Nominating Committee seeks awards nominations

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REBA's 2014 Annual Meeting & Conference

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Hank Phillippi Ryan to give luncheon keynote address at Annual Meeting and Conference

HANK PHILLIPPI RYAN

Hank Phillippi Ryan, on-air investigative reporter for Boston's NBC affiliate, will provide the luncheon keynote address at REBA's 2014 Annual Meeting and Conference.

Ryan has won 32 Emmys, 12 Edward R. Murrow awards and dozens of other honors for her ground-breaking journalism.

A best-selling author of six mystery novels, Ryan has won multiple prestigious awards for her crime fiction, including the Agatha, Anthony and Macavity awards and for *The Other Woman*, the coveted Mary Higgins Clark Award. National reviews have called her a "master at crafting suspenseful mysteries" and "a superb and gifted storyteller." Her newest thriller, *The Wrong Girl*, has the honor of winning the 2013 Agatha Award for Best Contemporary Novel. A six-week *Boston Globe* bestseller, it is also an Anthony and Daphne Award nominee, a *Patriot Ledger* bestseller, and was dubbed "another winner" in a Booklist starred review and "stellar" by *Library Journal*. Ryan is a founding teacher at Mystery Writers of America University and 2013 president of national Sisters in Crime. Watch for her next novel, *Truth Be Told*, on Oct. 7.

For more about the conference, see page 6. ♦

REBA on Beacon Hill

BY EDWARD J. SMITH

REBA has long advocated the passage of legislation at the State House to advance the practice of conveyancing and real estate law generally. Successes in recent years have included:

- Title-curative/protective legislation (revisions to derelict fee and obsolete mortgage statutes, lis pendens reform, conclusive effect of foreclosure affidavit);
- Laws that modernized other statutes (mortgage discharge law, homestead reform, use of informal probate with power of sale);
- Consumer protection measures (required title certifications in mortgage closings, good funds law);
- Laws that facilitated real estate development (mechanics lien reform, authorization for limited liability companies, permit extension laws, expanded Land Court subject matter jurisdiction); and
- Laws that heralded registry of deeds improvements (elimination of owners duplicate certificates, uniform practices and procedures at registries, enhanced technology supports).

These are just some of the measures that REBA has worked to shepherd through the legislative process – an effort now ably overseen by the Legislation Committee and its co-chairs, Fran Nolan and Rich Hogan. REBA has often partnered with other real estate-related organizations to achieve success. REBA has also succeeded in the defeat of many legislative proposals that would have been detrimental to the integrity of real estate titles and the practice of real estate law.

NEW WITHDRAWAL FROM REGISTRATION STATUTE

The latest success for REBA is the expanded right to withdraw land from the registered land system (St.2014, c.287, §§81-

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In Memoriam

REMEMBERING JON DAVIS

BY JOEL STEIN

Jon Davis, former president of the Massachusetts Conveyancers' Association, died of glioblastoma, a form of brain cancer, on July 14, 2014, at the age of 70.

Jon was born in Ottawa Falls, a suburb of Toledo, Ohio. He attended the University of Michigan and George Washington National Law Center. While at GW, he served as a staff member to The Kerner Commission, which examined the 1967 race riots that occurred in cities throughout the United States. After graduation, Jon, together with his wife, Jane, served in Ecuador as a member of the Peace Corps.

He was a longtime resident of Hingham and practiced law in Marshfield at Stanton & Davis. In addition to his wife, he leaves two daughters, Hadley Rierson and Carrie Lebovich, and four grandchildren, Teddy and Opal Rierson and Mabel and Max Lebovich.

Jon came to the attention of the board of the MCA when he wrote a letter in

support of strengthening M.G.L. c. 93, § 70. He was invited by Syd Smithers to become a board member and soon thereafter, conveyancers were faced with the challenge presented by Closings Limited, which had started providing residential closing services. Confronted by the first unauthorized practice of law challenge, Jon spoke eloquently on the necessity of the MCA to take action on behalf of its membership.

The MCA and REBA were never the same. The board became more activist and, led by Jon, endured two more long, costly and ultimately successful suits against corporations attempting to practice law. Through setbacks, financial adversity and the occasional grumblings of membership and fellow board members, Jon willed the bar association to continue on. Throughout the most recent and most prolonged litigation, Jon stated he would not leave the board until the case was successfully concluded. By the time he left the board at the end of 2012, Jon had become the face of REBA.

Jon was all about professionalism. He loved being a lawyer and he set high standards for other practitioners. He was

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SJC puts final nail in the coffin of the Economic Loss Doctrine for condominiums

BY DAVID M. ROGERS

DAVID ROGERS

The Supreme Judicial Court has issued a landmark decision that has effectively carved out an exception to the "economic loss rule" for condominium associations seeking to recover for defective construction and design. In *Wyman v. Ayer Properties, LLC*, the SJC reversed the Superior Court's dismissal of a condominium association's claims associated with negligently constructed masonry – finding that the association could recover more than $500,000 from the developer of a Lowell condominium.

The SJC recognized that the economic loss rule had placed an unintended and substantial burden upon condominium associations and "conclude[d] that the economic loss rule is not applicable to the damage caused to the common areas of a condominium building as a result of the builder's negligence."

The economic loss rule holds that in a "tort" action (distinguished from a breach of contract claim), plaintiffs can recover damages only for actual property damage or personal injury – they may not recover damages for purely economic loss.

In the condominium context, this had meant that an association that had discovered that they had a defective roof could not directly sue the developer for the cost of repairing the roof itself – unless that defective roof caused personal injury or damage to other property. In other words, if the condominium association could not demonstrate that the defective roof was causing water infiltration into the individual units or common areas of the condominium, for example, the association could not recover against the developer for negligence under the economic loss rule.

The legal theory behind this rule is

See ECONOMIC LOSS, page 3

LEGISLATIVE UPDATE

CONTINUED FROM PAGE 1

83). Working with the judges of the Land Court, we were able to provide in M.G.L. c. 185, § 52 for withdrawal*at the landowner's option* if: (i) contiguous lots are in common ownership and any of the lots are on the unregistered side; *or* (ii) the land consists of less than 10 percent in area of the total of the land to which an original certificate of title pertained, the rest of the land having been conveyed out since the original registration; *or* (iii) the owner has submitted the land, or satisfied the court that he will submit the land to M.G.L. c. 183A or 183B; *or* (iv) the land is improved with an occupied building *not* used or occupied as or in connection with, and *not* designed or intended for use or occupancy as or in connection with, a one-to-four-family residential dwelling.

Under clause (i) there would no longer be a requirement that the registered land comprise less than 50 percent of the entire parcel. Clause (ii) is not new. It has been particularly helpful in urban areas where there were originally large tracts that have been subdivided into small lots. Clause (iii) removes the requirement when creating a condominium or timeshare on registered land to first file documents on the registered land side as a part of the withdrawal application. If the owners "satisfy the court that the owners shall create those interests," that is sufficient basis to withdraw. Clause (iv) excludes from as-of-right withdrawal any vacant land or property that is used or occupied, or designed or intended for one-to four-family residential use, but permits withdrawal for land that qualifies under one of the other clauses. Further, an owner of registered land may establish other "good cause" for withdrawal. In this regard, the statute now expressly includes the "burdens and expenses of further dividing the registered land into lots for separate conveyance" as "good cause" for withdrawal.

