REBA news
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THE NEWSPAPER OF THE REAL ESTATE BAR ASSOCIATION
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WFG's Pat Stone to give spring conference keynote address

Patrick F. Stone, chairman and CEO of Williston Financial Group, will deliver the luncheon keynote address at REBA's Spring Conference on May 1 at the Four Points by Sheraton in Norwood.

One of the fastest growing and unique real estate service providers in the mortgage industry, Williston Financial Group is the Portland, Oregon-based parent company of WFG National Title Insurance Company.

Stone enjoys a national reputation with his insights on global economic trends and the directions of the residential and commercial real estate marketplace, offering predictions of future economic trajectories. Some have called him a visionary.

Stone has enjoyed a lengthy career in real estate and real estate related services, including "C" officer positions with three public companies and as a director on two Fortune 500 Boards. His senior executive management positions included nine years as president and COO of the nation's largest title insurance company, chairman and co-CEO of a software company and CEO of a real estate data and information company.

Currently, Stone serves as chairman of Williston Financial Group, and as a board member of Green Street Advisors, the leading REIT analytics firm, Linked2Pay, a bank payments innovator, and Inman News, who named him one of 2013's "100 Most Influential People in Real Estate."

POWER WALK

REBA co-sponsored the Equal Justice Coalition's 18th Annual Walk to the Hill for Civil Legal Aid. REBA President Francis J. Nolan of Harmon Law Offices (left) and Legislation Section Co-Chair Douglas A. Troyer of Moriarty, Troyer & Malloy

Remote electronic acknowledgments

BY RICHARD P. HOWE JR.

Several weeks ago, an out-of-state title company sent a letter asking if the Middlesex North Registry of Deeds would record a mortgage that was acknowledged in Virginia in accordance with that state's remote electronic acknowledgment law.

In Virginia, an authorized electronic notary may take an acknowledgment online using audio-video conference technology, even though the person executing the document is not in the physical presence of the notary.

My initial thought was, "Remote electronic notary? No way!" but I delayed answering the query with an, "I'll have to see the document before deciding" response.

On further review, my opinion has changed. The Massachusetts Deed Indexing Standards say that for a document executed outside of Massachusetts, an acknowledgment may be taken by a justice of the peace, notary public, or magistrate of the state in which the acknowledgment was taken.

Implied in that standard is that the acknowledgment was taken in accordance with the laws of that non-Massachusetts jurisdiction. When deciding whether to record such a document, Massachusetts registries just assume compliance with the law of the other jurisdiction and do not verify it since we cannot realistically track the notary laws of every jurisdiction in America.

This outcome also assumes the validity of the choice of law principle upon which the Indexing Standard is based, namely that it is the jurisdiction where the acknowledgment is taken that controls its legality, not the law of the jurisdiction in which the land is located. To my knowledge, no one disputes this, however, I am not aware of any Massachusetts statute or decision that confirms that interpretation.

Applying these standards to the question posed by the title company, I would conclude that since a remote electronic acknowledgment is legal in Virginia, a document acknowledged by that means in that state would be recordable in Massachusetts.

While we would record a document from Virginia that was remotely electronically acknowledged, a document acknowledged that same way in Massachusetts would be rejected. Massachusetts law makes no provision for electronic acknowledgments, either in person or remote. This is so despite our notary laws having just been updated by Chapter 289 of the Acts of 2016, which became effective Jan. 4.

Although not expressly allowed, would a reasonable interpretation of the new law nevertheless permit electronic acknowledgments to be done in Massachusetts? §3 of that law defines acknowledgment as "a notarial act in which an individual, at a single time and place appears in person, be-

See Acknowledgments, page 14

REAL (ESTATE) WOMEN

REBA Women's Real Estate Networking Group held a meeting in January, which featured a conversation with Supreme Judicial Court Justice Barbara A. Lenk as a special guest. Prince, Lobel & Tye hosted the reception. From left: WNG Co-Chair Michelle T. Simons, Lenk and REBA President-Elect Diane R. Rubin

Diane Rubin joins REBA Dispute Resolution

Diane Rubin, a partner at Prince, Lobel & Tye has joined REBA Dispute Resolution's panel of neutral mediators.

"Diane possesses a unique combination of strengths in both construction and condominium disputes, as well as in real estate disputes more generally," said REBA's Dispute Resolution President Joel Reck. "I know she will be a key asset in expanding our program's reach into these areas."

About Diane Rubin

During a career of over 30 years, Rubin has tried cases to verdict, arbitrated and mediated more than a hundred construction, condominium and real estate disputes. Her clients include general contractors, subcontractors and design professionals, as well as awarding authorities and property owners, most notably condominium associations, colleges and universities. Previously, she served as associate general counsel for the Massachusetts Turnpike Authority with oversight of all litigation.

For the past ten years, Rubin has integrated dispute resolution into her practices with more than three dozen cases, serving as neutral. Representative matters range from small condominium disputes to complex, multi-party construction disputes. Condominium disputes involve parking easements, turnover from developer control and management, improvement versus repair and governance issues. Construction and commercial disputes include HVAC issues, aging infrastructure, façade and window systems, telecommunications systems, mold and environmental claims, fire suppression and prevention systems, acoustics, bridge, paving and drainage projects, athletic fields and lost productivity and delay claims, as well as lease, purchase and sale agreements and escrow disputes.

Rubin believes that each dispute is unique and works with the parties to fashion the optimal dispute resolution process. She confers with counsel in advance of mediation sessions to ensure an efficient and effective session. She is committed to proper preparation ahead of time to gain a thorough understanding of both background and legal issues involved. If

See Rubin, page 14

The healthiest emotion: being thankful

BY FRANCIS J. NOLAN

President's Message

A thankful heart is the greatest virtue.
— Cicero

We're moving into my favorite time of year, when I'm finally able to stop glaring at the snow shovels sitting on my front porch and move them into the shed, where they will rest undisturbed for as long as I can possibly leave them there.

With days growing longer and warmer, I'm better able to shake off the doldrums of the winter months and move forward with a renewed focus on weightier things. (Pretty much all of those things relate to the Red Sox. Put me down as being cautiously optimistic.)

It's a turbulent time in the world, to be sure, but I am trying to focus myself on the many things in my life for which I am grateful. I've been surprised by the number of times REBA has popped onto the list in one form or another.

For example:

• I'm grateful for the chance to learn about other areas of real estate law besides the ones that occupy my everyday work hours. At a recent Legislation Section meeting, I (mostly) listened to a great discussion that ranged from permitting requirements to brownfields, to smart growth zoning, to appellate procedure. By attending REBA "road show" presentations in Dedham and Salem, I learned about some traps for the unwary when dealing with solar panels.

• On a related note, I'm thankful for the generosity shown by our colleagues who take the time to head out on the road, whether it leads to Boston or Needham or elsewhere, so they can share what they know with me and other REBA members.

