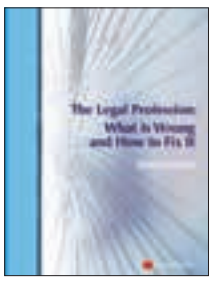
Paul Alphen reviews a must-read book
PAGE 3



All you need to know about REBA's Annual Spring Conference
PAGE 4

REBA 2014 Spring Conference

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REBA news

THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION

MARCH 2014
Vol. 11, No. 2

A publication of The Warren Group

PRESIDENT'S MESSAGE

REBA serves all its members, from Barnstable to Pittsfield

BY MICHELLE T. SIMONS

MICHELLE SIMONS

As you know, REBA is a bar association that serves the *entire* commonwealth of Massachusetts. Although headquarters may be in Boston, we know that most of our members are from cities and towns that are outside of the Hub of the Universe! Our continuing goal is to be more accessible to all members, while bringing REBA to local cities and towns.

REBA began this process six years ago. The plan had its genesis with the Residential Conveyancers Committee (RCC). The RCC asked leaders from each county to join the committee, meeting monthly via conference call, reaching out to local bar associations, and urging the creation of local real estate bar groups where none existed. These local groups are now REBA's affiliates.

The RCC schedules regional meetings and conducts hour-long educational

See PRESIDENT, page 2

Walk to the Hill

REBA President Michelle Simons led a delegation of the association's officers on the 15th Annual Walk to the Hill for Civil Legal Aid. REBA is one of many bar association sponsors of this event hosted by the Equal Justice Coalition. Pictured (left to right): Immediate past president Mike MacClary; president-elect Tom Bhisitkul; Simons, board clerk Fran Nolan and former president Chris Pitt.

Puleo to give keynote address at REBA's Spring Conference

Steve Puleo – author, historian, university teacher, public speaker and communications professional – will address the attendees of the Real Estate Bar Association's Spring Conference on May 5, 2014.

STEVE PULEO

A former award-winning newspaper reporter and contributor of feature stories and book reviews to *American History* magazine and the *Boston Globe*, Puleo holds a master's degree in history and teaches at Suffolk University.

His books include *The Caning: The Assault That Drove America to Civil War*; *A City So Grand: The Rise of an American Metropolis, Boston 1850-1900*; *The Boston Italians: A Story of Pride, Perseverance and Paesani, from the Years of the Great Immigration to the Present Day*; *Due to Enemy Action: The True World War II Story of the USS Eagle 56*; and *Dark Tide: The Great Boston Molasses Flood of 1919*.

Puleo donates a portion of his book proceeds to the Juvenile Diabetes Research Foundation.

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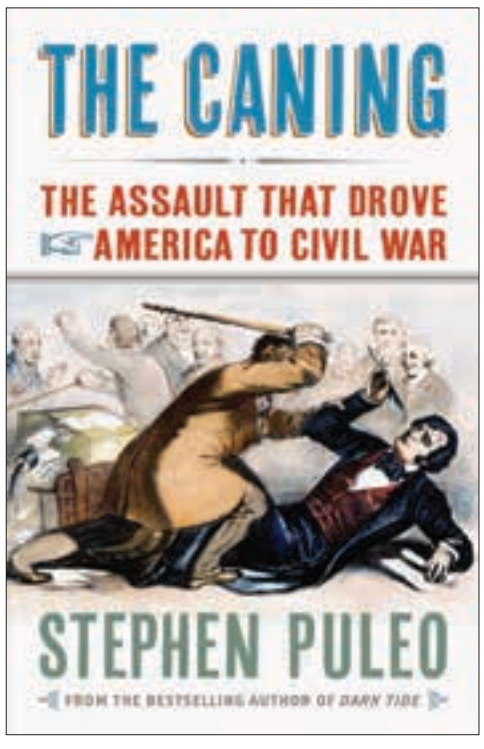
Puleo's most recent book, *The Caning*, is the story of one of the seminal events leading up to the Civil War. Russell S. Bonds, author of *War Like the Thunderbolt: The Battle and Burning of Atlanta*, said "Stephen Puleo's beautifully written, compelling account of the caning and its aftermath presents the often-overlooked drama of the late 1850's, illuminating a cast of fascinating characters – not only Brooks and Sumner, but Stephen Douglas, John Brown and Abraham Lincoln – just as they step from the wings onto the great stage of history." A *Boston Globe* feature on the book, said, "As a divided nation faces a close election and recalls the 150th anniversary of polarization's worst case scenario – the Civil War – a new book focuses on an act of violence in 1856 that turned moderates into hard-liners and made war almost inevitable."

Please join us on May 5 at the Spring Conference! For more details, please see page 4. ♦



REBA SERVES ALL ITS MEMBERS

CONTINUED FROM PAGE 1

programs and updates throughout the state, consisting of a legislative update, an unauthorized practice of law update, a section on 'traps for the unwary,' and current changes or developments in real estate practice at the state and national level. For the past six years, I have had the privilege of being a part of these traveling road shows with the core RCC members – Tom Bussone, Tom Moriarty and Susan LaRose, together with staffers Edward Smith and Peter Wittenborg. We have spoken at hotels, restaurants and even a sushi bar, from Barnstable to Pittsfield. I want to thank our participants and our current sponsors, Massachusetts Attorneys Title Group and Landy Insurance, who have supported us for many years, helping to foster an environment of learning and collective growth. We also welcome our newest sponsor, Belmont Saving Bank.

Our regional affiliate meetings are already underway, and are open to all real estate practitioners, not just REBA members. This year the RCC welcomes two new counties to the regional road shows – Middlesex North and Franklin Counties.

If you have not been to a road show in your area, please find time to attend. These meetings are educational and should not be missed. Come check us out at a local hotel ballroom, restaurant or sushi bar near you!

This is an opportunity to reach out to other members of REBA and the greater real estate and conveyancing community, to support and advance our interests legitimate issues affecting our practices and the industry, while making the kinds of connections that help expand and enlighten our lives in many ways. Join us! ♦

Michelle Simons, REBA's 2014 president, is a partner in the Newton firm of Brecher, Wyner, Simons, Fox & Bolan LLP. She can be reached at msimons@legalpro.com.

Upcoming Regional Affiliate Events

Norfolk County
March 5
Noon
Summer Shack
850 Providence Highway (Route 1), Dedham

Franklin County
March 12
Noon
Location TBD.

Plymouth County
March 20
8:15 a.m.
John Carver Inn, Plymouth

Barnstable County
March 20
Noon
Double Tree by Hilton Cape Cod-Hyannis
287 Iyannough Road, Hyannis

As more road shows meeting are scheduled, we will post them on REBA's website. If you would like to attend any of the meetings, please reach out to Nicole Cunningham at cunningham@reba.net.

Why I'm a member

REBA MEMBERSHIP IS ITS OWN REWARD

Meet Neil Golden

"While other areas of law seem to attract new practitioners, title law – including easements, restrictions, rights of way and other obstacles that go bump in the night – is losing its experts to age and retirement, with no new generation to replace us."

As part one of his ongoing series exploring the rewards of membership in the Real Estate Bar Association, former president Mike McClary speaks with member Neil Golden about his practice, his years of experience in the industry, and his advice to new lawyers.

Q. Where do you work, and what type of cases do you typically handle?

A. I have been a partner at Gilmartin Magence for eight years. In addition to reviewing all of the titles for the firm and mentoring other lawyers, I am involved in most of the commercial transactional work for the firm, including condominium development, and in my spare time I still enjoy representing residential buyers and sellers. The firm has developed into a diverse commercial and residential law firm and I am excited to be part of that growth.

Q. How long have you been a REBA member and how long have you been on the board of directors?

A. I have been a member of REBA and its predecessor Massachusetts Conveyancers Association for over 37 years, since the days of the nighttime conferences at the Newton Marriott. Now I am one of the old-timers. I am serving my second tour of duty on the Title Standards Committee and as my committee cohorts would admit, I am not one of the quiet, go-along members. I have written the title standard on condominium irregularities and homestead, the practice standard on homeowners' associations, have revised other standards and have taken an active part in others, and spent more time than I like to admit helping drafting the mortgage discharge forms. I have been on the board of directors for only two months and have a standing bet with Chris Pitt that I can stay quiet at least for a couple of meetings.