When assembling or subdividing parcels in a development project, it is not at all unusual for the project to include lots that are registered as well as lots that are in the unregistered side of the registry of deeds. The time and expense in assembling documentation in such transactions can be so great as to make the project less feasible within the project's window of opportunity. Thus, the benefits of land registration are often outweighed by the attendant complications for transactions, which may add significant delay and costs to even simple deals. This legislation would not eliminate registered land. It just gives more landowners, after considering the benefits and advantages, a greater opportunity to withdraw land from the Torrens system. That is the same right already enjoyed by the commonwealth, or any authority or political subdivision owning registered land.

HOW WILL THE LAND COURT IMPLEMENT THE NEW STATUTE?

The Land Court is justifiably protective of the registration system that was introduced in Massachusetts in 1898. (REBA estimates that 10 to 15 percent of the land in the commonwealth is in registration.) The court has been concerned with limiting the withdrawal as of right to commercial properties and has wanted to ensure that less sophisticated residential owners would not lose the protection of the registration system without good cause and careful consideration. The court assumed that commercial developers and owners would have the advice of counsel and would be better able to understand and evaluate the risks involved in withdrawing land from the registration system. There are still areas that will require further consideration by the court as practice develops under the new provisions. For example, will "occupied" be interpreted literally, or will it be treated in a manner similar to abandonment so that there is a question of intent that may come into play? Also, the court will have to address the question of what does "designed for" mean in the context of an owner who has made design changes to a one-tofour-family dwelling to allow for in-home or accessory business use. The court has demonstrated a willingness to work with practitioners over the past few years and REBA anticipates that this cooperation will continue under the new provisions in section 52.

Chapter 287 of 2014, in § 83, also amends M.G.L. c. 185, § 62, to hold harmless the Land Court's Assurance Fund when accepting certain documents in registration. The Registered Land Section accepts instruments executed on behalf of corporations that comply with M.G.L. c. 156B, §115. (M.G.L. c. 156B, § 115 permits third parties acting in good faith to rely on instruments that purport to be executed on behalf of a corporation.) However, the Land Court is not equipped to do the necessary investigation to assure that the persons named in the instrument actually hold the title of corporate officer. The risk is properly on the parties and their counsel, who can make inquiry with the state secretary or otherwise as to whether the signatories do hold the titles indicated on the instrument.

IBAÑEZ LEGISLATION

Legislation was filed to respond to the hardship for many third-party purchasers of residential real estate whose title had passed through foreclosure prior to the 2011 decision of the Supreme Judicial Court in *U.S. Bank National Association vs. Ibañez*. As a practical matter, this decision held that a mortgagee could not pass good and clear record title to a third party if it was unable to show that it was the holder of record of a particular mortgage at the time it initiated the foreclosure process. Title to hundreds of homes foreclosed in the years preceding were held to be defective, although lenders had relied on the accepted practice of recording the mortgage assignment after the foreclosure. Such titles may be forever defective until the new owner establishes title by expensive litigation. The obvious consequence of this is that the owner has been unable to sell or even refinance his or her home.

Senate Bill 1987, based on legislation filed by the Massachusetts Land Title Association, would establish a three-year limit on a challenge by any foreclosed mortgagor to the mortgagee's exercise of its statutory power of sale. Generally, the foreclosure affidavit would be "conclusive evidence: in favor of an arm's length third-party purchaser for value at or subsequent to the foreclosure sale; that the power of sale under the foreclosed mortgage was duly executed [sic]; and that the provisions of [*chapter 244*] and section 21 of chapter 183 were duly exercised [sic]."

In most cases the former mortgagors have had over five years to attempt to regain their homes because banks corrected their practices after *Ibañez* was first decided by the Land Court in March 2009. In the event the three-year period has elapsed before the proposed effective date of the legislation, the legislation provides that the former mortgagor would have a full year to bring suit. There is precedent in Massachusetts for similar limitations periods. M.G.L. c. 260, §§ 33, 34, as amended by St. 2006, c.63, §§ 6-8.

It has been argued by opponents to Senate Bill 1987 that current law provides for a 20-year statute of limitations for an owner to establish title that has been deemed defective. M.G.L. c. 260, § 21. A three-year statute, they argue, would be unfair. REBA believes that assertion to be disingenuous for a few reasons. It is said that, on average, owners resell their homes every seven years. To force a homeowner to stay in place for 20 years is an unacceptable hardship, assuming he or she has the financial means to litigate the issue of adverse possession. Also, the adverse possession option does not apply to registered land. Former mortgagors have had over five years to attempt to regain their homes after *Ibañez* was first decided by the Land Court in March 2009. We suspect that a motivation of the bill's opponents is to provide unlimited opportunity for new foreclosure defense theories, now unrecognized, to gain judicial acceptance. This line of thinking, which will keep properties on the sidelines unnecessarily, ignores the reasonable expectations of the marketplace. The law should only deal with what is known at the current time. Finally, this legislation would not in any way relieve the liability of the lenders who were responsible for improper foreclosure practices. Any mortgagor who was the victim of such practices retains his or her right to hold the lender accountable.

GOVERNOR RETURNS IBAÑEZ BILL WITH AMENDMENT

The General Court passed the "Ibañez bill" at the end of the formal sessions. Regrettably, however, Gov. Deval Patrick chose to return the legislation to the Senate with an amendment, extending the proposed three-year statute of repose to 10 years. (Senate Bill 2355). In his message, the governor wrote: "Buyers who later purchased the property – or, at least, believed they had done so – are now faced with title questions. Many of these buyers were investors, but many are now homeowners themselves. I commend the Legislature's effort to address these problems. But I believe the proposed three year period is insufficient. A family improperly removed from its home deserves greater protection, and a meaningful opportunity to claim the right to the land that it still holds. The right need not be indefinite, but it should extend for longer than three years. Certainty of title is a good thing – it helps the real estate market function more smoothly, which ultimately can help us all. But this certainty should not come at the expense of wrongly displaced homeowners or, at least, not until we have put this period further behind us."

Since formal sessions have come to an end this year, further action on the Ibañez legislation appears unlikely. Consideration of the governor's amendment, in whatever form, during an "informal session" would require "unanimous consent." Even a single objection would make that impossible.

Informal sessions may be hospitable, however, to some other less controversial legislation supported by REBA, including Senate Bill 2306, to establish standards of conduct applicable to notaries and confirm the validity of instruments executed under power of attorney. This has been passed by the Senate. Another REBA bill, H.4380, would provide a procedure for disposing of the property of, and otherwise winding down, a limited liability company whose registration has been cancelled. A similar procedure already exists for corporations that no longer have legal existence. House Bill 4380 has been passed by the House. ♦

Ed Smith has served as REBA's legislative counsel for more than 20 years. He also has a Boston-based private law practice representing individuals, businesses and nonprofits in real estate transactions and related litigation. Any member with questions relating to REBA's legislative agenda may contact Ed directly at ejs@ejsmithrelaw.com.

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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

'Truth Be Told': foreclosures, murder and romance

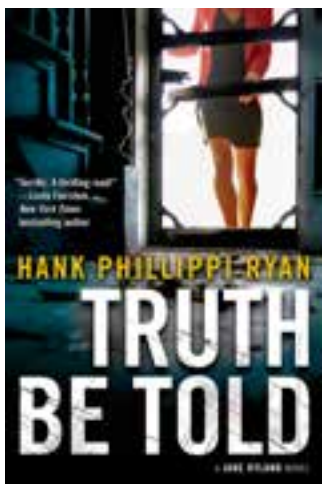
BY NICHOLAS P. SHAPIRO

NICHOLAS SHAPIRO

It is an uncharacteristically hot day in May in Boston. Jane Ryland, the former television investigative journalist and now reporter for the Boston *Register*, is covering the foreclosure crisis in Boston. Ryland is observing deputies of the Suffolk County Sheriff's Department effect an eviction in West Roxbury when the body of a real estate agent is found dead, murdered. Meanwhile, at Boston Police Headquarters, homicide Detective Jake Brogan, Ryland's clandestine love interest, is listening, behind a two-way mirror, to the confession of an ex-con, Gordon Thorley, to an infamous, 20-year-old, cold case murder of a teenage girl in Arnold Arboretum. The so-called Lilac Sunday Killer had captivated the city's attention in the early 1990s, and his unknown identity had haunted Brogan's grandfather, the former Boston Police Commissioner, to his grave. It is with these sensational events that Hank Phillippi Ryan begins her seventh novel, *Truth Be Told*.