Consider Phil Lapatin's regular review of recent real estate case law, which is both enlightening and entertaining. I'm sure more than one person will be attending our Spring Conference on May 1 just to listen to Phil's roundup!

• Is it okay for me to say I'm grateful for the food at our Spring Conference? No, seriously. Don't take that for granted, people. Nothing dampens the mood like a sub-par lunch.

• I am always appreciative of the opportunity to see friends and colleagues at our conferences. It seems like we're all either "chained to the desk" or always on the go, and e-mails are a poor substitute for direct interaction, as I am reminded every time I see a friendly face in line to pick up the conference materials.

• My constant gratitude for the hard work and dedication of the REBA staff can never go without saying. Even though we have a lot of very active volunteer members, all of us ultimately rely heavily on the folks who man our headquarters and not only make the daily operations run smoothly, but also oversee the technical and logistical arrangements of our programs and conferences.

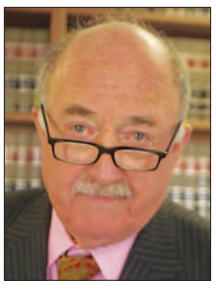
• I'm hugely thankful for the opportunity to work with the members of REBA's board of directors. These are people who are deeply respected and admired by their colleagues and peers throughout the industry, and it's remarkable to see their dedication to the continuing improvement of both the real estate bar and REBA. That's what lawyering is all about, in my opinion.

• Lastly, I'm grateful for the opportunity I have had already in my short tenure to see how representatives of other organizations view REBA. It is clear that we are viewed as an organization whose members are true subject matter experts, who care about their clients, their colleagues and the maintenance of the high quality of real estate legal work in Massachusetts. And if you're a member of REBA, I am grateful to you too for your contribution to the organization. REBA is as good as its members.

That's it for now. I encourage you to take time, even if it's just 60 seconds in your day, to consider the many things for which you might be grateful. Being a real estate lawyer in Massachusetts can be many things on any given day — frustrating, rewarding, dynamic, exciting, infuriating — but it's a privilege that's hard-earned, and one few can claim. I am grateful for the opportunity.

Cyber fraud and the conveyancer

BY HENRY J. DANE



No one is immune to cyber fraud, so why does everyone think it won't happen to them? Lawyers are still getting nailed every day with altered or fabricated wire instructions that they believe to be authentic. This is definitely not "old news" yet.

Some of the frauds are very sophisticated and cleverly disguised to look genuine, using names of parties, attorneys and brokers involved in the transaction, forging logos and similar-looking email addresses and containing information (presumed to be confidential) that vouches for their genuineness.

When asked why he robbed banks, the well-known stickup artist Willie Sutton said, "Because that's where the money is." But today a bank holdup will rarely net the kind of money that conveyancing attorneys handle every day, hundreds of thousands if not millions of dollars which can be stolen without a gun, a mask or a brown paper bag. And yet, even smart attorneys are still sending out this kind of money every day based on information given, or more frequently, changed at the last minute by a telephone call, a scrap of paper, or an email from an unverified source.

Think about it this way: if you were a bank, the person giving you the instructions would need to have a unique user name and a password (eight characters, upper and lower case, a number and a special character) to pay your $49 phone bill. Although it hasn't been suggested that attorneys assign user names and passwords to clients, fellow attorneys, brokers and mortgage lenders, it wouldn't help much even if we did, because we cannot limit incoming communications to known and verified originators, if we are going to effectively conduct our business or theirs. And the problem for us is as much of what goes out online as what comes in.

The banks aren't doing that well either, and the crooks are doing to banks what has been working on lawyers. If the front door is double-bolted with a couple of steel bars and a combination lock, just walk around to the back of the building and climb in an open window.

Take for example, the *Berkshire Bank* case brought in the U.S. District Court in Boston. *Jacobs v. Berkshire Bank,* USDC 3:16-dv-30190-MGM. The following information comes from the complaint which I have taken at face value. The bank has 90 branches in four states and belongs to a holding company with total assets close to $8 billion. Not a mom and pop operation.

The plaintiff, Mr. Jacobs, one of the bank's customers periodically sent emails to his "personal banker" whom he believed to be an employee of the bank, asking her to wire out funds from his account. These earlier transactions were remarkable only in that they were the set up for what was to follow.

On Oct. 17, 2016, while Mr. Jacobs was traveling in Europe, an imposter impersonating him sent an email requesting that $580,000 be wired to a bank in Hong Kong. The wire was originated either with no or inadequate measures to verify the authenticity of the request. The next day, another email was received asking how much money remained in the account. The "personal banker" responded that $1,590,000 remained in the account (but not for long).

There was an opportunity to salvage the situation when the original $580,000 wire bounced. Not to be deterred, the "personal banker" sent the wire again, this time successfully putting the funds in the hands of the imposter. Then, on Oct. 24, responding to a similar email, another $826,000 was sent to another bank in Hong Kong.

Upon his return, Mr. Jacobs found out about the unauthorized wires, asked the bank to restore the funds and the bank disavowed any liability.

The bank, in its answer filed on Feb. 10, alleges in part that the "personal banker" was "performing personal services for Mr. Jacobs and his business, including but not limited to serving as his personal bookkeeper and in conducting banking transactions for him, she was doing so as his employee, agent and authorized signer on the account."

Without any knowledge of this particular situation, but based on my experience with similar instances, the bank had much better security against electronic intrusion than Mr. Jacobs. By means of

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REBA
THE REAL ESTATE BAR ASSOCIATION
for Massachusetts

295 Devonshire Street, Sixth Floor,
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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's Title Standards, Practice Standards, Ethical Standards and Forms with the understanding that advice to Association members is not, of course, a legal option.

Postmaster: Send address changes to REBA, 295 Devonshire Street, 6th Floor, Boston MA, 02110

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Don't look now, but the homeownership rate keeps falling

BY ROBERT M. RUZZO

From Capitol Hill to Beacon Hill, 2017 promises to be a very interesting, and perhaps difficult, year for housing aficionados.

First of all, on the national front, the impact of tax reform, particularly its impact on the affordable housing tax credit world, is likely to be front and center. In addition, although the details are still evolving, it is difficult to imagine a (potentially) $1 billion infrastructure proposal that would not have a major impact upon transit oriented development efforts.

Rumor also has it that long ago in a galaxy far away, reform of the government-sponsored enterprises (the GSEs, a/k/a Fannie Mae and Freddie Mac) was once imminent. If GSE reform is going to happen within the lifetime of any life presently in being, the current session of Congress might seem as likely a time as any, but the betting window is still wide open on that one.

Meanwhile, the debate over zoning reform is sure to resurface on Beacon Hill, and it is once again time for a new Housing Bond bill. Mix in some potential measures at the state level to counteract, offset or capitalize upon whatever comes out of Washington, and are things interesting enough for you yet?