Q. What do you feel are the biggest benefits of being a REBA member?

A. [Definitely] the camaraderie among members. The legal profession can often become combative, and REBA gives us all a chance to work together to help fellow members become better and more knowledgeable lawyers. REBA is in the forefront of all issues affecting all sectors of real estate law. REBA gives us a forum to stay on top of the issues affecting our practice.

Q. How has your membership with REBA benefitted your practice?

A. Being a member of REBA, and particularly the title standards committee, has kept me on top of pending cases and legislation affecting my practice. Not only am I alerted to upcoming changes, I can be part of the solution to those changes so that my practice, as well as that of other REBA members, can be at a higher level.

Q. What advice would you give to a REBA member who is new to the practice of law?

A. I would tell new REBA members to participate as much as they can. REBA is more than having membership

See WHY I'M A MEMBER, page 6

THE REAL ESTATE BAR ASSOCIATION for Massachusetts

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www.reba.net

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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 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.

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BOOK REVIEW

Krantz's proposals for fixing the legal profession

BY PAUL F. ALPHEN

PAUL ALPHEN

Sheldon Krantz is a professor of law at the University of Maryland Carey School of Law and has held positions as a litigation partner at DLA Piper, dean of the University of San Diego School of Law, professor of law at Boston University School of Law, and positions with a Massachusetts criminal justice agency and as a federal prosecutor. His book should be required reading for all members of the profession and for who are interested in improving the profession.

His descriptions of the problems within the profession are consistent with the commentary that we have read over the years in professional journals and newspapers, but the book pulls together characteristics that are problematic to the continued health of our judicial system in one concise work. The book is remarkably devoid of verbosity, and contains a nice balance of history, statistics and personal observations from experienced practitioners.

Notwithstanding their back-breaking tuitions, we are all aware that law schools generally do not equip graduates with the skills necessary to provide effective counsel to the unsuspecting public. In 2000, 48 percent of the lawyers in private practice were solo practitioners, which raises doubts about the opportunities for necessary mentoring of a significance chunk of the Bar. Krantz also questions whether young attorneys that join firms are provided with appropriate mentoring.

The U.S. Bureau of Labor and Statistics predicts that law schools will be graduating nearly 360,000 new lawyers this decade, with only 73,000 available jobs in the legal profession. On the other hand, one third of the profession's lawyers are now reaching retirement age. The coming decade may be an opportunity within which sweeping changes may be made concurrent with the changing of the guard.

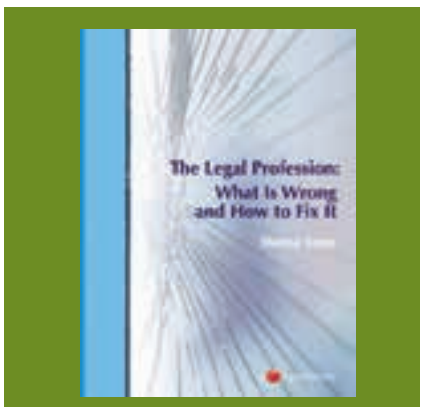
Not surprisingly, Krantz is critical of the environment within too many large law firms (which he refers to as "BigLaw firms"). He reports that many lawyers are unhappy in their work, and too many BigLaw firms emphasize the goal of generating profit over the goal of providing efficient and effective legal counsel to their clients. He quotes a recently retired partner from a BigLaw firm, who said: "There was a time when lawyers were valued in their law firms not just because of their billable hours and rainmaking abilities but also because of other contributions – such as expertise, reputation and collegiality. Those days are gone and that is a real loss to the profession."

Krantz is especially critical of the economic and political realities that have denied access to justice to millions of Americas because of the high cost of counsel. Not only are the poor often denied legal services, the cost of counsel is out of reach for many middle-income Americans.

His solutions for resolving the problems are not simple, but on balance have merit. I let out an audible groan when I read that one of his primary solutions was requiring mandatory pro bono services from every attorney in every state. I envisioned that pro bono credit would be provided only for specific services provided through designated clearing house agencies, and all the counsel that we already provide for free at the request of acquaintances, priests and other community leaders would become not applicable.

However, as I read his recommendations in their totality, I became more convinced that the overall solution must be comprehensive and involves law schools, bar associations and the legislatures of the individual states. Although consumers "need to be protected from the unscrupulous or unskilled," with appropriate legislation, Krantz makes a good case for having non lawyers provide some direction to pro-se litigants, because it may be preferable to having pro se litigants proceed without any counsel at all. Likewise, the opportunity for limited assistance representation should be expanded (as is now being done in the Massachusetts Land Court). He also advocates for reduced fee programs and increasing public and private funding for legal services programs.

In conclusion, he provides an agenda for the ABA and the American Law Institute to take leadership roles in reforming the profession, and provides step by step instructions. He admits that the ABA (like the profession and elements of the profession generally) is a large, hard to change institution. But because there are already a variety of law schools, firms and public and private agencies that are working on ways to improve the profession, and improving access to justice for the non-wealthy and poor, Krantz feels that that ABA and the ALI (and their constituencies) would not have to start from scratch. Additionally, if we all do nothing, things will only get worse. ♦



The Legal Profession: What is Wrong and How to Fix It
Sheldon Krantz LexisNexis (2013)

Paul Alphen has been practicing law primarily in areas related to real estate development within a small firm in his hometown of Westford, Mass., for 29 years, after having enjoyed a decade of public service in state and local government. He is actively involved in the improvement of the profession including serving as a member of the board of directors of the Real Estate Bar Association for Massachusetts since 2001 and as its president in 2008, and as chairman of the Annual MCLE Real Estate Law Conference since 2009. More importantly, his youngest son is on schedule to join the profession this year. Paul can be reached at paul@lawbas.com.

2014 Spring Conference

Monday, May 5, 2014 • 7:30 A.M. – 2:45 P.M.

Four Points by Sheraton

General Information

- REBA's 2014 Spring Conference welcomes both members and non-members. All attendees must register; the registration fee includes the breakout sessions, the luncheon, and all written materials. REBA cannot offer discounts for registrants not attending the Conference luncheon.
- Credits are available for professional liability insurance and for continuing legal education in other states. For more information, contact Bob Gaudette at 617.854.7555 or gaudette@reba.net.
- Please submit one registration per attendee. Additional registration applications are available at www.reba.net. REBA will confirm all registrations by email.
- To guarantee a reservation, conference registrations should be sent with the appropriate fee by email, mail or fax, or submitted online at www.reba.net, on/before April 28, 2014. Registrations received after April 28, 2014 will be subject to a late registration processing fee of $25. Registrations may be cancelled in writing on/before April 28, 2014 and will be subject to a processing fee of $25. Registrations cannot be cancelled after April 28, 2014; however, substitutions of registrants attending the program are welcome. Conference materials will be mailed to non-attendee registrants within four weeks following the event.
- Attendees may not use cell phones during the breakout sessions or the luncheon.

Driving Directions

FROM BOSTON:
Take I-93 South which turns into I-95 (Rte 128) North.
Take Exit 15B, Route 1 South toward Norwood.
Continue 4.5 miles down Route 1 South
The hotel will be on your right after the Staples Plaza.

FROM PROVIDENCE:
Take I-95 North to Exit 11B, Neponset Street, Norwood.
Drive 7/10 of a mile and turn left onto Dean Street.
At traffic light, turn left onto Route 1 heading South.
The hotel will be on your right after the Staples Plaza.

FROM THE WEST:
Follow the Mass. Turnpike (I-90) East,
Take Exit 14 onto I-95 (Route 128) South (from the West, it is Exit 14; from the East, it is Exit 15),
Continue South to Exit 15B (Route 1, Norwood),
Continue 4.5 miles down Route 1
The hotel will be on your right after the Staples Plaza.