In the metro Boston area, Ryan is perhaps best known as the hard-hitting, innumerable Emmy Award-winning investigative reporter for the local NBC affiliate, WHDH-TV, Channel 7 News. Ryan, however, is also a highly accomplished, award-winning mystery/crime novelist. She has won two Agatha Awards, as well as Anthony, Macavity and Mary Higgins Clark awards, for her fiction writing. Thus, Ryan does not merely moonlight as a fiction author; she has developed a second, equally successful day job as a novelist.

Truth Be Told is comprised of 400 pages of muscular prose. Ryan has developed a structure for crime fiction writing that bears striking resemblance to Michael Bay's directorial style in movies, where the camera does not linger for very long on any given frame. The book is divided into a vast number of short and direct chapters and subparts of chapters. The result of this technique is a page-turning pace that greatly enhances readability, and keeps the reader's attention gripped. It also allows Ryan to jump back and forth between narrative threads without over-challenging the reader's ability to remember what was going on in each thread.



Thematically, Ryan blends many subject matters and motifs; there is literally something for everyone. Her protagonist/alter ego, Jane Ryland, in chasing the developing story of dead bodies found in foreclosed properties throughout Boston's middle-class neighborhoods, also finds herself caught between vying love interests: the homicide detective, Jake Brogan, and the defense attorney, Peter Hardesty. Brogan is the embodiment of Boston's duality. He is Harvard-educated, and the son of an Irish-American, police commissioner's son and a Boston Brahmin – the modern product of Boston's multi-faceted history. Hardesty is a young widower, who passionately defends murder suspects from police overreach. Both pose serious professional conflicts for Ryland, enhancing the illicit quality of their attraction.

Of perhaps greatest interest to REBA members, the foreclosure crisis and bank malfeasance constitute what is perhaps the novel's primary plot device. *Truth Be Told* imaginatively tackles what might be done with an REO – real estate owned by a bank – which has foreclosed upon a defaulted mortgage, if greed and profit motive were totally to eclipse the law.

Because *Truth Be Told* is a police procedural and tackles the foreclosure crisis, Ryan includes myriad legal concepts in the book, from the Housing Court's jurisdiction over evictions, to the doctrine of attractive nuisance, to the attorney-client and marital privileges, and even Rule 3.3 of the Rules of Professional Conduct and the *Brady* rule. While Ryan mistakenly conflates a memorandum of *lis pendens* with the order of notice issued in a soldiers and sailors proceeding, her treatment of legal matters is, in general, impressively accurate. In particular, in her portrayal of the defense attorney Hardesty, she captures the importance of listening to clients and potential witnesses to effective lawyering, as well as the significance of Internet marketing as a source of clients, particularly for smaller firms. REBA members will not find a distorted and inaccurate representation of our profession in the pages of *Truth Be Told*.

Given her chosen subject matter, as well as the investigative reporting that she has done on the foreclosure crisis in Boston, Ryan is a natural selection for the keynote speaker at REBA's Annual Meeting on Nov. 3, 2014. *Truth Be Told*has a release date of Oct. 7, 2014. I highly recommend picking up a copy in advance of the Annual Meeting. ♦

A member of the REBA young lawyers committee, Nick Shapiro practices with the Boston-based firm of Phillips & Angley. He practices in several areas of real estate law, including zoning and land use, litigation, developing and permitting. Prior to entering private practice, Nick clerked for Land Court Associate Justice Harry M. Grossman. Nick can be reached by email at nshapiro@phillips-angley.com.

SJC RULES FOR CONDO ASSOCIATIONS IN ECONOMIC LOSS CASE

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that the party contracting to have the roof installed had an opportunity to negotiate an express warranty guaranteeing its performance. If the purchaser of the roof had failed to negotiate such a warranty, the economic loss rule served to prevent the purchaser from receiving a "second bite at the apple" by recovering against the roof installer with a tort claim.

The economic loss rule posed a significant problem for community associations, as, in certain circumstances, the rule provided developers with a potential shield of protection against construction defect claims. Community associations, which do not have the ability to negotiate express warranties covering the original construction of the common areas, are generally unable to advance contract-based claims to recover for construction deficiencies. As such, the economic loss rule, which serves to prevent recovery in tort unless certain criteria were satisfied, effectively rendered community associations without recourse against a developer for certain claims of negligent construction.

The *Wyman* case involved the Market Gallery Condominium in Lowell. The four-story brick building, which was originally constructed in the 19th century, was purchased by Ayer Properties LLC in 2002 and converted to condominium status after the developer performed a renovation of the building over nearly three years. After control of the condominium was transferred from the developer to the unit-owner-elected board, the association engaged an engineering consultant to investigate the building. The investigation performed by the association's consultant revealed deficiencies associated with the windows, the roof and masonry of the building.

After an 11-day trial, the Superior Court awarded damages to the association for the negligent design and construction of the window frames and the negligent construction of the roof. The court determined that the economic loss rule did not serve as a defense to the association's claims concerning the windows and the roof because these deficiencies caused additional harm within the individual condominium units (i.e., water infiltration). The court did not allow the association to recover for the negligently constructed masonry, however, because it determined that the deficient masonry did not extend to any harm beyond the masonry itself.

The Supreme Judicial Court, in reversing the Superior Court's dismissal of the association's masonry-related claims, reasoned that "the nature of condominium unit ownership supports our conclusion that claims such as those raised here do not fit into the rubric of claims intended to be covered by the [economic loss] rule." The court noted that the economic loss rule was intended to divert liability and damages away from negligence damages and toward available alternative contract claims. The court recognized that a condominium association, which "has no contract with the builder under which it can recover its costs of repair and replacement," has no alternative contract claims upon which to rely, and concluded that an application of the economic loss rule – under the unique circumstances presented by condominium ownership – would not serve the fundamental purpose of the rule.

The SJC's decision will make it easier for condominium associations to obtain a remedy for all of its construction defect claims.

It is notable that the SJC also reversed the Superior Court's decision to reduce the repair and replacement damages to reflect costs at the time the damages were incurred. The Superior Court had reduced the amount of damages awarded at trial by twenty percent to reflect what costs would have been at the time of the negligent construction rather than at the time of the actual expenditures for repair and replacement. The SJC – in determining that the Superior Court's reduction of the condominium association's damage award was unreasonable – noted that "it appears that the judge's decision to reduce the amount of damages was motivated, in significant part, by a desire to prevent the trustees from receiving the full benefit of statutorily mandated interest" and found that the judge's "subsequent 20 percent reduction is largely unexplained and unsupported by any evidence." ♦

Dave Rogers is an associate in the Litigation Group of Braintree-based Marcus, Errico Emmer & Brooks, PC, the largest firm in New England specializing in representing condominium associations. His practice focuses on community association matters and construction disputes. Dave can be reached by email at drogers@meeb.com.