If you can tear yourself away from this political back-and-forth long enough to ruminate upon any other housing issue, kindly consider the following as a way to add an eggbeater to already troubled waters: take a look at the homeownership rate in our otherwise economically vibrant commonwealth, particularly the five counties comprising Greater Boston.

Like the MBTA in the fall of 2014, the plummeting homeownership rate in

THE HOUSING WATCH

Greater Boston has all of the hallmarks of a crisis hiding in plain view. While five counties do not a commonwealth make, one would have a hard time arguing that homeownership is substantially more achievable to the average resident in Barnstable, Dukes, or Nantucket Counties. When combined with Greater Boston, as defined in the Report Card, this would represent eight of the state's 14 counties and more than two-thirds of the state's total population.

The drop (plummet) in homeownership is the most underplayed issue to emerge (or not emerge) from the 2016 Greater Boston Housing Report Card. And while the swing of the pendulum in favor of funky downtown apartments explains some of this phenomenon, not everyone wants to spend their entire life in a micro unit, no matter how vibrant the surrounding neighborhood may be.

> Homeownership as the engine of middle class expansion in post-World War II America and a fundamental means of wealth creation is becoming less viable for an increasing number of young citizens in Massachusetts, particularly in Greater Boston.

Massachusetts has always been somewhat of a laggard in terms of its homeownership rate due to our restrictive local zoning and high housing costs. Nationwide, the homeownership rate grazed the 69 percent level before crashing back to earth in the throes of the Great Recession. According to U.S. Census Bureau data, the nationwide homeownership rate was 63.7 percent in the fourth quarter of 2016. The homeownership rates for African Americans and people of Hispanic origin are far lower, averaging in the mid-40 percent range.

Of particular interest in Greater Boston is the homeownership rate among "prime age households" (those between the ages of 25 and 44). The facts are there in all their shocking glory in table 2.2 of the Housing Report Card.

In Greater Boston, in the year 2000, 67.2 percent of all households between the ages of 35 and 44 (the choicest of the prime age households) were homeowners. After the Great Recession, in 2010, that rate had fallen to 65 percent. Even more troubling is the fact that since then, in the years 2011-2014, the decline in homeownership in Greater Boston has been more than twice as fast as it was between 2000 and 2010. Between 2011 and 2014, the homeownership rate in this age group plunged to 58.9 percent, despite historically low interest rates.

For those between the ages of 25 and 34, less than one-third (30.2 percent) are homeowners, according to the most recent data published in the Report Card, compared to 40.7 percent in the year 2000. With increasing student loan debt levels, rising home prices and now rising interest rates, it's unlikely that trend will improve dramatically any time soon. The expiration, at the end of 2016, of the ability to deduct mortgage insurance premiums will not help matters.

Homeownership as the engine of middle class expansion in post-World War II America and a fundamental means of wealth creation is be-

See Housing, page 14

It's time to become a mentor to young lawyers

BY PAUL F. ALPHEN

When I look around the room at the luncheons at the REBA spring and fall conferences, I see many familiar faces. It is fabulous to see so many members return year after year and decade after decade. It sometimes seems like none of us are ever going to retire.

As one of my favorite members said to me recently, "Why would I retire? I love doing what I do, and I don't play golf!" I agree, and there are only so many ball games one person can attend before the experience becomes too blasé.

I am also reluctant to think about retirement because whenever I get together with my retired buddies, who used to have great work stories about criminal cases and search warrants, they only tell stories about condo meetings and gardening. I told my old friends from Wayland that I am not getting together with them again until they get better stories.

Supposedly with age, comes wisdom. It's an honor to be asked to share wisdom. Some of the younger attorneys who used to call me for second opinions are now more experienced and are figuring things out on their own. I have fond memories of the conversations I had with fellow members of the Massachusetts Conveyancers Association when I was just starting out, and the lessons I learned from those experiences were invaluable.

Some of the younger attorneys who used to call me for second opinions are now more experienced and are figuring things out on their own.

We older attorneys still call one another for counsel and emotional support; those calls usually start with, "Am I crazy, or do you agree with me that…"

So when I heard that REBA needed more mentors, I decided it was time to sign up. I have heard so many good things from other members who have served as mentors over the years, and I have never forgotten the enthusiasm that past president Sami Baghdady had for the program.

My initial reluctance to become a mentor was based on a concern that I did not have the time. Sure, time is still a concern, but loss of some time will be outweighed by the benefits. Recently I had the opportunity to field some zoning questions from a young attorney whom I know well, and as I was discussing the nuances of pre-existing non-conforming uses with him, he asked me some questions that made me rethink some of my counsel. We sometimes get used to thinking about issues in a linear fashion, but it can be intellectually beneficial to have someone challenge our assumptions and take us out of our comfort zones.

Hopefully, when a mentee gives me a call I can direct him or her in the right direction. Especially in matters pertaining to zoning and land use, my initial advice will probably be, "Read the local zoning bylaw with a highlighter in your hand." And sometimes the answer may be, "I am sure I read a case like your situation a year or so ago; I think the case was about a property in Falmouth."

In any event, I am looking forward to the experience and I am sure that I will learn something in the process.

A former REBA president, Paul Alphen currently serves on the association's executive committee and co-chairs the long-range planning committee. He is a partner in the Westford firm of Alphen & Santos and concentrates in residential and commercial real estate development, land use regulation, administrative law, real estate transactional practice and title examination. As entertaining as he finds the practice of law, Alphen enjoys numerous hobbies, including messing around with his power boats and fulfilling his bucket list of visiting every Major League ballpark. He can be contacted at palphen@alphensantos.com.

Massachusetts realtors set legislative priorities

BY MICHAEL F. MCDONAGH

The convening of the 190th General Court of the Commonwealth of Massachusetts provides a good time to review some of the legislative priorities of the Massachusetts Association of Realtors. Once again, Realtors will be focused on legislation that impacts the housing industry. The following are some of MAR's specific legislative recommendations for the 2017-2018 session.

First time homebuyer accounts

The rising costs of housing and crippling student loan debt appear to be impacting younger generations and their housing choices.

This makes saving for a down payment and closing costs very challenging. Over the past few months, MAR has been working with Sen. Julian Cyr to develop new legislation that would create a First-Time Home Buyer Savings Account Program in Massachusetts. This new legislative proposal is one way to help overcome the challenge of saving for a down payment.

This legislation uses a small state tax incentive to encourage future homebuyers to save for the purchase of a home. Specifically, this program would allow future home buyers to deposit up to $5,000 per year into a First-Time Home Buyer Savings Account and then claim that contribution as a deduction on their state income tax.

The rise of student loan debt means homebuyers need this type of assistance now more than ever. Per the 2016 Massachusetts Profile of Home Buyers and Sellers, the share of first-time homebuyers in Massachusetts has dropped to a low of 35 percent — the lowest share of first-time buyers since the Profile began collecting Massachusetts data in 2003.