Registration

COMPLETE AND RETURN THIS REGISTRATION FORM WITH THE APPROPRIATE FEE TO:

REBA Foundation, 50 Congress Street, Suite 600, Boston, MA 02109-4075
TEL: (617) 854-7555 | morales@reba.net | FAX: (617) 854-7570

	By April 28	After April 28
☐ YES, please register me. I am a REBA member in good standing.	$205.00	$230.00
☐ YES, please register me as a guest. I am not a REBA member.	$245.00	$270.00
☐ NO, I am unable to attend, but I would like to purchase conference materials and a CD of the breakout sessions and luncheon address. (Please order by 5/7/14 and allow four weeks for delivery)	$190.00	$190.00
	$_____	$_____

☐ Check Enclosed
Check No:_____
Date:_____

☐ Credit Card ☐ VISA ☐ MasterCard ☐ American Express
Card No:_____ Expiration:_____
Signature:_____ Date:_____

You May Also Register Online at REBA.net

Registrant Information

Name of Registrant:_____ Esq. (y/n):_____
Call Name *(for badge)*:_____ Email:_____
Firm/Company:_____
Address: _____
City/Town: _____ State: _____ Zip:_____
Tel:_____ Cell:_____ Fax: _____

Selcet Your Luncheon Choice Below

☐ Butcher shop cut choice petit filet mignon, grilled and served with a red wine demi-glace
☐ Pan seared chicken breast with spinach, garlic & Fontina cheese in a wild mushroom sauce
☐ Pasta primavera in a cream sauce
☐ None, as I will not be eating at the luncheon
☐ None, as I am unable to stay for the luncheon

Luncheon Keynote Address Presented by Stephen Puleo

Steve Puleo is an author, historian, university teacher, public speaker, and communications professional. His books include The Caning: The Assault That Drove America to Civil War; A City So Grand: The Rise of an American Metropolis, Boston 1850-1900; The Boston Italians: A Story of Pride, Perseverance and Paesani, from the Years of the Great Immigration to the Present Day; Due to Enemy Action: The True World War II Story of the USS Eagle 56; and Dark Tide: The Great Boston Molasses Flood of 1919.

A former award-winning newspaper reporter and contributor of feature stories and book reviews to American History magazine and the Boston Globe, Puleo holds a master's degree in history from UMass-Boston. He teaches at Suffolk University. Steve resides with his wife, Kate, south of Boston. He donates a portion of his book proceeds to the Juvenile Diabetes Research Foundation (JDRF).

The Caning

Steve's most recent book, The Caning, is the story of one of the seminal events leading up to the Civil War. Russell S. Bonds, author of War Like the Thunderbolt: The Battle and Burning of Atlanta, said "Stephen Puleo's beautifully written, compelling account of the caning and its aftermath presents the often-overlooked drama of the late 1850's, illuminating a cast of fascinating characters — not only Brooks and Sumner, but Stephen Douglas, John Brown, and Abraham Lincoln — just as they step from the wings onto the great stage of history." A Boston Globe feature on the book, published in October 2012, said "As a divided nation faces a close election and recalls the 150th anniversary of polarization's worst case scenario — the Civil War — a new book focuses on an act of violence in 1856 that turned moderates into hard-liners and made war almost inevitable."

Schedule of Events

7:30 A.M. – 8:30 A.M. **Registration and Exhibitors' Hour**
8:30 A.M. – 1:15 P.M. **BREAKOUT SESSIONS**

8:30 A.M. – 9:30 A.M. **Tiffany Ballroom A**
9:45 A.M. – 10:45 A.M. **Tiffany Ballroom A**

Trials and Tribulations of the New FEMA Flood Maps

Ingeborg E. Hegemann; Scott W. Horsley; James Smith

The new FEMA maps have received much general coverage in print and broadcast media. Session attendees will learn how much new land is deemed to be in federal hazard and high hazard areas, or otherwise regulated, by virtue of these maps. Panelists will discuss what recourse may be available to property owners and their counsel and how to challenge the new maps before or after the revisions take effect, as well as the legal effect of FEMA map revisions on land development, real estate closings, zoning and building code compliance, real estate assessments and abatements. They will also discuss whether any larger claims are available for newly appreciated flooding trespass, drainage easements, flooding easements, or even de facto takings.

8:30 A.M. – 9:30 A.M. **Tiffany Ballroom B**
9:45 A.M. – 10:45 A.M. **Tiffany Ballroom B**

Rule 1.15: The 411 on Trust Accounting and Three-way IOLTA Account Reconciliation

Tammy L. Boyle; Terrence D. Pricher

A 'three-way' reconciliation is the accurate way of reconciling an IOLTA account so that every penny is accounted for. All underwriters require three-way reconciliations to be performed each month for each account and maintain the proper reports for audit purposes. Join our experienced panelists who will discuss Rule 1.15, trust accounting and the reconciliation process in detail.

8:30 A.M. – 9:30 A.M. **Essex/Lenox Room**
11:00 A.M. – 12:00 P.M. **Tiffany Ballroom B**

Small Condominiums: Solutions for Drafting Challenges, Dispute Resolution, Pet Rules and Other Provisions

Patrick J. Brady; Noel M. Di Carlo; Kathryn M. Morin

Small condominiums present real-world challenges that are different from larger condominiums. Drafting considerations are unique; how the association functions (or doesn't) in the real world and how disputes are settled are unique. Service animal, pet provisions, and other rules and regulations provisions can be problematic. This session will provide perspective and practical alternatives to boiler-plate condominium document provisions drafted with larger projects in mind.

8:30 A.M. – 9:30 A.M. **Conference Room 103**
11:00 A.M. – 12:00 P.M. **Conference Room 104**

Overview of Land Court Practice & Procedure

Hon. Robert B. Foster; Edward A. Rainen; David C. Uitti; Edmund A. Williams

If you want to learn more about how to practice in the Land Court, then this is the session for you. Speakers will include Associate Justice Robert B. Foster, and the Court's Chief Title Examiner Ed Williams. Attendees will hear directly from these members of the Court about litigation and title practices and standards. Ed Rainen will provide practice tips on easing the burden of Land Court title work and David Uitti will provide tips on Land Court litigation practice methods, as well as a list of litigation practice preferences from other Land Court Justices.

9:45 A.M. – 10:45 A.M. **Essex/Lenox Room**
11:00 A.M. – 12:00 P.M. **Essex/Lenox Room**

Update on Recent & Pending Legislation: Summary & Highlights

Francis J. Nolan; Edward J. Smith

This legislative update features pending real property-related legislation proposed by REBA's Legislation Committee and others, including Ibanez title cures, expanded "deregistration" of registered land, unauthorized practice of law issues, homestead law clarifications, specialized topics (railroad rights of way, private subdivisions) and other timely issues for practitioners.

9:45 A.M. – 10:45 A.M. **Conference Room 103**
11:00 A.M. – 12:00 P.M. **Conference Room 103**

Avoiding Litigation Through Arbitration and Mediation Clauses in Real Estate Agreements

Edward S. Cheng; Hon. Nancy S. Holtz; David K. Moynihan

The panel will discuss arbitration and mediation as ways to resolve real estate disputes faster and more efficiently (thus less costly) than litigation. The panel will present arbitration and mediation clauses, including the use of blanket and specific clauses, and will discuss issues that may arise in drafting these clauses. Attorneys who attend this session will come away with: (1) an understanding of arbitration and mediation as alternatives to filing suit to enforce agreements or leases; (2) examples of effective arbitration and mediation clauses and when to use them; and (3) an understanding of the issues that may arise in drafting arbitration and mediation clauses.