REMEMBERING JON DAVIS

CONTINUED FROM PAGE 1

thoughtful and combative. He was dedicated to his clients – the word is "clients," never "customers." He was practical and even occasionally patient with those who failed to agree with his point of view. He couldn't imagine life without lawyering. When he called me a few days after learning of his illness, he assured me he would not die, and worried only how the anticipated memory issues would impact his ability to work. Jon faced brain cancer as he did all challenges – with the indefatigable belief that this was a roadblock he could work around.

Jon was also unfailingly positive and stunningly energetic. Those egg white omelettes and pilates sessions served him well. He was discouraged by setbacks, but never deterred. He was surprised by disagreement, but invigorated to press forward. Many times I watched as Jon energized an entire room as he focused in on a point he believed must – MUST – be understood. We were dazzled by his passion, awed by his certainty and strengthened by his positive energy.

Jon didn't win all his arguments. For several years he argued with other board members about the requirement for an attorney to need a written power of attorney to sign for a client at a closing. "We're attorneys," Jon would say. "That is what attorneys do: We represent clients." Despite his advocacy, the board was not moved – and I disagreed with Jon. That was one long ride home.

Jon's sense of professionalism extended to a strong belief in community service and in service to the Bar. In addition to his involvement with the Talking Information Center, Jon gave innumerable hours to not only REBA, but to several other bar associations. He never understood an attorney who was content to simply practice law. He believed attorneys should mentor and educate.

And Jon always looked professional. Each month we would leave early for our board meetings so Jon could get his hair cut in Boston. He didn't like that I seldom wore a jacket and tie to work and would occasionally greet me with, "It looks like you need a haircut," or "Are you working today?"

Jon and I spent many memorable hours together over the past 20 years – at meetings, seminars and in the car commuting back and forth from Boston. We spoke of managing our offices and having daughters in California. We shared similar ideas about religion and politics and readily acknowledged our wives knew way more than we did about everything. We discussed growing up and growing old. I trusted Jon fully. Like an older brother, without the mishagas, Jon was my touchstone for ethical questions, office advice and more personal matters. I'm a cynic, but Jon was someone you could believe in.

Over the last few years Chris Kehoe joined our commutes home, regaling us with tales of culinary treats, which made us desperately hungry. It was Chris who once told us conspiratorially, "I've never liked a young Gouda." Jon just laughed and laughed.

And Jon did love to laugh. He had a magical smile and great eyes and could switch from a serious pronouncement to laughter in an instant. He loved Woody Allen and "Seinfeld," and recounting films and shows would always break up the more serious discussions. He wasn't a joke-teller, but he was a joke-lover. He also loved chocolate chip cookies. Any meeting without a chocolate chip cookie left Jon very disappointed.

At Jon's memorial service, friends from different stages of his life, from elementary school and summer camp through high school and college shared remembrances. I recognized in their stories the Jon I knew so well. The thoughtful leader, the incessant list-maker, the high-energy achiever and the cackling laugh.

One speaker recalled an eight-year-old Jon arriving at a friend's birthday party dressed as a cowboy – all in black, from hat to holster to boots. This was not a costume party, but somehow it still makes sense – except that Jon should have been wearing white. He was the ultimate good guy. ♦

Why I'm a member

REBA MEMBERSHIP IS ITS OWN REWARD

Meet Luke H. Legere

LUKE LEGERE

I joined the Real Estate Bar Association as a young associate practicing at New England's oldest environmental law firm. I learned very early in my career that environmental law is closely connected to land use and property law. In REBA, I found an organization that offers top-notch programs and resources in each of these practice areas.

I was particularly attracted to REBA's Committees on Environmental Law, and Land Use and Zoning, whose monthly programs provide informative, timely presentations on all manner of important issues by luminaries in the fields. Likewise, *REBA News* presents articles on critical topics including court rulings and legislative news, with helpful, practical tips for attorneys. I have found the resources available on REBA's website to be extremely informative and useful as well. The spring and fall conferences are collegial gatherings full of workshops and exhibitors.

I represent a wide range of clients, including private property owners, real estate developers, municipalities, corporations, nonprofit organizations and resident groups on environmental, land use, zoning and real estate matters. I routinely handle permitting matters before local environmental and land use boards and officials, administrative enforcement proceedings and adjudicatory hearings before state agencies, and litigation in state and federal courts. REBA resources help me with all of these.

Thanks, REBA, for the networking, continuing education and legal resources. ♦

Luke Legere is a senior associate with McGregor & Associates, P.C. He may be reached at llegere@McGregorLaw.com

Today's sermon: A reflection on lawyer e-life

BY JAMES S. BOLAN

JIM BOLAN

Practice is practice. The "ways" are the same, even if the "means" have evolved. Conflicts issues, prospective client concerns, communications, fee agreements, "toxic" clients, "toxic" lawyers,, the creation of the attorney-client relationship, the scope of the undertakings, handling and mishandling funds, handling and mishandling matters, and termination of the relationship are all issues that afflict and sustain us regardless of whether we are litigators or transactional lawyers. That much has not changed.

What has changed are the "means." Social media changes demonstrate a real generational shift: "BS" (carbon paper, actual time slips) and "AS" (tweets, texts and emails that never disappear). The "cloud" is really in New Jersey! (I cannot wait for the case where the server-farm goes bankrupt and the trustee is now the "owner" of the asset, including all confidential work product and communications. But I digress.)

Lawyer "e-Life" is real. Some lawyers still proudly proclaim that they don't have email and cannot use a computer. So, with apologies to the "dog ate my homework" rationalization, it don't hunt no more!

The challenge is to strike an active (not passive) balance between preservation of 19th-century ideals – contemplation before hitting "Reply All" – and the accelerated expectation generated by 21st-century toys and requisites. Recognizing that social media is predominant, data privacy laws are obligatory and ESI are required. The inexorable technological shift has occurred, whether we like it or not.

The ABA's Model Rules now set forth a standard that all lawyers must be competent and knowledgeable in technology. Massachusetts will soon adopt such a rule. How to become competent is another topic for another day – how to cope with reality is today's lesson.

THE EFFECT OF TECHNOLOGY

Dr. Thomas Jackson of Loughborough University found that "it takes an average of 64 seconds to recover your train of thought after interruption by email. So people who check their email every five minutes waste 8.5 hours a week figuring out what they were doing moments before. Jackson found that people tend to respond to email as it arrives, taking an average of only one minute and 44 seconds to act upon a new email notification, with 70 percent of alerts getting a reaction within six seconds. That's faster than letting the phone ring three times." (Suw Charman-Anderson, The Guardian, Wednesday 27 August 2008.)

So, how do we balance speed and contemplation? The first is requisite. We are charged with being competent, diligent, responsive and communicative. The second is becoming a lost art. Remember "mail," when "going postal" meant a paper delivery, not going rogue? You opened the letter (I have had clients who actually never opened their mail, but that's a different story); then you sat down and contemplated a response.

Now, think of the experience of getting mail today. Ding! Bong! Beep! Holy crap, Batman, I had better respond before the next beeeeeeeeeeeeep!!!

NOW WHAT?

"I've come to the conclusion that I use email to distract myself. Whenever I feel the least bit uneasy, I check my email. Stuck while writing an article? Bored on a phone call? Standing in an elevator, frustrated in a meeting, anxious about an interaction? Might as well check email. It's an ever-present, easy-access way to avoid my feelings of discomfort. What makes it so compelling is that it's so compelling. I wonder what's waiting for me in my inbox? It's scintillating. It also feels legitimate, even responsible. I'm *working*. I need to make sure I don't miss an important message or fail to respond in a timely fashion." *Coping with Email Overload*, by Peter Bregman, Harvard Business Review, April 26, 2012.)