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'The Home Bill'

Due to the short supply of housing in Massachusetts, potential homeowners continue to face increasing housing costs. One of the many issues driving the reduced housing stock is the presence of barriers to production, many of which are found in current zoning laws. MAR, in conjunction with the Greater Boston Real Estate Board, has filed legislation addressing these barriers. Some of the key provisions are outlined here.

Multifamily construction is important as a means to provide affordable housing in the commonwealth. State law does not require cities and towns to permit multifamily development by right in some residential zoning districts. In the absence of a mandate, few cities and towns permit multifamily development by right in any zoning district. This section of the bill promotes multifamily construction by requiring that municipalities permit multifamily development by right in one or more zoning districts that are suitable for multifamily residential development and cover no less than 1.5 percent of the community's developable land area.

Accessory dwelling units provide units that can be integrated into existing single family neighborhoods to provide low-priced housing alternatives that have little or no negative impact on the character of the neighborhood. Current state law does not require that zoning ordinances and bylaws permit accessory dwelling units in residential zoning districts, whether by right or with a special permit. These sections of the legislation promote affordable in-fill housing by requiring that accessory dwelling units be permitted by right in all single-family residential zoning districts. It also prohibits zoning ordinances and by-laws from unreasonably regulating the location, dimensions, or design of an accessory dwelling unit on a lot.

In another section, the Home Bill seeks to encourage cluster development. In comparison to a conventional subdivision, cluster developments benefit communities by preserving land for open space and recreation, reducing infrastructure costs, and protecting environmentally sensitive land. This section promotes smart growth by requiring that cluster development be allowed by right in residential zoning districts, at the density permitted in the underlying zoning district. The section also prohibits cities and towns from requiring a "proof permit" plan in connection with a cluster development application.

Two other costly barriers to housing production that the Home Bill seeks to correct are overly restrictive local Title V and wetland regulations. The patchwork of local Title V regulations is one of the costliest barriers to housing production in areas not served by public sewer and wastewater treatment systems. Additionally, local wetland regulations that are more restrictive than state laws and regulations undermine uniformity and also may have no scientific basis. The result is duplicative application, review, and appeal processes. Both of these concerns represent significant and costly barriers to affordable housing and other development in Massachusetts.

Mortgage cancellation debt relief

The general tax rule that applies to forgiven debt is that the amount forgiven, sometimes referred to as phantom income, is treated as taxable income to the borrower. MAR supports legislation that would allow homeowners to complete loan modifications, short sales and foreclosures for which they have debt forgiven without making them liable to pay state taxes on that debt. This bill would mirror the federal law, the Mortgage Debt Relief Act of 2007, to allow taxpayers to apply for this exclusion on their state tax return as well.

Transfer taxes

Each session proposals are filed that would either allow a community to create a transfer tax on the sale of property in that community or authorize a statewide transfer tax to fund specific projects. The imposition of this type of new sales tax on homes could have serious implications for the Massachusetts economy and set the wrong precedent for the commonwealth's tax policies. Transfer taxes would increase the bottom-line price of many homes by thousands of dollars. These bills single out home buyers and sellers and subjecting them to this new tax only further exemplifies the inequitable nature of this taxing scheme.

Energy audits

For the second straight session, there is a proposal to require sellers or their agents to perform a Mass Save energy audit prior to listing a home for sale and disclose to any prospective buyer the information in the energy audit at the time of the listing. Additionally, the bill commissions the design and implementation of an energy scoring and labeling system.

Over and above having an enormous impact on an individual's right to freely transfer land, such requirements would negatively affect the real estate industry in the commonwealth. Massachusetts is home to some of the oldest housing stocks in the country and mandatory energy scoring of such older homes would significantly stigmatize and potentially devalue an individual's largest investment. MAR hopes to work with the legislature and other stakeholders to encourage all homeowners to make energy efficient upgrades to their homes – not just those who decide to sell their home.

Co-chair of REBA's legislation section, Mike McDonagh is the general counsel and director of government affairs at the Massachusetts Association of Realtors, where he is responsible for overseeing MAR's legal affairs and risk management programs for the membership. As government affairs director, he is in charge of MAR's legislative efforts. McDonagh can be reached at mike@marealtor.com.

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2017 REBA Spring Conference

Monday, May 1, 2017
7:30 AM - 2:45 PM
Four Points by Sheraton Hotel
1125 Providence Tpke (Rt. 1)
Norwood, Massachusetts

Luncheon Keynote Address presented by PATRICK F. STONE

PAT STONE, Chairman and CEO of Williston Financial Group, will deliver the luncheon keynote address at the Association's 2017 Spring Conference on Monday, May 1st at the Four Points by Sheraton Hotel in Norwood.

Pat enjoys a national reputation with his insights on global economic trends and the directions of the residential and commercial real estate marketplace,
offering predictions of future economic trajectories. Some have called him a visionary.

Currently, Pat serves as Chairman of Williston Financial Group, and as a board member of Green Street Advisors, the leading REIT analytics firm, Linked2Pay, a bank payments innovator, and Inman News, who named him one of 2013's "100 Most Influential People in Real Estate."

One of the fastest growing and unique real estate service providers in the mortgage industry, Williston Financial Group is the Portland, Oregon-based parent company of WFG National Title Insurance Company.

Join us at our 2017 Spring Conference, where you can take advantage of accredited continuing legal education, network with colleagues and enjoy an informational luncheon with old friends. We look forward to seeing you on May 1st!

For more information, visit www.reba.net

REGISTRATION

COMPLETE AND RETURN THIS REGISTRATION WITH THE APPROPRIATE FEE TO:
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	By April 24	*After April 24*
❒ YES! Please register me as a REBA member in good standing.	$225	$250
❒ YES! Please register me as a guest, as I am not a REBA member.	$265	$290
❒ I would like to purchase the conference syllabus, as I am unable to attend.	$200	$200
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Select your Luncheon Choice Below

❒ Butcher shop cut choice petit filet mignon, grilled and served with a red wine demi-glace
❒ Pan-seared statler chicken breast stuffed with spinach, garlic and Fontina cheese with an herbed jus
❒ Roasted Portabella, red pepper, zucchini and squash on quinoa with balsamic glaze (gluten free)
❒ None, as I will not be eating at the conference luncheon
❒ None, as I am unable to stay for the conference luncheon

YOU MAY ALSO REGISTER ONLINE AT REBA.NET | For additional information, call REBA at 617.854.7555

SCHEDULE OF EVENTS

7:30 AM REGISTRATION & EXHIBITORS' HOUR

8:30 AM - 1:15 PM BREAKOUT SESSIONS (DESCRIPTIONS BELOW)

1:20 PM LUNCHEON PROGRAM

1:20 PM - 1:45 PM OPENING REMARKS FROM PRESIDENT FRAN NOLAN

1:45 PM - 2:05 PM KEYNOTE ADDRESS BY WFG'S PAT STONE

2:05 PM - 2:20 PM BUSINESS MEETING

2:20 PM - 2:45 PM CONCLUDING REMARKS

8:30 AM - 9:30 AM TIFFANY BALLROOM A
9:45 AM - 10:45 AM TIFFANY BALLROOM A

Emerging Trends in the Title Insurance Industry

James M. Czapiga; Patrick F. Stone
In an era of ever-changing technology, business-to-business relationships, regulatory oversight, and settlement and title services industry practices, the title insurance industry is facing new challenges in adapting to these changing practices and requirements. Our speakers will discuss some of these challenges including the effect of the Trump administration on the CFPB and Dodd-Frank, the evolution of technology integrations with third parties, technology partnerships between agents and title companies, and lender pressures. They will also provide insight into the future practices of the settlement business.

