. Take immediate action.

Keeping an eye out for delinquencies can be difficult. Red Flag Alerts deliver the information you need in an actionable format.

Red Flag Alerts combine new tax lien filings with *lis pendens* and petition filings. They contain more detailed information than you get from other sources. Important things like owner-occupancy status, property and owner address, an automated value model for the property in question and more.

Essential, timely Red Flag Alerts delivered to you automatically.

THE WARREN GROUP Since 1872
Real Estate & Financial Information

DATA SOLUTIONS
Turning Information Into Opportunities
617-896-5392 datasolutions@thewarrengroup.com