Whatever the psychological genesis, the fact is that, we, as lawyers, whose job

See LIFE ONLINE, page 11

Nominating Committee seeks award nominations

The REBA Nominating Committee invites nominations for the Association's three member recognition awards, the Richard B. Johnson Award, the Denis Maguire Community Service Award and the Jon Davis Excellence in Professionalism Award.

Established in 1977, the Richard B. Johnson Award is the Association's highest honor. An award for lifetime achievement, it recognizes the recipient's outstanding and selfless contributions to advancing the practice of real estate law. Award recipients have included members of the judiciary, former officers of the Association, members of the Land Court's legal staff and distinguished conveyancers.

The Denis Maguire Community Service Award honors REBA members contributing to their communities and constituencies outside the legal field. This award recognizes outstanding lawyers who, through their volunteer endeavors, have demonstrated an exemplary sense of caring, initiative and ingenuity.

The Jon Davis Excellence in Professionalism Award recognizes the honoree's integrity, passion and dedication to the highest standards in the practice of law. The award's recipients understand that the legal profession is a higher calling imbued with noble aspirational goals of service – to client, to the community and to the profession.

To nominate a candidate for any of these awards, contact REBA Nominating Committee Chair Mike MacClary at mmaclary@burnslev.com. ♦

2014 Annual Meeting & Conference

Monday, Nov. 3, 2014 • 7:30 A.M. – 2:45 P.M.

Four Points by Sheraton

General Information

- REBA's 2014 Annual Meeting & 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 or before Oct. 27, 2014. Registrations received after Oct. 27, 2014, will be subject to a late registration processing fee of $25. Registrations may be cancelled in writing on or before Oct. 27, 2014, and will be subject to a processing fee of $25. Registrations cannot be cancelled after Oct. 27, 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 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 South.
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 Oct. 27	After Oct. 27
☐ 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 allow four weeks for delivery)	$190.00 $_____	$190.00 $_____

☐ Check Enclosed ☐ Credit Card ☐ VISA ☐ MasterCard ☐ American Express

Check No:_____ Date:_____

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

☐ Parmesan encrusted chicken with tomatoes, artichokes and spinach in a white wine sauce

☐ Risotto with leeks, butternut squash, sage and braised lentils

☐ 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 Hank Phillippi Ryan

Hank Phillippi Ryan, on-air investigative reporter for Boston's NBC affiliate, will provide the luncheon keynote address at the 2014 Annual Meeting & Conference! Ryan has won 32 Emmys, 12 Edward R. Murrow awards and dozens of other honors for her ground-breaking journalism.

A bestselling author of six mystery novels, Ryan has won multiple prestigious awards for her crime fiction: the Agatha, Anthony and Macavity awards, and for*The Other Woman*, the coveted Mary Higgins Clark Award. National reviews have called her a "master at crafting suspenseful mysteries" and "a superb and gifted storyteller."

Her newest thriller, *The Wrong Girl*, has the extraordinary honor of winning the 2013 Agatha Award for Best Contemporary Novel. A six-week *Boston Globe* bestseller, it is also an Anthony and Daphne Award nominee, a *Patriot Ledger* bestseller, and was dubbed "another winner" in a *Booklist* starred review and "stellar" by *Library Journal*.

Ryan is also founding teacher at Mystery Writers of America University and 2013 president of national Sisters in Crime.

Watch for her next novel, *Truth Be Told*, to be published on Oct. 7, 2014.

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**

From Dodd Frank to CFPB Compliance: TILA-RESPA Integrated Disclosure Rule

Joe Drum; Donald A. O'Neill

Spawned by the Dodd-Frank Act in July 2011, the Consumer Financial Protection Bureau has wasted no time in reshaping the consumer mortgage and settlement arenas by implementing regulations, doling out enforcement actions, initiating investigations and supervising industry participants … all the while protecting the consumer. The centerpiece of this effort is the TILA-RESPA Integrated Disclosure Rule, taking effect in less than a year, which will totally change decades of real estate closing practices. Panelists Joe Drum and Don O'Neill will offer our participants practical advice and useful insights to insure that they will be fully prepared and compliant when the new rule takes effect.

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

New & Revised Title Insurance Endorsements: Expansion & Specialization

Jonathan Anderson; Steven H. Winkler

Since 2012, over 40 new or revised title insurance endorsements have been approved by the American Land Title Association (ALTA). These endorsements allow an attorney to refine title policy coverage in order to address more specific risks presented by individual real estate transactions. Join Steve Winkler, Chief Underwriting Counsel of WFG National Title Insurance Company, and Jon Anderson, Senior Underwriting Counsel of CATIC, both members of the ALTA Forms Committee, as they present their inside view of these endorsements. Learn how endorsements, in general, and these new and revised ALTA endorsements, in particular, can significantly improve the coverage provided in your clients' title insurance policies.

8:30 A.M. – 9:30 A.M. **TIFFANY BALLROOM B**
9:45 A.M. – 10:45 P.M. **TIFFANY BALLROOM B**

The Exit Ramp: Solo Practitioners & Succession Planning

James S. Bolan; Jennifer L. Markowski; Constance V. Vecchione

"The party's over. All good things must end." When Comden and Green wrote those lyrics, they didn't have law practices in mind. But when you decide to retire or move on, it is no longer the best practice to hope that someone, someday will come along and buy your practice. Or, maybe your spouse would like the chore if you die or become disabled. Now is the time to put into place a succession plan, particularly for solo or small firm practitioners. The panel will address the need, planning options and alternatives if a plan is not already in place.

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

Recent Developments in the Law of Real Estate Broker Commissions

Michael F. McDonagh; William G. Mullen III

Agency law for real estate licensees has changed and become significantly more complex in the last 10 years. The law and accompanying regulations set forth clear standards and guidance for brokers, depending on the business model and type of agency they choose to practice. This session will examine the different types of brokerage office models, the different types of listing and buyer agency agreements, traditional agency, designated agency, dual agency, facilitation, offers of compensation and cooperation between brokers, an overview of key MLS rules and REALTOR Code of Ethics standards of practice.

11:00 A.M. – 12:00 A.M. **Essex/Lenox Room**

The New MCP: The First Six Months

Benjamin J. Ericson; Lawrence Feldman; Greg D. Peterson

In April 2014, the Department of Environmental Protection promulgated the most significant changes in over 20 years to the Massachusetts Contingency Plan, the regulations implementing M.G.L. c.21E. The new MCP amendments change not only the terminology that real estate and environmental practitioners use for site closure activities, but also create new site closure categories, change tier classification and site assessment criteria, modify AUL standards, create new assessment, mitigation and closure options for vapor intrusion sites and "historic fill" locations, and add new provisions for petroleum NAPL sites and source control. The changes have already had an impact on new development and redevelopment of real property. Hear about the experience gained and the questions arising from the first six months under the new MCP. The three speakers were deeply involved over many years in the discussions that produced the new MCP, as well as its implementation.

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

Legislative Update: Newly-Enacted Real Estate Legislation

Francis J. Nolan; Edward J. Smith; Douglas A. Troyer

This legislative update features both recently-enacted and 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 am – 10:45 A.M. **Conference Room 103**
11:00 am – 12:00 P.M. **Conference Room 103**

E-Recordings in Massachusetts – A Practical Skills Session

Brian Kilfoyle; Anthony J. Vigliotti

E-recording is becoming the standard across the country for getting land records recorded at county offices. Massachusetts has fully embraced the process from both the submitter and receiver side. Technology is constantly evolving and improving and streamlining the recording process for all. This session will focus on how e-recording benefits the submitters, including lawyers, title insurance underwriters, lenders and other stakeholders. The program will also focus on how various county registries have embraced this emerging technology.