9:45 AM - 10:45 AM TIFFANY BALLROOM B
11:00 AM - 12:00 PM TIFFANY BALLROOM B

Data Security: Ethical Considerations and Best Practices

Steven J. Bolotin; Christopher J. Gulotta
The world of data security is constantly changing, and so are the rules governing how lawyers deal with those changes. What are your obligations and how can you meet them? Our panelists will discuss the current ethical rules, regulatory requirements and disciplinary trends, as well as present practical solutions to protect you and your clients.

8:30 AM - 9:30 AM ESSEX/LENOX ROOM
9:45 AM - 10:45 AM ESSEX/LENOX ROOM

Emerging Topics in Legislation that Concern REBA and Other Industry Players

Michael F. McDonagh; Edward J. Smith; Douglas A. Troyer
Experts will discuss private roads legislation, notary acknowledgement requirements, marketable title act, just cause eviction, mandatory rent escrow, home energy audits, short sales, and other real estate-related topics pending in the current session of the legislature.

8:30 AM - 9:30 AM CONFERENCE ROOM 101
9:45 AM - 10:45 AM CONFERENCE ROOM 101

Shining Bright: Solar Energy's Impact on Real Estate Law

Bethany Anne Bartlett; Jonathan S. Klavens
In the past decade, Massachusetts has made significant advancements in the development of alternative energy sources. Solar arrays cover residential and commercial rooftops and solar panel fields are becoming increasingly prevalent across the Commonwealth. As this technology expands, real estate law continues to develop in this area as land containing, intending to contain, or abutting these elements continues to be bought, sold, leased, and developed. In this session, panelists will explore the legal complexities which arise in connection with the installation, permitting, development, and leasing of solar energy sources on residential, commercial, and municipal lands and the future outlook for solar energy projects.

8:30 AM - 9:30 AM CONFERENCE ROOM 103
11:00 AM - 12:00 PM ESSEX/LENOX ROOM

Gettin' High with a Little Help From Your...Landlord?... Trustee?

Adam D. Fine; Jordana Roubicek Greenman; George J. Warshaw
The new marijuana laws pose challenges to landlords, condo owners and associations, and property owners, especially because there has yet to be any significant case law. Our panelists will review what is permissible, impermissible and uncertain under the new laws, including conflicts between state and federal substance control criminal laws and enforcement directives. The program will seek to answer questions concerning the extent to which a landlord, unit owner or condo association may prohibit smoking, or the use or cultivation of marijuana in a dwelling. The panel will also offer counsel on creating and amending leases and condo documents to co-exist with the new laws, and the elements of proof to redress a lease or condo regulation violation.

9:45 AM - 10:45 AM CONFERENCE ROOM 104
11:00 AM - 12:00 PM CONFERENCE ROOM 104

Proposed New Land Court Rule 14: Binding Summary Decisions

Giles L. Krill; Thomas O. Moriarty; Hon. Gordon H. Piper; Hon. Karyn F. Scheier
A major change, Rule 14 holds the potential to streamline Land Court litigation and to afford substantial benefits to the parties, their attorneys and the Court. Under the new Rule, approved by the SJC late last year, parties may go directly to a bench trial under a stipulation waiving detailed findings of fact and rulings of law. Instead, a decision will be in a written or oral form akin to a special jury verdict. Rule 14 offers Land Court litigants a far speedier resolution of their disputes. Our panelists will include associate justices Karyn F. Scheier and Gordon H. Piper, as well as Giles Krill and Tom Moriarty, who were REBA's representatives on a special working group comprised of judges, Court staff and lawyers which developed Rule 14.

8:30 AM - 9:30 AM TIFFANY BALLROOM B

Practical & Ethical Advice for Maintaining Your IOLTA ~ Practical Skills Session

Deanna Atwood; Terrence D. Pricher
Maintaining an IOLTA account for real estate conveyancing requires a 'three-way' reconciliation for each account. A three-way reconciliation is the accurate way of reconciling an IOLTA account, so that every penny is accounted for. Title insurance underwriters and the Consumer Financial Protection Bureau require that monthly three-way reconciliations are performed for each account. Proper reports for the reconciliations must be maintained for audit purposes. Our experienced panelists will discuss trust accounting and the three-way reconciliation process in detail. Learn about the Massachusetts Rule of Professional Conduct 1.15: Safekeeping Property in this timely and common-sense approach to maintaining your IOLTA accounts.

8:30 AM - 9:30 AM CONFERENCE ROOM 104
11:00 AM - 12:00 PM CONFERENCE ROOM 101

Searching, Transferring & Insuring Title to Real Estate Coming out of Bankruptcy ~ Practical Skills Session

David J. Buczkowski; Michael J. Goldberg; Robert J. Moriarty Jr.
Even experienced practitioners sometimes trip up on what to do when confronted with a title coming out of bankruptcy. In this session, you will learn what and where to look when searching title, and what to do when you find it. The REBA Title Standards and their applicability to common issues will be discussed, along with when and to what extent you want or need to be involved in the bankruptcy case. Finally, learn what title insurers require in order to insure title coming "free and clear" out of a bankruptcy.

9:45 AM - 10:45 AM CONFERENCE ROOM 103
11:00 AM - 12:00 PM CONFERENCE ROOM 103

Make Them Work for You: Dispute Resolution Clauses & Your Practice ~ Practical Skills Session

Joel M. Reck; Diane R. Rubin
Both transactional lawyers and litigators must be familiar with the variety of dispute resolution clauses -- ranging from those in REBA's new Two-unit Condominium Trust Form to those in small and large, partnership, leasing, construction and financing documents. The program will examine mediation and arbitration, as well as stepped decision-making structures, such as "med-arb" (mediation-arbitration), baseball arbitration and appellate-type review of arbitration awards. Best practices and sample provisions will be reviewed from the simple to the sophisticated, together with the risks and benefits of different provisions.