11:00 A.M. – 12:00 P.M. **Conference Room 102**

Update on the Mortgage Discharge Law: Using Various Forms of Discharges by Affidavits A Practical Skills Session

Elizabeth J. Barton; Evelyn J. Patsos

The discharge by affidavit statutes are effective tools to clear real estate titles of defective or missing discharges. REBA's first comprehensive review of these statutes since the 2006 enactment will include several new forms which should make using the statutes and accepting title with a discharge affidavit easier for all conveyancers.

8:30 A.M. – 9:30 A.M. **Tiffany Ballroom A**
9:45 A.M. – 10:45 A.M. **Tiffany Ballroom A**

Title Exams and the MUPC: What's New? A Practical Skills Session

Elizabeth J. Barton; Evelyn J. Patsos

Since its implementation in 2012, G.L. c. 190B, the Massachusetts Uniform Probate Code (MUPC) has made a dramatic impact on estate administration in Massachusetts. The MUPC's influence resonates in the area of real estate transactions with new patterns of intestate succession, new terminology and court procedures, as well as new REBA title standards, to clarify important real estate conveyancing issues. In this breakout session, registrants will hear what's changed under the MUPC and what they need to know to take title from probate.

8:30 A.M. – 9:30 A.M. **Conference Room 104**
9:45 A.M. – 10:45 A.M. **Conference Room 104**

Let's Talk Title 5: FAQ'S and the Rules Governing Property Transfer Inspections for Private Sewers A Practical Skills Session

~ A Practical Skills Session

The panel will discuss general information and terminology; types of systems, including residential systems, commercial systems, large systems, shared systems, and cesspools; inspection requirements for the sale of a property with septic systems; requirements for new construction; negotiating the sale of and closing on property with failed or conditionally passed system; and differences between Pass/Fail Certificate vs. Certificate of Compliance vs. Conditional Approvals.

8:30 A.M. – 9:30 A.M. **Conference Room 102**
9:45 A.M. – 10:45 A.M. **Conference Room 102**

Recent Developments in Massachusetts Case Law

Philip S. Lapatin

Now in his 36th year at these meetings, Phil continues to draw a huge crowd with this session. His presentation on the Recent Developments in Massachusetts Case Law is a must hear for any practicing real estate attorney. Phil is the 2008 recipient of the Association's highest honor, the Richard B. Johnson Award.

12:15 P.M. – 1:15 P.M. **Conference Room 103***

1:20 P.M.
LUNCHEON PROGRAM

1:20 P.M. – 1:40 P.M.
President's Welcome & Remarks

Michelle Simons

1:40 P.M. – 1:50 P.M.
Report of the REBA Title Standards Committee

1:50 P.M. – 2:10 P.M.
Denis Maguire Community Service Award Presentation

Tribute to Edward C. Mendler (1926–2013)

Edward C. Mendler, who practiced law at Nutter McClennen & Fish for 53 years and who died on Dec. 30, 2013, at age 87, is warmly remembered as a lively man of great conviction and accomplishment in the real estate world and a gentleman of many interests. He had a highly successful career as a preeminent real estate lawyer, represented Nutter in Tokyo and Amsterdam, and served as a member of the firm's Executive Committee.

Ed was probably best known as the author of the third and fourth editions of the *Massachusetts Conveyancers' Handbook*, a universal sourcebook for several generations of real estate lawyers, published by Thomson/West. In that respect he carried on a long and proud Nutter legacy: Ed took over the *Handbook* project from another partner, George P. Davis, and solicited contributions from a handful of other Nutter lawyers.

As a real estate attorney, Ed identified the highlights of his career as putting together Amtrak's Northeast Corridor and working on what was then the biggest real estate transaction ever signed in Boston, the purchase of the Bank of Boston Building in 1986. He was particularly proud of his decades of service to clients Tufts University and Boston University. Ed was a pioneer in the development of Massachusetts condominium law, inventing the tool of "phasing" as well as other concepts, novel at the time, now taken for granted.

His obituary in the *Boston Globe* recognized Ed's contribution to land management and preservation, noting that both his home town and summer community benefitted greatly from his hard work, forethought, expertise and action in these areas. In addition to his many legal achievements, he pioneered the planned unit development concept in Massachusetts with Mainstone Farm in Wayland. He was a former member of the Wayland Conservation Commission, supported the Sudbury Valley Trustees, and took a special interest in leading the Bridle Trail Trustees Inc. The agreement he authored for the island in Maine where the Mendlers summered for over 40 years became the foundation of its preservation, and he was a recognized leader in the use of conservation easements.

One of the current leaders of Nutter's Real Estate practice, who overlapped and worked with Ed for over 15 years at the firm, recalls Ed's sometimes skeptical, independent streak, including a few particularly memorable instances where it showed through. That partner relates:

"Once, when he was negotiating with a religious institution on a matter for a client, the lawyer for the church was giving him a hard time. Ed said to the attorney: 'I may not know a lot about faith, but I know a lot about *good faith*, and you're not showing it in this negotiation!'"

Another Nutter real estate partner had these reflections on other aspects of Ed's work and wit:

"Ed generally took a liberal interpretation of real estate law. That is, if a legal theory wasn't precluded by statute or case law, he would generally find a way to interpret the law to facilitate real estate activities. And each year at Nutter's annual holiday party, Ed wore a musical tie that played a Christmas song. He seemed to really enjoy playing it for everyone (until the batteries wore out)."

The tax attorney who was managing partner for Ed's last 14 years at Nutter recalled: "An amusing reminiscence I have of Ed relates to his interest in linguistics. Ed loved language and he enjoyed especially learning new languages. Ed was reasonably fluent in French, but he decided to take on something more difficult – Japanese. He wasn't shy about practicing what he was learning. On occasion, I would ride home with Ed in the evening after he had taken up the study of Japanese. In order to practice, when Ed got upset with another driver, he would shout criticisms of the other driver in Japanese. Fortunately, his Japanese rants could not be heard outside the car, but he certainly did express himself excitedly (and loudly) to those of us riding with him. Of course, because none of us were fluent in Japanese, for all we know he might have been yelling 'Where is the nearest subway station?'"

One litigator who considered Ed to be a mentor in her early career worked with him on litigation involving a condominium development in Boston. The main legal issue concerned interpretation of phasing language authored by Judge Kass before he went on the bench. The client came to Ed because, with the unavailability of the draftsman due to his new role as a judge, Ed was the only lawyer in town who would venture an opinion as to how to apply the language in the client's favor. This was one of the young Nutter litigator's first trials and it was before Judge Marilyn Sullivan in the Land Court. She reports that while Ed really would have preferred to try the whole case himself, he confined his role to being a superb expert witness. One of Ed's most impressive qualities, she reports, was his quickness – when she went to him with a problem, he wouldn't just tell her what to do, but would take whatever document it was and immediately do the redrafting right then and there.

HIS LATER YEARS

Ed was dedicated to justice, democracy and civil rights. He was a supporter of the United Way, and drafted the founding policy statement for Massachusetts Fair Housing, Inc., for which he also served as its first president. He wrote an early opposition to the Vietnam War and, more recently, analyzed the constitutionality of the United States' invasion of Iraq.

The real estate counselor extraordinaire and renaissance man Ed Mendler grew up in South Bend, Indiana, and served as a Navy radio technician in Guam during the Bikini A-bomb tests in 1946. He graduated from the Lawrenceville School, from the School of Public and International Affairs at Princeton University (magna cum laude), and from Harvard Law School. Following his long and successful law career at NMF he turned to research and writing about philosophy, science, law and government. ♦

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WHY I'M A MEMBER

CONTINUED FROM PAGE 2

on your resume. Participate in the mentor programs, go to open meetings that effect your practice, come to the conferences to meet other members to learn and share experiences. Also you can usually get some neat free stuff at the conferences from the exhibitors.

Q. How do you think the real estate practice will evolve over the next five years?

A. I am concerned about real property law, which is the core of what I do and care about. While other areas of law seem to attract new practitioners, title law – including easements, restrictions, rights of way and other obstacles that go bump in the night – is losing its experts to age and retirement, with no new generation to replace us. I think it is wrong to think that title law is not the core and substance of any real estate transaction. I would love to see new members become interested in real property law and lead the real estate bar into the future.