8:30 A.M. – 9:30 A.M. **Essex/Lenox Room**
9:45 A.M. – 10:45 A.M. **Essex/Lenox Room**

Conundrums Relating to Ancillary Closing Documents – A Practical Skills Session

Konstantinos "Kosta" Ligris; Paula D. Lyons

Join our faculty to discuss the importance and necessity, or unnecessary inclusion, of certain ancillary closing documents. Non-foreign affidavits, 1099-S forms, mechanics lien affidavits and homestead disclosures will be discussed.

8:30 A.M. – 9:30 A.M. **Conference Room 102**
11:00 A.M. – 12:00 P.M. **Conference Room 104**

How to Successfully Appear Before a Town Board – A Practical Skills Session

Paul F. Alphen; David C. Uitti; David A. Wilson

Lawyers must take note that in recent years, the relationship between applicants, town boards and the public has changed, and not necessarily for the better. There is a new form of animosity brewing, which can be easily stirred by social media. In addition, there is the issue of conflicts that can arise for an attorney who appears before a town board, which can be due to, among other things, an attorney's prior or current municipal service or to a relationship between an attorney and a board member. This session will provide attendees with useful information, tools, ethical guidelines and strategies for appearing before a town board and for identifying, avoiding and resolving conflicts.

9:45 A.M. – 9:30 A.M. **Conference Room 102**
11:00 A.M. – 12:00 P.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.

**Video simulcasts of this presentation will be held in Conference Rooms 102 & 104*

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

1:20 P.M.
LUNCHEON PROGRAM

1:20 P.M. – 1:45 P.M.
President's Welcome & Remarks

Michelle T. Simons

1:45 P.M. – 2:10 P.M.
Report of the REBA Title Standards Committee

Richard M. Serkey

2:10 P.M. – 2:45 P.M.
Luncheon Keynote Address by Hank Phillippi Ryan

Three years after NREIS: Are settlement companies complying?

BY TIMOTHY J. VAN DER VEEN

TIM VAN DER VEEN

It has been more than three years since the Supreme Judicial Court handed down its landmark ruling *REBA v. NREIS* holding that witness closings in Massachusetts constitute the unauthorized practice of law. Most, if not all, non-lawyer settlement service providers operating in Massachusetts have taken at least some steps to comply with the SJC ruling. Not all compliance efforts are created equal. Some companies appear to have fully embraced the *NREIS* decision and have worked closely with REBA and/or local Massachusetts counsel to overhaul long-standing witness closing practices. However, other companies may be choosing to follow only certain aspects of *NREIS* while ignoring compliance requirements of the decision.

The heart of the *NREIS* decision is the court's sweeping advisory holding issued toward the end of the opinion that clarifies the required role of the Massachusetts closing attorney in a real estate transaction. This advisory opinion essentially contains two sub-holdings.

The primary sub-holding spells out once and for all the ethical and professional duties of the closing attorney in a Massachusetts conveyance transaction. It begins with the oft-quoted: "Implicit in what we have just stated is our belief that the closing attorney must play a meaningful role in connection with the conveyancing transaction that the closing is intended to finalize." Chief among the many professional and ethical responsibilities described in the holding, the closing attorney must i) ensure marketable title prior to closing, ii) conduct the closing, iii) disburse all funds in the transaction iv) and oversee the recording while again ensuring good title, just to name a few.

The second sub-holding in the advisory opinion discusses the necessity of a "genuine attorney/client relationship" between the closing attorney and the lender. The SJC cautioned that NREIS' control over the transaction and the closing attorney raised concerns that it was improperly placing itself as an intermediary between attorney and client. The defendant in *NREIS* directed and controlled its purchase and refinance transactions from title order to recording while choosing to employ a Massachusetts attorney only to the limited extent it believed the law required.

It appears that some settlement service providers may be disregarding this aspect of the ruling by maintaining virtually complete control over their Massachusetts transactions and hiring attorneys simply to perform the "practice of law" tasks within the transaction. In fact, some settlement service providers employ as many as three or four separate attorneys to complete a single transaction. How can the lender and the closing attorney have a genuine attorney client relationship where it is unclear who the closing attorney even is?

In *NREIS*, Justice Margot Botsford articulated that "[w]hen a third party interposes itself between an attorney and a client, the key question is, 'Who exercises and retains control over the attorney?'" In other words, who is really calling the shots in the transaction with regard to the role of the closing attorney and the discharge of his or her professional and ethical duties under Massachusetts law? Botsford cautioned that "direction and control over the attorney's actions cannot rest with a third party."

Inquiries that would aid the discernment of a true attorney/client relationship between closing attorney and lender include: Does the settlement company defer to the conveyancing attorney not only in terms of the legal aspects of the transaction but also on compliance issues? Has the conveyancing attorney complied with Massachusetts Rule of Professional Conduct 1.5(b) by memorializing the attorney/client relationship with an engagement letter or other appropriate communication to the lender? Does the "closing attorney" show up at the closing with no prior knowledge of the transaction including any title matters and with no affiliation with any other lawyer involved in the transaction? If the answer to this last question is "yes," it begs another question: Isn't that a witness closing just the same?

Another disturbing trend appears to be the practice of a settlement service provider establishing or registering a Massachusetts law firm that then purports to serve as the conveyancing attorney in a transaction. Control of the transaction then remains with the out-of-state settlement service provider or its out-of-state agent while a local attorney is retained to disburse the settlement proceeds in the name of the shadow law firm. Again, the repudiated NREIS

See NREIS, page 11

An update on the aftermath of the Ibañez decision

BY RICHARD M. SERKEY

RICH SERKEY

In 2011, the Supreme Judicial Court, in *U.S. Bank N. A. v. Ibañez*, 458 Mass. 637, upheld a 2009 decision by Land Court Judge Keith C. Long that a foreclosure under power of sale was invalid if the purported mortgage holder was not in fact the mortgage holder on the date the first notice of the auction was published.

However, what would the result be if, by the date of the auction, the purported mortgage holder was in fact the mortgage holder and an entry was made by the mortgage holder on the date of the auction, and the mortgage holder, and its successors in interest thereafter, remained in possession of the property for over three years thereafter? Would the invalidity of the auction make the entry invalid? In 2014, Long answered the question in the negative, in *Daukas v. Dadoun et al* (Land Court Case 13 Misc 479718 KCL).

Long held that the two methods of foreclosure (foreclosure by sale and foreclosure by entry) are independent of each other. He reasoned that, under the doctrine of estoppel, the foreclosure deed and the deeds subsequent thereto gave full fee title to the plaintiff "as soon as that tile accrued (three years after the recording of the certificate of entry)."

Unfortunately, the *Daukas* decision will be of no assistance in cases in which the assignment to the purported mortgage holder was dated after the date of the entry (which, typically, is the auction date), even if the entry was purportedly to be considered "effective" as of the earlier auction date. However, it will be of assistance in those cases in which the assignment to the party making the entry is dated and recorded prior to the date of the certificate of entry.

What really would have helped the many Massachusetts residents whose titles derive from foreclosure sales invalidated by *Ibañez* would have been Senate Bill No. 1987. Senate Bill No. 1987 would have set a three-year limit in favor of arms-length third party purchasers on challenges to the exercise of the statutory power of sale, and, if the three-year limit had elapsed before the bill's proposed effective date, would have given the mortgagors a full additional year within which to challenge to the title of the arms-length, third-party purchaser. Since lenders corrected their foreclosure procedures after Long's 2009 *Ibañez* decision, mortgagors have already had at least five years to attempt to regain title to their homes, and Senate Bill No. 1987 would have given them one additional year.