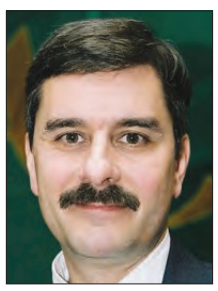
12:15 PM - 1:15 PM CONFERENCE ROOM 103
Video simulcasts of presentation in Conference Rooms 101 & 104

Recent Developments in Massachusetts Case Law

Philip S. Lapatin
Now in his 39th year at these meetings, Phil continues to draw a huge crowd with this session. His presentation on 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.

Association supports passage of 'private ways' bill

BY DANIEL J. OSSOFF



The fact patterns are familiar to many of us. The client owns a property to which access is available by means of a shared private way serving a dozen separate properties. The private way has fallen into disrepair. Although several of the owners are prepared to contribute their share of the cost of making the necessary repairs to the private way, other owners are not so forthcoming. The distressed owners, who are unable to raise the funds necessary to repair the way from the full roster of owners who use the way, turn to the town for assistance.

The municipality, which is struggling to find the necessary funds to maintain and repair the public ways under its jurisdiction, responds to the disappointed property owners that the private way on which they reside is not the town's responsibility. The town officials suggest that the owners look to their homeowners' association documents to enforce the obligations of all the owners to pay their fair share of the costs of maintaining and repairing the private way.

Alas, no such association was created at the time the private way came into existence, and no association binding on all the property owners can be formed without the cooperation of one hundred percent of the property owners using the private way.

Of course, there is little or no chance that the troublesome owners who are not willing to pay their share of the costs of maintenance and repair of the way will cooperate in the creation of a homeowners' association that could compel them to pay up. So the owners who are willing to "do the right thing" are stymied in their efforts to get the private way repaired.

Similar scenarios arise in connection with private bridges or other appurtenances to private ways, privately owned water, sewer or other utility lines, and privately owned beaches, parks or other recreational facilities.

In each case, in the absence of an established owners' association or maintenance process, it is often an insurmountable task to keep such bridges, utilities or other common amenities and appurtenances in good condition and repair. Nor are these problems limited to residential subdivisions. Similar issues can arise in office and industrial parks, which were created without the establishment of associations charged to maintain the roadways, utilities and other park infrastructure.

Meanwhile, the headaches of these property owners more often than not also become the headaches of the municipality charged with assuring that safe access is available to all properties for the provision of emergency services.

The only statutory mechanism that is available to assist property owners seeking to insure the maintenance of private ways can be found in the seldom-used provisions of G.L.c. 84, §§12, 13 and 14. Those statutory provisions provide a procedure by which the proprietors and rightful occupants of a private way or bridge may make application to a clerk of the District Court, to the clerk of the city or town, or to a justice of the peace, to issue a warrant for a proprietors' meeting at which a surveyor can be appointed to oversee the maintenance and repair of the private way or bridge.

Of course, the process for causing such a meeting to be held is cumbersome, and the concept of appointing a surveyor to oversee the private roadways strikes the modern day practitioner as particularly archaic. The statute also provides little guidance as to how maintenance costs are to be assessed and collected or how owners are to work together to cause the maintenance to be performed and the assessments collected.

Needless to say, these existing statutory provisions have proved to be of little use in current times to address the problem of assuring that private ways, bridges and other common amenities are properly maintained.

A bill sponsored by REBA, S 1910, titled "An act relative to the maintenance of private ways, bridges and common amenities in municipalities" is an effort to replace Chapter 84, §§12-14 with a more modern framework by which maintenance processes can be established and common associations formed to ensure the ongoing maintenance, not only of private ways and bridges, but also of private utility lines, recreational areas, or other common facilities and amenities.

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Building off the procedures in the existing statutory provisions, where four or more property owners have the right to use a private way, bridge or other common amenity, the bill provides a mechanism for any three of those property owners to call a meeting for the purpose of establishing a maintenance process for the private way, bridge or amenity. The meeting may also be called for the purpose of establishing a common association that will oversee that maintenance process.

In deference to small subdivisions or office or industrial parks where the formality of an owner's association may not be necessary, the bill allows but does not require a common association to be formed in order to establish a maintenance regime for the private ways or other amenities. The bill not only addresses the creation of new maintenance procedures and common associations, but also provides mechanisms to revive and amend existing procedures and associations which may have not been used in years or which are in need of being modernized and revised to meet the current needs of the property owners.

In order to avoid the present situation in which unanimous consent is required to establish a maintenance process or common association for existing private ways, bridges or other common amenities where none currently exist, the bill provides for the adoption of a maintenance process or common association by vote of a majority of the property owners attending a meeting called for that purpose.

Notice of that initial meeting is given by mailing by certified and first class mail a copy of the notice to each owner at its address appearing in the records of the tax assessor and by publishing the notice in a newspaper with general circulation in the municipality. Both the mailed notice and published notice are to be accomplished not less than 14 days prior to the meeting. No longer will it be necessary to make application to the clerk of the District Court or the municipality or to a justice of the peace to issue a warrant for a meeting of the owners having the right to use the private way.

Senate Bill 1910 is enabling in nature, allowing the owners to devise a maintenance process or structure an owner's association as necessary to meet the needs of their particular situation, without prescribing exactly what elements are to be included in either. However, upon the establishment of a maintenance process and/or a common association, the bill requires certain basic information identifying the same to be recorded at the registry of deeds or the registry district of the Land Court, including the identity of the affected property owners and a description of the private ways, bridges or other common amenities that are the subject of the maintenance process or the common association.

Where a common association is formed, the names of the members of the board of the association must also be placed on record (as well as any future changes to the board). All of this is intended to assure that this information is available to title examiners, conveyancing attorneys and new owners and lenders looking to acquire or finance a property that is subject to a maintenance process or part of an owner's association.

The bill also formalizes the process of establishing a lien for unpaid common expenses, similar, in many ways, to the process that is available to condominium associations for unpaid common area charges. Importantly, in order to take advantage of the lien provisions in the bill, a formal common association is required to be formed to oversee the enforcement of those lien provisions. The bill also provides for a member of the board of the association to be able to execute and deliver a certificate confirming that all common charges assessed to a particular property have been paid, so that the certificate will be available to be recorded in order to pass clear title to the property in the event of a sale or refinancing.

For the purpose of allowing for foreclosure of the lien, the bill amends the provisions of G.L.c. 254 to establish a foreclosure mechanism which again parallels the mechanism that is available in the context of unpaid condominium common area charges.

A subcommittee of REBA's Legislation Section has spent a significant amount of time revising and refining the bill. It is the view of the members of that subcommittee that the bill, if enacted, would be of significant assistance to property owners faced with assuring that private ways and other common amenities are maintained, and assuring, also, that all owners benefitting from the use of such ways and amenities will pay their fair share. REBA strongly supports the passage of this bill.

The chief sponsor of the legislation is new Sen. Julian Cyr. Co-sponsors include Sen. Adam G. Hinds, Rep. Sarah K. Peake, Rep. Keiko M. Orrall and Rep. Mathew Muratore.