Q. Can you give us a memorable closing stories?

A. [I have a] couple of memorable closings from my 37-plus years of practice. I was representing a young couple buying their first home in the late 70s from Arthur Stiveletta, a right-wing builder and personal friend of Bob Hope. As we were sitting at the table, Arthur asked my clients if they were married; they said they were not. Arthur said he would not sell to people living in sin and stormed out of the room, while I tried to comfort my clients, who were inconsolable. I got Arthur back and the sale went through. The couple later got married but had a bitter divorce. For once Arthur may have been right.

A buyer client of mine was a retired Israeli commander and was moving to the Boston area to become a professor at Harvard Law School. At the closing I asked how the walk-through was. He said it was fine except for the live World War II bomb that was in the basement. He said that it was ok, as the bomb squad came and removed. It. I have been tempted to add to my purchase and sales agreements that the property will be delivered "broom-clean, free of all personal property – and live bombs." ♦

Careful considerations for conveyancers

BY JOEL A. STEIN

JOEL STEIN

Following up on the article that appeared in the January 2014 issue of *REBA News*, this article will address two additional pitfalls for conveyancers and title examiners.

The case of *HSBC Bank USA, National Association v. Stephen Galebach and Others*, considered the adequacy of an affidavit of sale under G.L. c. 244, §15 in the context of the summary process action.

In its decision, the court noted, "in a summary process action for possession after foreclosure by sale, the plaintiff is required to make a prima facie showing that it obtained the deeds to the property at issue and that the deed and affidavit of sale, showing compliance with the statutory foreclosure requirements, were recorded."

In this case, the foreclosure affidavit notes as follows:

"2. Central Mortgage Company, by and through its attorneys, caused a notice, of which the following is a true copy, to be published on November 25, 2010, December 2, 2012 and December 9, 2012, in the Medford Transcript, a newspaper having a general circulation in Medford.

3. Central Mortgage Company, by and through its attorneys, also complied with Chapter 244, Section 14 of the Massachusetts General Laws, as amended, by ailing the required notices certified mail, return receipt requested."

The court notes that the affiant did not cause the notice to be published and make the mailings necessary to comply with Chapter 244, §14 of Massachusetts General Laws.

The statutory form for a foreclosure affidavit set out as Form 12 of the Appendix to G.L. c. 183 requires that the affiant describe his or her acts in the first person.

It is imperative that an attorney preparing an affidavit of sale or reviewing one as part of a transaction be certain that the affidavit complies with the requirement of the statute. Not only must the affidavit include a jurat, but also must be drafted so that the affiant shows personal knowledge.

FAILURE TO FILE MORTGAGES IN REGISTERED LAND

Following the case of *In re Traverse*, 485 B.R. 815 (2013), the case of *In re Woodman*, 2013 WL 4498927, is a further example of the harsh results of the failure to properly record or file a mortgage.

In the *Traverse* case, a refinanced mortgage went unrecorded and therefore unperfected leaving the lender, JPMorgan Chase, unsecured.

In the *Woodman* case, both the first and second mortgages were improperly recorded rather than filed on the registered land side in Essex County. The judge allowed the mortgages to be avoided by the bankruptcy trustee citing M.G.L. c. 185, §57 which provides:

"An owner of registered land may convey, mortgage, lease, charge or otherwise deal with it as fully as if it had not been registered. He may use forms of deeds, mortgages, leases or other voluntary instruments, like those now in use, sufficient in law for the purpose intended. But no deed, mortgage or other voluntary instrument, except a will and a lease for a term not exceeding seven years, purporting to convey or affect registered land, shall take effect as a conveyance or bind the land, but shall operate only as a contract between the parties, and as evidence of authority to the recorder or assistant recorder to make registration. The act of registration only shall be the operative act to convey or affect the land, and in all cases the registration shall be made in the office of the assistant recorder for the district or districts where the land lies."

And M.G.L. c. 185, §46 which further provides:

"Every plaintiff receiving a certificate of title in pursuance of a judgment of registration, and every subsequent purchaser of registered land taking a certificate of title for value and in good faith, shall hold the same free from all encumbrances except those noted on the certificate, and any of the following encumbrances which may be existing …"

The court concludes "… the Woodmans' certificate of title makes absolutely no reference to either the Citi or Nationstar Mortgage. Nothing on the certificate of title would prompt a purchaser to search for these mortgages anywhere, and accordingly the trustee had no constructive notice of them." ♦

Joel Stein serves as co-chair of REBA's title insurance and national affairs committees. He can be reached at jstein@steintitle.com.

Traps for the unwary settlement agent

BY BRUCE T. EISENHUT

BRUCE EISENHUT

Trap 1: Not responding to bar counsel: The Attorney Consumer Assistance Program (ACAP) of bar counsel often receives inquiries about unrecorded mortgage discharges.. Absent a pattern of neglect or mismanagement of the collected recording fees, bar counsel's primary interest is getting the discharge recorded, possibly involving an attorney's affidavit or use of a third-party private title tracking company. If ACAP calls you regarding an unrecorded mortgage discharge, return the call, find the HUD-1, see if the unrecorded discharge is in your file, research who collected the $75 recording fee and who is responsible for recording. If recording is your responsibility, inform ACAP that you will investigate and will work to clear the title. Good faith cooperation will likely keep such inquiries out of the disciplinary system.

Trap 2: Becoming judge and jury of an escrow dispute: A settlement agent who agrees to hold back funds should require a written escrow agreement to avoid dispute over distribution conditions or who is entitled to the interest. An escrow agent should maintain strict neutrality, refraining from becoming judge and jury of any reasonable dispute. If all parties to an escrow agreement cannot agree as to distribution, the settlement/escrow agent may be required to file a stakeholder case in court and ask for instruction.

Unless the parties direct otherwise, such funds, unless nominal in amount and certain to be held for a very short time, should be moved out of the IOLTA or conveyancing account to an individual interest bearing trust account because most holdbacks are not nominal in amount and most, despite all intentions to the contrary, are not resolved in a short period of time.

An attorney holding back funds should keep a separate ledger reflecting the handling of all funds from the transaction, consistent with basic record keeping requirements. (See Mass. R. Prof. C. 1.15(f).)

A written escrow agreement and communicating that you will not release disputed funds without consent of all parties or a court order would resolve most inquiries to bar counsel.

Trap 3: Accommodating non-clients: Settlement agents may unwittingly represent multiple parties in an effort to resolve buyer-seller disputes. While settlement agents try to help the parties resolve differences to facilitate the process, the settlement agent's client is typically the lender, not seller or buyer. A settlement agent who exceeds those bounds to finalize the closing can be the legitimate target of a bar counsel inquiry. Giving casual legal advice to a non-client buyer or seller, particularly beyond the standard customary explanation of closing documents, may create an implied attorney-client relationship, creating a duty of full and diligent representation free of conflict.

Trap 4: The "short sale" closing: Failed short sale transactions are complex. The parties, particularly the end buyer, may have unreasonable expectations as to the prospect of success. Expectations should be managed from the outset. In regard to attorney inquiries about marketing their expertise with short-sale lenders, reference must be made to 940 CMR 25.00, which prohibits "foreclosure rescue plans," very broadly defined, and to Chapter 206 of the Acts of 2007 (providing homeowners a 90-day right to cure without charge). The Division of Banks has interpreted the above laws as prohibiting brokers or third parties "to impose a loan modification fee or any other charge, fee or penalty attributable to the exercise of the right to cure a default." Because of lack of clarity on the opinion's meaning and scope, settlement agents should have concerns with short-sale transactions if it is known that there was a default or "an actual or anticipated foreclosure" and a fee is being charged by a third party facilitator.