Unfortunately, however, anti-lender activists prevailed upon the Gov. Deval Patrick to amend Senate Bill No. 1987 and send it back to the Legislature by changing the three-year limit to a 10-year limit. By doing so, buyers who purchased their properties – or, at least, believed they had done so – have been forced to endure their title problems for an additional four-year period. For many of these buyers the properties are their homes. These buyers are having difficulty refinancing or selling their homes because of their "*Ibañez* problem." If they were prescient enough to have purchased an owner's title insurance policy, then at least their title insurer will subsidize the effort to track down and secure release deeds from the mortgagors and track down and secure discharges from any junior lienholders. If they do not have an owner's title insurance policy, however, then they will either have to subsidize this effort themselves or they will have to wait for this additional four-year period to expire.

Improperly foreclosed upon mortgagors were not the only parties damaged in the wake of *Ibañez*; arms-length, third-party purchasers whose properties are their homes became collateral damage. Their plight was not helped by the governor's decision not to sign Senate Bill No. 1987 as written. ♦

Co-chair of the REBA title standards committee, Rich Serkey practices in Plymouth with Winokur, Serkey & Rosenberg, P.C. Rich can be reached via email at rserkey@winokurlaw.com.

Dr. Seuss explains zoning reform

BY ROBERT M. RUZZO

BOB RUZZO

It's not every day that an adult discussion about zoning reform begins with a reference to children's poetry, but so be it.

Most REBA members have at least a passing familiarity with the rhythmic works of Springfield's own Theodor Seuss Geisel, better known as Dr. Seuss. A particular Dr. Seuss favorite in many circles is the story of the two stubborn Zax, one north-going and one south-going. The two Zax, each on his own journey, collide by chance and then steadfastly refuse to get out of each other's way. The confrontation leaves them, as the good doctor told us, "foot to foot, face to face." Years later, as the story closes, we learn that the Zax are still at it, despite the fact that the world all around them has changed radically, passing them by. They remain, metaphorically forever, "unbudged in their tracks."

An ongoing refusal to compromise is hardly a novel political or legislative theme; however, the fate of a "zoning reform" proposal in the recently concluded legislative session struck a number of familiar Zaxian themes.

A broad consensus exists that Massachusetts needs to re-examine its zoning statute, particularly with respect to housing production. The pages of the September 2013 *REBA News* offered three differing perspectives on the now expired House Bill No.1859 (entitled "An Act Promoting the Planning and Development of Sustainable Communities"), yet none contained anything approaching an endorsement of the status quo under Chapter 40A.

We in Massachusetts simply do not produce enough new housing units to make our market-rate housing affordable to the average worker. Zoning isn't the sole source of the problem, but land-use regulation is the infrastructure upon which our ability to compete economically against other states depends. Once again, we have underinvested in our infrastructure and failed to maintain it properly.

Fortunately, extensive work has gone into trying to improve this situation, most notably the Zoning Reform Task Force meetings of 2007-2009. The result of that effort, the Land Use Partnership Act (LUPA), a step forward but far from perfect, was filed in both the 2009-2010 and the 2011-2012 legislative sessions. When that effort stalled, for many, the zoning reform effort seemed to pass into abeyance.

Enter the Zax. In the current legislative session, House Bill No. 1859 had more than 50 House and Senate cosponsors and was strongly backed by the Smart Growth Alliance of Massachusetts (hereinafter referred to as the "North Going Zax"). Headed straight for them was the "South-Going" Homebuilders & Remodelers Association of Massachusetts.

Zax, apparently, travel in packs. The North-Goers, in addition to their legislative sponsors, were editorially endorsed by the *Boston Globe*. The South-Going squad had allies in the form of the Greater Boston Real Estate Board and the Massachusetts Association of Realtors, among others.

[Disclosure is important at this juncture: your humble correspondent is a member of the Builders and Remodelers Association of Greater Boston, as well as the GBREB Government Affairs Committee. While unquestionably a South-Goer, at the same time, he ardently supports the transit-oriented development efforts of the Smart Growth Alliance, as well as its focus on redevelopment. And from time to time, he has been known to read John Henry's Journal, particularly the Sunday "Baseball Notes" section. All of which goes to prove that there is nothing inherently bad about either Zax; they are just stubborn. Note: any views expressed herein are entirely my own. Simply put, that view is as follows: In a state that does not currently produce enough housing, it is hard to argue that "reform" that is opposed by the people who actually build housing is going to improve things.]

Somewhat surprisingly, the Committee on Municipalities and Regional Government reported House Bill No. 1859 out with a favorable recommendation. From there, the battle was truly joined. Ultimately, time ran out on the formal legislative calendar and the South-Goers justifiably could justifiably claim success, *for now*.

In January, the incoming governor will encounter the Zax midstream. House No. 1859 will undoubtedly re-surface.

Free advice being well, free, the incoming governor might want to tackle the complicated housing affordability issue on several fronts simultaneously: (1) regulatory reform; (2) process improvement (i.e. taming the land-use appeals process, particularly abutter appeals); and (3) examining new incentives to municipalities to encourage and reward both affordable and market rate new production.

It's a daunting task, but there is work upon which to build. The LUPA effort is at least a jumping-off point for discussion on zoning reform. On the abutter appeal front, in 2013 the Massachusetts Housing Partnership presented an interesting recommendation about requiring a review process to examine abutter appeals before they could move forward, akin to the medical malpractice tribunal. We can also look to solutions developed in other states.

The evolution of how to address the municipal side of the equation, a trail that began with Governor King's Executive Order 215, and continued on through Governor Cellucci's Executive Order 418 and from there to the development of the Commonwealth Capital Fund under Governor Romney to, ultimately, Governor Patrick's MassWorks program, needs to continue to move forward. If there is an area ripe for experimentation, this would be it.

The new administration should be prepared for frustration. We need to help the Zax develop a new mindset; otherwise, the options are limited to two: (a) a continuation of the generally deplorable current state of affairs; or (b) the possibility of an unwieldy referendum question of some kind.

Thus, while it may not yet be high tide for the South-Goers, that day is drawing near. We South-Goers can not indefinitely both criticize current law and repeatedly stymie attempts to change it.

A new governor who is willing to "try, try again" presents a new opportunity to break the logjam. Otherwise, your correspondent fears that we South-Goers may one day be turning from Dr. Seuss to the Roman historian Plutarch, who wrote of the Greek King Pyrrhus of Epirus, "[O]ne more such victory would utterly undo him." ♦

Bob Ruzzo is a senior counsel at Holland & Knight LLP. 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 LAWYERS' COUNSEL

Legal malpractice and real estate lawyers

THE STANDARD OF CARE AND HOW IT MANIFESTS ITSELF IN REAL ESTATE MATTERS

BY JAMES S. BOLAN AND SARA N. HOLDEN

JIM BOLAN

SARA HOLDEN

Editor's Note: This issue of REBA News *includes a regular column by Jim Bolan and Sara Holden entitled "The Lawyers' Counsel." Heretofore, Jim and Sara have been regular contributors covering a variety of topics and issues for lawyers involving risk prevention and avoidance. This new column will continue that theme.*

What is the standard of care? In general, an attorney handling a real estate transaction must exercise the degree of care, skill and diligence required of the average qualified practitioner in Massachusetts in representing a purchaser of residential real estate. See *Fishman v. Brooks*, 396 Mass. 643, (1986) and *Glidden v. Terranova*, 12 Mass. App. Ct. 597, (1981). That does not mean, however, that an attorney will be held to the standard of being "perfect" or "infallible." If an attorney exercises the requisite degree of care, skill and diligence and fully communicates sufficient information to the client for informed consent, there is no liability "for pursuing reasonable strategies" even if those strategies ultimately fail. *Meyer v. Wagner*, 429 Mass. 410 (1999).