Principal draftsman of REBA's private ways legislation, Dan Ossoff chairs the real estate department at Rackemann, Sawyer & Brewster, P.C. His practice concentrates on all aspects of commercial real estate development and finance with an emphasis on land acquisition and disposition, leasing, title and land use planning matters. Ossoff's email address is dossoff@rackemann.com.

Will a creditor's execution sever a joint tenancy?

BY TUCKER DULONG

The question of whether a joint tenancy can be severed by the mere recording of a judgment execution has become a hot-button topic among members of the Massachusetts real estate bar in recent years. The Land Court recently weighed in on the issue in the matter of *McHugh v. Zanfardino*, 16 MISC 000331 (2016).

The underlying decision in the matter stems from a quiet title action filed by Kelly McHugh against the adult sons of her deceased co-owner, James Zanfardino Sr. In 2005, McHugh and Zanfardino Sr. purchased a three-family property on Greenwood Street in Worcester as joint tenants with rights of survivorship.

The next year, they converted the property into a three-unit condominium, and later sold one of the units to a third party. McHugh and Zanfardino Sr. retained ownership of the remaining two units.

In August of 2008, a judgment execution in the amount of $4,989.65 was recorded in the Worcester District Registry of Deeds against McHugh's interest in the property. This execution was later brought forward by a notice recorded in the registry in July 2014, however the judgment creditor never completed the levy. Zanfardino Sr. died intestate in April 2016.

The defendants in this matter contended that the recording of the judgment execution against McHugh caused the severance of the joint tenancy between her and Zanfardino Sr., thereby converting their interests in the property into a tenancy in common. As such, upon his death, the defendants asserted that Zanfardino Sr.'s interest in the property therefore passed to them according to the law of intestate succession, and not to McHugh as a surviving joint tenant.

For her part, the plaintiff contended that the joint tenancy is not severed until the completion of the levy by sale or by setoff, and since neither had occurred in this instance, the joint tenancy remained intact, entitling her to full ownership of the property through the law of joint tenancy.

The Land Court's decision in this case hinged on its interpretation of G.L.c. 236, §12, which governs the effect of a levy on execution for properties held both in joint tenancy as well as tenancy in common.

The statute, which consists of only two sentences, reads as follows: If land is held by a debtor in joint tenancy or as a tenant in common, the share thereof belonging to the debtor may be taken on execution, and shall thereafter be held in common with the co-tenant. If the whole share of the debtor is more than sufficient to satisfy the execution, the levy shall be made upon such undivided portion of such share as will, in the opinion of the appraisers, of the execution."

All parties were in agreement that a joint tenancy is severed and becomes a tenancy in common at the point at which the property is "taken on execution," but they disagreed as to the meaning of this phrase. In undertaking its analysis, the court noted that the statute is arcane and susceptible to competing interpretations.

Upon consideration of other sections of Chapter 236, as well as interpretations rendered in prior cases dating to the mid-1800's, the Land Court ultimately agreed with the defendants' contention that the taking occurs at some point prior to the completion of the levy. However, the court went on to explain that the language of §12 "does not entail a severance of the joint tenancy immediately upon recording

The court acknowledged that liens against one joint tenant's interest in property are generally extinguished at death where non-debtor co-joint tenants survive. However, the Court pointed out that there exists a long history of case law in Massachusetts that has treated levies differently from other liens, in that the intervening death of the debtor does not prevent the creditor from completing the levy.

Instead, the court interpreted §12 as establishing the severance of the joint tenancy only retroactively, if and when the judgment creditor actually completes the levy. Therefore, given that the levy against McHugh's interest in the property was never completed, the court held that the joint tenancy was not severed, and that all right, title and interest in the property had vested in the plaintiff as the surviving joint tenant upon the death of Zanfardino Sr.

The court also dispatched a number of concerns put forth by the defendants, including their argument that delaying severance of the joint tenancy could harm creditors in the event that the debtor joint tenant dies before the levy is complete.

In addressing this issue, the court acknowledged that liens against one joint tenant's interest in property are generally extinguished at death where non-debtor co-joint tenants survive. However, the court pointed out that there exists a long history of case law in Massachusetts that has treated levies differently from other liens, in that the intervening death of the debtor does not prevent the creditor from completing the levy.

The court concluded that "for purposes of the levy, a transfer of the debtor's interest through the right of survivorship would differ little from any other living or testate conveyance from which it is well-established that the creditor is protected," and accordingly, from the perspective of a judgment creditor, early severance of the joint tenancy "thus accomplishes no discernable goal."

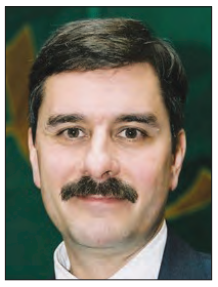
Whereas the completion of a levy by setoff or by sale is a relatively rare occurrence, recorded judgment executions are commonplace. As such, had the *McHugh* court reached the conclusion espoused by the defendants, an untold number of titles would have been clouded by unaccounted-for interests held by the heirs or devisees of a decedent whose interest was thought to have passed to one or more surviving co-tenants.

Clearly, for this reason, the decision as rendered by the Land Court in *McHugh* is welcome news to conveyancers and title insurers alike. Moreover, this decision no doubt stands in harmony with the presumed purpose of the law which, as stated by the court, is to "provide a process for the satisfaction of a judgment that sufficiently protects the rights of both debtor and creditor," while avoiding what the court considered a possible "irreparable harm" to the property interests of the debtor in the case of an incomplete levy.

Tucker DuLong is Massachusetts title counsel for CATIC, New England's largest domestic title insurance underwriter. He is also a member of the association's Standards and Forms Committee. DuLong can be reached at tdulong@catic.com.

REBA's Amicus Committee: the year in review

BY EDWARD M. BLOOM AND DANIEL J. OSSOFF



We'd like to take a moment to reflect back on 2016 – a busy and productive year for REBA's Amicus Committee.

The mission of the Amicus Committee, often (but not always) operating in conjunction with the Abstract Club, is to write and submit to the appellate courts of the commonwealth, and occasionally to the Federal courts sitting in the state, briefs relating to matters of interest to the real estate bar and its clients.

In general, cases are taken on by the committee if they are of wide application in real estate law and will have significant precedential value. In those circumstances where a case is so fact-intensive that it limits the precedential value of any decision that may issue, the committee will typically opt not to weigh in on the matter with a brief. Briefs are submitted at the request of the court or, on occasion, at the request of one of the litigants, provided, of course, that the criteria for submission of a brief have been met.

The year 2016 saw four cases decided by the Supreme Judicial Court in which the Amicus Committee submitted a brief. In each instance, the decision of the Court was in favor of the position adopted by the amicus brief submitted on behalf of REBA.