Trap 5: Participating in non-disclosed side deals: Unequivocally, the HUD-1 settlement statement and the deed must reflect the parties' actual financial transaction. Undisclosed seller concessions and the like would most likely result in bar discipline proceedings. Settlement agents should be alert to red flags that suggest any type of side deal not reported on the HUD-1 or disclosed to the lender. Bar counsel has imposed substantial discipline on attorneys who participated in HUD-1 settlement statements and deeds that did not reflect economic reality.

Trap 6: Over-delegation: Over-delegation of the settlement service can result in mistakes or worse. An experienced legal secretary or paralegal is able to perform many tasks in connection with a real estate transaction, but the client has engaged and expects to be represented by a lawyer. During a closing transaction, for example, adjustments may be disputed, escrows may be negotiated, undisclosed financing may be uncovered, interest rate lock disputes may arise, discrepancies from the GFE may be called into question or any number of other unexpected last minute issues. A client is entitled to diligent representation by competent counsel at these times. Permitting non-lawyer assistants to conduct closings, at least without immediate attorney availability, is fraught with peril.

Excessive delegation of the record-keeping obligations contained in Mass. R. Prof. C. 1.15 to staff can cause the misuse of funds. In order to minimize the potential of staff dishonesty, financial responsibilities should be separated as much as practicable, with the person responsible for account reconciliation being other than the software data-entry person or persons, and different from the person who conducts post-closing work (e.g. dealing with and resolving uncleared transaction detail, making sure that each summary disbursement sheet balances to zero, etc.).

Finally, ALTA recommends back-

See TRAPS, page 11

Municipal actions previously taken

BY ROBERT RUZZO

DHCD's regulatory changes in 2008 represented a conscious effort to make the front end of the Chapter 40B process more rigorous.

BOB RUZZO

Despite its original promise of expedited permitting, Chapter 40B, the commonwealth's affordable housing law, is often best viewed as a purveyor of patience. Chapter 40B practitioners simply have to be in it for the long haul.

It is hardly surprising then that the development community has yet to absorb the full import of the Chapter 40B regulatory changes made by the Department of Housing and Community Development (DHCD) in 2008. The new regulations added a requirement to the project eligibility review process requiring a "subsidizing agency" to take into consideration information "regarding municipal actions previously taken to meet affordable housing needs" when considering whether a proposed project is generally appropriate for its proposed site. Under 760 CMR 56.04 (4)(b), these actions may include "inclusionary zoning, multifamily districts adopted under [Chapter 40A] , and overlay districts adopted under [Chapter 40R]." Municipalities thus have an opportunity to demonstrate that the host community truly does embrace affordable housing, just not the proposal in question.

TAKING THE CHANGE TO HEART

While the Great Recession has masked much of the impact of this regulatory change, one subsidizing agency, MassHousing, has issued three letters denying project eligibility applications over the past three years, in each case citing a combination of poor site design and municipal actions previously taken to address affordable housing.

In March 2011, MassHousing denied an application for a project eligibility letter for 20 homeownership units in Reading for two reasons. First, Reading had approved two Chapter 40R districts, which, when viewed together, would allow construction of 458 units of housing by right. The second reason for denying the application was that the site layout was inconsistent with the design requirements of 760 CMR 56.04 (4) (c), since the development plan "would require deconstructing a well-established residential neighborhood to accommodate a building program that is not well suited to the site." The combination of these considerations was decisive; the agency stated that its analysis did not rely upon "any one factor in isolation."

A proposal to construct 36 homeownership units in Easton under Chapter 40B met with a similar fate in March 2012, notwithstanding the proponent's voluntary reduction in the number of units from the 44 originally proposed. Once again, MassHousing's analysis focused on both design issues and the town of Easton's recent actions that included adoption of a Chapter 40R overlay district, the approval of a comprehensive permit for 113 units in a historic mill district, and a considerable financial commitment by the town to support that mill redevelopment.

Most recently, in November 2013, the agency denied an application to construct 42 rental apartment units in Norwood. While in this instance MassHousing first cited a number of municipal actions dating back to 2000 (some six in all), it also focused on five specific flaws in the proposed site layout and design. As in the earlier denial letters, the agency relied upon a combination of design issues and municipal actions rather than any single factor.

THE ROAD AHEAD

DHCD's regulatory changes in 2008 represented a conscious effort to make the front end of the Chapter 40B process more rigorous. The overdependence on Chapter 40B as a means of housing production that occurred during the real estate boom of the early to mid-2000s precipitated this change. Some six years later, however, we are still in the early days of this new reality.

Thus far, for example, MassHousing has relied upon a combination of poor site design and recent municipal action as the basis for denying eligibility letters. Lurking in the future, however, is an as yet unidentified development where site design

See MUNICIPAL ACTIONS, page 10

The Massachusetts Uniform Trust Code and the real estate practitioner

BY ANDREW M. GOLDEN AND SARA GOLDMAN CURLEY

ANDREW GOLDEN

SARA GOLDMAN CURLEY

The Massachusetts Uniform Trust Code (MUTC), M.G.L. c. 203E, was signed into law by Gov. Deval Patrick with little fanfare on July 8, 2012, and became effective immediately. While the Massachusetts Uniform Probate Code (MUPC) created a much bigger splash, the MUTC has not achieved the same level of awareness. Nevertheless, an understanding of key provisions of the MUTC will prove essential to real estate professionals faced with matters involving trusts.

Most provisions of the MUTC are default rules that an attorney may draft around in the trust instrument – and, as has always been the case, real estate professionals must first look to the trust. Importantly, several provisions may *not* be modified by the terms of the trust, including the power of the court to modify or terminate the trust in accordance with relevant provisions of the MUTC, and the effect of a spendthrift provision and the rights of certain creditors and assignees to reach trust property.

EFFECTIVE DATES TO KEEP IN MIND

The MUTC became effective with respect to all donative trusts created before, on or after the effective date of July 8, 2012, as well as trust-related judicial proceedings commenced on or after the effective date, and all trust-related judicial proceedings commenced *prior* to that date, with limited exceptions. The notable exceptions to this nearly universal applicability are a set of provisions that are only applicable to instruments created on or after July 8, 2012: the changes to new default rules involving spendthrift provisions (§502), the new statutory presumption that all trusts are revocable unless they expressly state otherwise (§602), and majority decisions by co-trustees when all trustees are not in agreement on a particular course of action (§703).

IMPORTANT CHANGES

The changes brought forth by the passage of the MUTC are sweeping, but that does not mean practitioners need to clear their minds of several hundred years of Massachusetts trust law. As §106 of Chapter 203E provides, the MUTC is not intended to replace the common law of trusts except where it expressly modifies it. Many provisions of the MUTC simply codify existing Massachusetts trust law. That being said, there are many important changes of which real estate professionals should take note when dealing with trusts.

KEY TERMS AND DEFINITIONS

The MUTC introduces new terminology. Two terms – "qualified beneficiaries" and "material purpose" – warrant special attention.

Section 103 defines a qualified beneficiary as one who, on the date the beneficiary's qualification is determined is either, (a) a distributee or permissible distributee of trust income or principal; or (b) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date. Under the MUTC, it is the *qualified* beneficiaries who the trustees must keep reasonably informed of the administration of a trust, or to whom the trustees must give notice of the intention to the transfer a trust's principal place of administration, or to whom notice of the acceptance of a new trustee or that trust has become irrevocable must be given. Beneficiaries who do not meet the definition of a qualified beneficiary do not possess the same powers and are not entitled to the same level of information about the trust.

Determining whether a provision of a trust instrument represents a "material purpose" of the trust may be of vital importance if trustees or beneficiaries seek to deviate from the written terms of a trust or to seek its early termination (more on those issues below). Despite its importance, "material purpose" is not defined in the MUTC. Real estate professionals may find that trusts drafted after the MUTC's effective date include express provisions regarding what is intended to be a material purpose. That is not to say that a trust's material purpose is entirely in the eye of the beholder – Massachusetts law continues to provide, for example, that a spendthrift provision is definitively a material purpose of a trust, and §411 of the Uniform Code was modified for Massachusetts to retain that aspect of our common law.