In the real estate realm, claims of legal malpractice often arise from negligent real estate title search or certification and negligent handling of conveyances, closings and of other real estate transactions. The following illustrates three different ways in which malpractice claims can arise and the application of the standard of care in each.

HENDRICKSON V. SEARS, 365 MASS. 83 (1974)

The plaintiffs in *Hendrickson* hired an attorney to perform a title search for real estate they wanted to purchase. The attorney certified to the plaintiffs that the title was "valid, clear and marketable." The plaintiffs purchased the property. Approximately 10 years later, when the plaintiffs attempted to sell the property, the prospective buyers balked because of a recorded easement that had not been identified in the attorney's title report. The plaintiffs sued the attorney for negligent certification of title to real estate. The issue before the court focused on one of the prime defenses: when the statute of limitations begins to run on such a claim. The court held that a "client's cause of action against an attorney for negligent certification of title to real estate does not accrue … until the misrepresentation is discovered or should reasonably have been discovered, which ever first occurs."

GLIDDEN V. TERRANOVA, 12 MASS.APP.CT. 597 (1981)

The plaintiffs in *Glidden* were sued by a real estate broker seeking to recover a commission allegedly earned in the sale of the plaintiff's home. Attorney Terranova agreed to defend them, but allegedly failed to file an answer or appear at a supplementary process hearing and contempt hearing, which resulted in Glidden being arrested. Nonetheless, the Superior Court allowed a motion for a directed verdict on the grounds that the plaintiffs did not offer expert testimony as to the attorney-client relationship or the standard of care owed by Attorney Terranova. The Appeals Court reversed and held that, while expert testimony is generally necessary to establish the standard of care owed by an attorney, in this instance and in viewing the allegations in the most favorable light to the plaintiffs, expert testimony was not essential where the conduct was so gross and/or obvious.

CACCIOLA V. NELLHAUS, 49 MASS.APP.CT. 746 (2000)

Attorney Nellhaus had represented a real estate partnership on an ongoing basis. The partnership was held by four brothers. When one of the brothers passed away, Attorney Nellhaus assisted one of the brothers in secretly purchasing the deceased brother's interest in the partnership from his heirs. When one of the other surviving brothers discovered that Attorney Nellhaus was involved in the secret purchase, he requested information as to which Attorney Nellhaus claimed attorney-client privilege.

Suit was filed against Attorney Nellhaus for legal malpractice, interference with a valuable opportunity of the partnership and violation of M.G.L. c. 93A. The Superior Court dismissed the malpractice and 93A claim. The Appeals Court agreed that the complaint did not state a claim for malpractice, but held that it did state a claim for breach of fiduciary duty and that Attorney Nellhaus may also be liable for aiding and abetting one brother's breach of his fiduciary duty to another brother. "Liability arises when a person [actively] participates in a fiduciary's breach of duty … such that he … could not reasonably be held to have acted in good faith." Id. at 753, citing *Spinner v. Nutt* , 417 Mass. 549 (1994).

As the above cases demonstrate, a breach of the standard of care can occur in a myriad of circumstances involving the practice of real estate law. And a violation of the Rules of Professional Conduct, while not "itself an actionable breach of duty to a client," may be evidence of the attorney's negligence. ♦

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COMPLIANCE POST-NREIS

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model is maintained as the settlement company or its agent controls the transaction from beginning to end while inserting local attorneys into the process only how and where it sees fit.

By contrast, some settlement service providers have actively engaged and continue to work with REBA and its counsel to incorporate practices that are fully compliant with current law.

For those companies that continue to follow the NREIS model of near total control over the transaction and the role of the closing attorney, full compliance under *NREIS* could be achieved relatively easily with little or no impact to their stake in the transaction or to their bottom line. Nearly all settlement service providers that continue to transact significant business in Massachusetts are affiliated with a national title insurer. These national insurers each have hundreds, in some cases thousands, of local attorney agents that issue title policies in the carrier's name and thus create business for the carrier.

It makes perfect business sense for the settlement service company to assign its transactions to the very agents that are already giving business to its own affiliate title insurance underwriter. Since agents of the major carriers are located in every county, title orders could be assigned to an attorney that is located near the closing location or to an attorney willing travel to the closing. This would ensure that every transaction is handled by one attorney or law firm and would more closely resemble long-established and fully compliant conveyancing practices. Moreover, it would ensure full compliance by establishing a true "closing attorney" for each transaction and by creating an attorney/client relationship with the lender more consonant with the traditional relationship that existed prior to the advent of non-lawyer witness closings. It might even *benefit* the title insurance underwriter's bottom line as its local agents would be incentivized to write more business with the underwriter in an effort to secure more business from its settlement service company.

The *NREIS* decision established the minimum or threshold role of the closing attorney in a transaction. Any transaction that fails to meet *all* of the *NREIS* requirements still constitutes the unauthorized practice of law. Full compliance will likely only come from a cooperative and sustained effort from REBA and its members, the Office of Bar Counsel of the Board of Bar Overseers, the state offices of the major title insurance underwriters and conveyancing attorneys throughout Massachusetts. Short of legislation, that is likely the only way forward to fulfill the promise of *NREIS* and finally eliminate witness closings and the associated unauthorized practice of law. REBA encourages all Massachusetts attorneys with knowledge of potentially non-compliant conveyancing practices to contact REBA at its dedicated UPL email address. All communications will be strictly confidential. ♦

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LEARNING TO LIVE A LIFE ONLINE

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is to give advice to a client about a range of options or choices, too often yield to the relentless electronic "beep" and fail to contemplate the intended and unintended consequences of a response, which in the days of "p-mail" (physical mail), we would have had no choice but to do. If you need proof of that reflexive conduct, read the email chains that regularly appear in lawsuits or news stories. The escalating ratchet of complaints, insult, threats, revenge, reward. Great reading, but not great lawyering, let alone absent any hint of the kindergarten rules.

Aside from turning off the e-beeper, the challenge is being responsive while resisting the pressure of getting out that response at nearly the speed of light. Compulsion versus consideration?

I submit that the quality of the response is often inverse to the speed with which it is rendered. What do you think clients would prefer? A fast response, a considered response or a timely, as well as considered, response? Business leaders say: "Take your time. Get it right. But get it right quickly." In a world where product development can have a half-life of six months from inception to copycat, if you don't get it done right *and* get it done fast, you will die a rapid business death!

Going too fast not only denigrates part of why we were hired – to give a considered and timely response – but feeds the risk of hitting "Reply All" when that is NOT what you wanted to do or "Send" because you were fearful that the client would think that you were not responding with the same electronic urgency.

WHAT'S THE ANSWER?

Respond. And respond quickly. But not so quickly that the repercussions, unintended consequences, and reasonable possibilities and alternatives are ignored. Our duty is to do both. Respond with neither the speed of light nor the speed of snail mail, but rather an appropriate melding of the two.

How? One approach to the "speed" bump is to never send out a substantive reply without a second lawyer taking the time (and distance) to read the draft. I know that many of you will say you don't have the time to do that. Well, if that's the case, please start saving up your retainer to hire us!

Another is to ask the client when a reply is needed and what is the urgency. Don't assume. Ask.

As Albert Einstein said, "The only reason for time is so that everything doesn't happen at once." Take a deep breath. Take the time. Get a second opinion. And then hit "Send." ♦

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