VIRTUAL REPRESENTATION

The concept of virtual representation will be familiar to those who have interacted with the MUPC. In sum, §§301-304 of the MUTC provide for representation by others (fiduciaries, parents of minor or unborn children, or persons having substantially identical interest to the represented person or class of persons) for notice and consent purposes in both the non-judicial and judicial contexts. To the extent there is no conflict of interest between the representative and the person(s) represented with respect to a particular question or dispute, such representative may represent and bind another.

NON-JUDICIAL SETTLEMENT AGREEMENTS

The MUTC offers trustees and beneficiaries the opportunity to deviate from the written terms of a trust in the form of non-judicial settlement agreements as set forth in §111. Such agreements are not appropriate in every circumstance, and are only valid to the extent they do not violate a material purpose of the trust and include terms and conditions that a court could have approved if court approval had been sought.

To be binding, a non-judicial settlement agreement should be agreed to by all "interested persons." The term "interested persons" is not precisely defined, but a trustee's consent would ordinarily be required. Any interested person may seek court approval to ensure that the agreement is appropriate or that, if virtual representation was relied upon, such representation was sufficient.

MODIFICATION AND TERMINATION OF TRUSTS

There are many circumstances in which settlors, trustees and beneficiaries may seek court approval of the modification or termination of otherwise irrevocable noncharitable trusts, set forth in greater detail by §§411-415.

A modification or termination also may be sought in light of unanticipated circumstances or the inability to administer trust effectively (§412), to address an uneconomic trust with a total value of less than $200,000 (§414), or to correct mistakes of fact or law (§415).

After notice to qualified beneficiaries (and without the necessity of court involvement), a trustee may combine or divide two or more trusts if the results do not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trusts (§417).

SPENDTHRIFT PROVISIONS

Section 502 changes current Massachusetts law with respect to spendthrift provisions. Under the new rule, valid spendthrift provisions must now prohibit both voluntary and involuntary transfers by a beneficiary, while the old rule in Massachusetts allowed for spendthrift provisions to prohibit involuntary transfers while permitting voluntary ones. As noted above, the new rule is effective only with respect to trust instruments executed after the effective date of MUTC, but it may not be waived by the trust instrument.

For an overview of the MUTC in greater detail, the Probate and Family Court Department has issued a helpful procedural advisory that may be accessed at www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/mutc-procedural-advisory-1-23-13.pdf. For other helpful resources and updates, including the fee schedule for trust-related court filings, visit the Probate and Family Court website at www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt. ♦

Co-chair of REBA's recently launched estate planning, trusts and estate administration committee, Sara Goldman Curley is a partner in the trusts and estates practice at Nutter McClennen & Fish LLP. Sara's practice includes all aspects of estate planning for high net worth individuals as well as counsel to executors and trustees in the administration of estates and trusts. Sara's email address is scurley@nutter.com. Also in Nutter's estates and trusts department, Andrew Golden's practices ranges from relatively straightforward estate planning for young families to more sophisticated plans with a focus on minimizing estate, gift and generation transfer taxes. Andrew can be reached at agolden@nutter.com.

Settlement at One Charles illustrates importance of expert disclosure

BY DAVID M. ROGERS

DAVID RODGERS

The $12.2 million settlement recently obtained by the One Charles Condominium Association in the construction defect case it brought against the developer of the condominium and certain design professionals underscores the significance of the 2012 Appeals Court Decision in *Wyman v. Ayer Properties, LLC*, 83 Mass. App. Ct. 21, and the importance of timely expert disclosure.

The One Charles Condominium is a luxury condominium building located on Charles Street in downtown Boston. The project was developed by MDA Park, LLC, a single-purpose entity related to and affiliated with Millennium Partners. In 2007, the condominium association initiated suit against the condominium declarant alleging, among other defects, that the heating, ventilation and air conditioning (HVAC) system was negligently designed.

In 2009, the condominium association amended its complaint to add claims directly against the the company that designed the HVAC system for the building. The plaintiff's primary claim was that the system, as designed, exhausted significantly more air than was supplied to the building. That, the association claimed, combined with the fact that the supply air, which was provided by roof-top air handling units, was effectively trapped in the common corridors of the building, resulted in a significant pressure imbalance between the units and the outside.

The plaintiff association asserted that the imbalance caused, among other things, excessive amounts of untempered and unconditioned outside air to be drawn into the units directly through the building envelope, contributing to high interior humidity during certain times and under certain conditions.

The HVAC engineer filed a motion for summary judgment, arguing that the economic loss rule was a bar to the plaintiff's claims. In rejecting the HVAC engineer's argument, the court relied upon the Appeals Court's decision in the matter of *Wyman v. Ayer Properties, LLC*, 83 Mass. App. Ct. 21 (2012), finding that the economic loss rule did not apply to a condominium association's claims for construction defect where the association benefits from no other remedy. The Trial Court held on summary judgment as follows: "Wyman clearly informs the outcome of the present case … application of the principles announced in Wyman requires the denial of Cosentini's motion for summary judgment …"

The Trial Court's application of *Wyman* is noteworthy, as there had been some question as to whether the purported "dicta" previously expressed by the Supreme Judicial Court in two cases decided a decade before would give a trial court pause in applying the holding of *Wyman* to similar facts. If the Trial Court's decision in One Charles is any indication, it appears that *Wyman* will be applied in a manner which significantly limits, if not prevents, an application of the economic loss doctrine to a condominium association's claims for construction defects.

DEMONSTRATING HARM TO PROPERTY UNNECESSARY

Opening a pathway to recovery for a condominium association in a construction defect case without having to demonstrate harm to other property is a significant step forward. While the economic loss rule has never presented an absolute bar to recovery, it has eliminated certain legitimate damage claims and imposed an artificial burden on others with no legitimate public policy goal.

The economic loss rule had its genesis in the products liability arena where a meaningful distinction between contract and tort remedies was required. The economic loss rule was later conflated with a line of cases requiring harm to persons or property as a means of limiting tort exposure for indirect, attenuated and arguably unforeseeable harm to contract and other economic expectations.

As noted by the Appeals Court in *Wyman*, the rule has no legitimate application to the claims of a condominium association which does not benefit from a contract and which does not seek indirect or attenuated damages based upon interference with economic expectations.

Another facet of the One Charles case should serve as a potent reminder to all trial counsel of the importance of timely expert disclosures. Shortly before trial, and well after all applicable deadlines, defendants Cosentini and Handel requested leave to supplement their expert disclosures. The defendants maintained that they had intended to rely upon experts identified by certain co-defendants, but those co-defendants had settled with the plaintiff after the pre-trial and those experts would no longer be available at trial.

The court granted the defendants leave to supplement, but only for the purpose of replacing the "lost" testimony of the co-defendants' experts. The defendants made supplemental disclosures that, from the plaintiff's perspective, went far beyond replacing the testimony of the co-defendants experts and covered issues which had been in the case for years. The plaintiff moved to strike the supplemental disclosures on such grounds.

The Trial Court granted the plaintiff's motion, striking all portions of the supplemental disclosure which exceeded the scope of the court's order. The plaintiff thereafter filed a motion to strike Cosentini's original disclosures on the grounds that they failed to comply with Mass.R.Civ.P. 26(b)(4)(A).

One Charles

At the final pre-trial conference and prior to scheduling a hearing on the plaintiff's motion to strike, the Trial Court (Billings, J.) had an opportunity to comment upon the state of the defendant's expert disclosures saying that Cosentini's expert disclosures "are something that a lawyer could do without having even spoken to the expert, and I'm very skeptical that they're sufficient."

The plaintiff's claims against Cosentini were reported settled shortly thereafter. The obvious lesson is that in an expert driven case it is critical to ensure that disclosures are timely made as the consequences can be significant. ♦

Dave Rogers practices in the litigation group at Marcus, Errico, Emmer & Brooks, P.C., concentrating on community association matters and construction disputes. Dave can be reached by email at drogers@meeb.com.

MUNICIPAL ACTIONS PREVIOUSLY TAKEN

CONTINUED FROM PAGE 8

is exemplary, and recent municipal action to promote affordable housing has been aggressive.

What will then become the determining factor? The size and scope of the previous municipal action compared to the size, scope and impact of the proposed new Chapter 40B development? A preference for rental development versus home ownership? The degree to which the "municipal actions previously taken" have been implemented as of the date of the application? The guidelines for Chapter 40B developments provide some clues (Section 1y(A)(3)(a)), but the possibilities abound.

So too do the questions. For example, how far back in time can or should a subsidizing agency go when examining "municipal actions previously taken?" And what does one such denial of an application for site eligibility mean for a subsequent development proposal a year or two later in the same community?

UP NEXT

Will a disappointed developer at some point bring suit after being issued a denial? MassHousing has previously been sued both for issuing a site eligibility letter and for denying a project eligibility letter application (prior to the regulatory change). In both instances, the agency's decision was upheld.

In *Marion v. Massachusetts Housing Finance Agency*, 68 Mass. App. Ct. 208 (2007), the Appeals Court agreed with a determination by the Superior Court that the issuance of a site eligibility letter was "only one step in the permitting process," saying that the "appropriate avenue" for challenging the validity of the eligibility letter was a pending Housing Appeals Committee proceeding. At the other end of the spectrum, a Superior Court judge in 2006 granted MassHousing's motion to dismiss a challenge to the agency's denial of a site letter without issuing any opinion.

Presumably an agency determination to issue a site eligibility letter is entitled to some deference, but the inclusion of a provision in 760 CMR 56.04 (6) stating that issuance of a determination a project eligibility shall be "conclusive evidence" a project has satisfied project eligibility requirements may have some unintended consequences. And one judge's apparent conclusion that a denial was only one step in the permitting process could be tested further in a subsequent proceeding.

The world of Chapter 40B is becoming ever more complex. Stay tuned. ♦

Bob Ruzzo is a senior counsel at Holland & Knight. He was the chief operating officer and deputy director of MassHousing from 2001 to 2012. He may be reached at robert.ruzzo@hklaw.com.

The law of unintended consequences

BY JAMES S. BOLAN AND SARA N. HOLDEN

JIM BOLAN

SARA HOLDEN

Quick question: Who is your client? A lack of clarity on lawyer-client roles can create unintended consequences of an implied relationship (such as one where the "client" asserts detrimental reliance). While the potential for an unintended attorney-client relationship more often arises in closely held entities – such as two individuals deciding to start a corporation – it can also arise in real estate matters.

So, who is the client? And what happens if several participants never "memorialize" their deal or joint venture on which the lawyer jumped in and started drafting? Everyone regards *that* lawyer as *their* lawyer – for the individuals and the entity.

An attorney-client relationship "may be implied when: a person seeks advice or assistance from an attorney, the advice or assistance sought pertains to matters within the attorney's professional competence, and the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance."

The *Restatement of the Law Governing Lawyers* notes that "a lawyer may be held to responsibility of representation when the client reasonably relies on the existence of the relationship," and that "a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer."

REAL ESTATE

In one case we tried, counsel represented a real estate development corporation that was equally owned by two individuals. When a dispute broke out, the attorney assisted one and the other was not well informed of counsel's involvement. The court concluded that there was a conflict in representing the shareholder, while also representing the corporation, during a property transfer to the shareholder. One finding was that counsel had "a legal duty as counsel to the corporation to inform one shareholder of an imminent and grave breach of fiduciary duties by the other."

In another case, an attorney-client relationship between the lawyer and his aunt was found where the lawyer bought her house, and the aunt was held to have been harmed by agreeing to a transaction with a man she trusted when the terms were not fair to her or fully disclosed, under Massachusetts. R. Prof. C 1.8.

CORPORATE

One common variant is where the shareholders (or members) also believe that you represent each of them, even if your fee agreement or bills are directed solely to the entity. Another is the implied duty to owners. In *Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C.*, Schaeffer and her brother-in-law, Gross, were each 50-percent owners of a corporation. Although they both were officers and directors, Gross managed the business. Cohen and his firm were initially retained by Schaeffer and Gross to incorporate the business. Gross continued to use Cohen as corporate counsel. When concern arose about Gross's management, Cohen represented the corporation and Gross in defending actions brought by Schaeffer. Even though the corporate claims were settled, Schaeffer sued the lawyers, alleging a conflict in representing the business and Gross in the disputes with Schaeffer. While those claims were dismissed as derivative and not direct, the court noted that Cohen had represented conflicting interests when he represented Gross and the corporation in the prior derivative action and that because shareholders, like partners, owe each other a fiduciary duty, counsel to the entity could owe all owners the same duty.

In 2002, in *Applebaum v. Verndale Corporation*, the Superior Court disqualified the defendant's corporate counsel from representing the corporate and individual defendants in the case in reliance on the above language from *Schaeffer*.

BUSINESS TRANSACTION

In *Blickenstaff v. Clegg*, a lawyer had handled a series of related transactions involving a number of parties, including plaintiff. The lawyer claimed that he did not represent the plaintiff. But, because plaintiff had asked the lawyer to prepare documents for the transaction, and the lawyer did not clearly document who was, and who was not, a client, the Idaho Supreme Court concluded that there was a question of fact whether plaintiff's belief that the lawyer represented him was reasonable and remanded the case for trial.

FAMILY SITUATIONS

The risk is acute, since there is a built-in expectation of relationship with a lawyer-relative. ("Danger, Will Robinson!! Danger!")

It is exceedingly rare when rights and entitlements are aligned among joint venturers and the entity. So, when the dispute arises, be assured that everyone will point the finger at you.

So, who is your client? And how do you make it clear that no one else is in the room with you?

First, determine and then disclose to all who you intend to represent. Putting the cart before the proverbial horse is a recipe for disaster. And then, put it in writing!

Second, once you have made it clear that you are going to represent the friend or former client who comes to you to set up the venture, then inform all that each, including the incipient entity, should have or seek independent counsel to protect the several and different rights. And then, put it in writing!

There is no benefit to letting the matter slide, hoping for the optimum result. No one will be insulted if you make it clear at the outset that you are representing one of the participants (whether an individual or an entity) and the others are told to seek counsel to advise on their individual interests. As lawyers representing lawyers, we love handling these cases, but all rarely ends well in these instances! ♦

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TRAPS FOR THE UNWARY

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ground checks at the inception of hire and each three to five years for any employee with access to financial records. Staff should also undergo periodic training and review as to compliance with Rule 1.15.

Trap 7: Representing borrower and lender: In general, it is permissible to represent a borrower and lender in a standard residential real estate closing provided there are no unforeseen disputes, and provided there is full disclosure and consent of both clients.

MBA Opinion 90 3 discusses the minimum required for full disclosure if the attorney represents both lender and borrower. The borrower should be provided specific examples of potential disputes between bank and borrower.

Where lender's counsel is not representing the borrower, written disclosure should be given to the borrower that lender's counsel is representing the lender only and the borrower may wish to consult with independent counsel.

Such disclosure forms are a required component of the closing package provided by most lenders, but should also be added to private financing transactions as well. When lender's counsel is in substance representing the borrower, a disclosure form given to the borrower just prior to closing will not be considered timely or sufficient. However, timely and adequate written disclosure may insulate an attorney from a borrower's malpractice claim, for example, a claim based on an erroneous certification of title.

The above traps are discussed for educational purposes with the hope of improving the quality of legal services and are offered in that spirit. Bar counsel has a call-in service to answer questions, Monday, Wednesday and Friday, 2 p.m. to 4 p.m., at (617) 728-8750. ♦

Bruce Eisenhut is assistant bar counsel. The opinions expressed herein reflect the opinions of the Office of the Bar Counsel, but not necessarily those of the Board of Bar Overseers or the Supreme Judicial Court. A longtime REBA member, Bruce has served as assistant bar counsel for the Board of Bar Overseers Office of the Bar Counsel for more than 20 years.