In March, the court decided the case of *Drummer Boy Homes Association, Inc. v. Britton* (474 Mass. 17), a case of great interest to REBA's Condominium Law and Practice Section and practitioners in the condo arena. The issue decided in that case was whether a "rolling lien" exists under Section 6(c) of Chapter 183A of the General Laws, allowing a condominium association to bring successive actions to enforce its lien for unpaid common area expense assessments and thereby establish and enforce multiple contemporaneous six-month priority liens.

Clive Martin of Robinson & Cole and Diane Rubin of Prince, Lobel & Tye, joint chairs of REBA's Condominium Law and Practice Section, authored an amicus brief on behalf of REBA arguing that the rolling lien is permitted by the language of the statute, that it has been long recognized as a feature of §6(c), and that for the Court to find otherwise would be disruptive to the financial health and well-being of condominium associations in Massachusetts.

In its decision, the SJC reversed the decision of the Appeals Court and held that successive actions may be brought by a condominium association pursuant to §6(c), and that in so-doing the association will have the benefit of successive six-month priority liens to secure the recovery of unpaid common area expense assessments.

Holding in favor the position adopted by the REBA brief and rejecting the argument by the Federal Housing Finance Agency and others, the Court emphasized the protections available to lenders under the statute by means of the notice that is given to a lender when a delinquency exists and the ability of the lender to avert a lien by stepping forward to assume the responsibility for payment of the condominium charges.

The rolling lien has been preserved, thanks in no small part to the efforts of the leaders of REBA's Condominium Law and Practice Section in preparing the brief that was submitted on behalf of the Amicus Committee.

Drummer Boy is a prime example of the expanded scope of the Amicus Committee's activities in recent years as REBA has expanded the breadth of its committees and sections. As issues arise in more specialized areas of real estate law – such as the condominium issues presented by *Drummer Boy* – the Amicus Committee now has the ability to call upon experienced practitioners in a variety of practice subspecialties represented by REBA's ever expanding roster of committees and sections. But that does not mean that the Amicus Committee does not remain very much involved in the title-related issues which have long been the focus of the Committee's activities working in conjunction with the Abstract Club.

Kitras v. Town of Aquinnah (474 Mass. 132) is an example of the Committee's continued focus on title matters. In *Kitras*, the issue under consideration by the SJC was whether easements by necessity were created when former Native American common land in Gay Head (now known as Aquinnah) was partitioned by commissioners appointed by the Probate Court in 1878.

The result of the partition was to create more than 500 lots, the majority of which were landlocked parcels of land. In creating the landlocked parcels, the commissioners did not include any express grant of rights of access to those parcels. Fast forward to the current day, and the owners of the landlocked land were arguing before the Court that easements by necessity arose when the landlocked parcels were created as a result of the partition in 1878.

An amicus brief prepared by Andy Cohn, Felicia Ellsworth and Claire Specht of WilmerHale and submitted on behalf of REBA and the Abstract Club argued, to the contrary, that to recognize easements by necessity more than 125 years after the lots at issue were created would upset well-settled title rights and would unnecessarily and inappropriately broaden the availability of such easements under the common law of the commonwealth.

The SJC affirmed the decision of the Land Court and held that easements by necessity were not created by the 1878 partitioning of the land. An important point in the Court's decision was that tribal custom at the time of the partitioning permitted free access over land, including not only land held in common but also land which was individually owned.

Because the Court held that an easement by necessity is created based upon the intent of the parties, and because tribal custom allowed for access without the need for creating easements for access, the Court was unwilling to find that the commissioners intended to create easements for access that were not necessary when the petition occurred in 1878. Therefore, as argued by the WilmerHale team, no easements by necessity were created.

As most REBA members are well aware, the spike in foreclosure activity which emerged from the downturn in the economy beginning in 2007 and 2008 has fostered any number of court decisions focused on the foreclosure process. The Amicus Committee has continued to monitor those cases and to submit briefs on behalf of the real estate bar where appropriate. The final two cases decided in 2016 on which the Committee weighed in, both arose in the foreclosure context.

In May, the SJC decided the case of *Federal National Mortgage Association v. Rego* (474 Mass. 329). That case confronted the seemingly novel argument made on behalf of the foreclosed owner that the foreclosure was void because various foreclosure notices were given by the attorney for the foreclosing lender without authority being given to the attorney to act by a "writing under seal" pursuant to G.L.c. 244, §14.

In reviewing the case as it came up from the lower court, it seemed fully apparent to the Amicus Committee that the language in §14, which was inserted by a 1906 amendment to the statute and which allowed acts authorized by the power of sale under §14 to be taken by an "attorney duly authorized by a writing under seal," was never intended to limit the ability of a mortgagee to retain legal counsel to conduct foreclosure activities on its behalf.

Nevertheless, the issue was too important for REBA and the Abstract Club to remain on the sidelines. A brief prepared on behalf of REBA and the Abstract Club by Tom Santolucito and Danielle Gaudreau of Harmon Law Offices made the argument which seemed so apparent, namely, that the language in §14 was intended to apply to agents operating as attorneys in fact under a power of attorney, and not to legal counsel hired to represent the foreclosing mortgagee.

In a decision authored by Supreme Judicial Court Justice Fernande R.V. Duffly, the SJC held that, "we conclude that to the legislators enacting the 1906 amendment, the phrase 'the attorney duly authorized by a writing under seal' meant the person authorized by a power of attorney, also known as an attorney in fact; it is not a reference to legal counsel (the attorney at law)." Thankfully, the position ably advocated by the team at Harmon Law Offices prevailed.

The final case decided in 2016 also arose in the foreclosure context, but has implications far beyond the foreclosure arena. *Bank of America v. Casey* (474 Mass. 556) is another in a seemingly unending line of cases addressing issues concerning defective acknowledgments on mortgages, which were subsequently foreclosed.

The facts in *Casey* were that, in acknowledging the mortgagors' signatures on a mortgage, the notary (and the attorney conducting the closing) failed to fill in the names of the mortgagors in the acknowledgment. More than six years later, but prior to any action being taken to foreclose the mortgage, the attorney in question caused a G.L.c. 183, §5B affidavit to be executed and recorded correcting the deficiency in the acknowledgment on the mortgage.

The Court was faced with deciding two questions as certified to it by the 1st U.S. Circuit Court of Appeals. First, whether a §5B affidavit can correct a defect in an acknowledgment where the names of the acknowledging parties are omitted. Second, whether such an affidavit provides constructive notice to a bona fide purchaser of the existence of the mortgage, either independently or in combination with the mortgage itself.

The Amicus Committee was particularly concerned that these questions, if answered in the negative, would not only have an adverse impact in the foreclosure arena in which this case arose, but would also severely impair the ability to use §5B affidavits to address a broad variety of clerical errors and ambiguities confronted more generally in title examinations.

To assist the Amicus Committee and the Abstract Club to address these important issues, Larry Heffernan and Danielle Andrews Long of Robinson & Cole stepped forward to author an amicus brief. The brief forcefully argued that both questions should be answered in the affirmative. The Court agreed, holding that "in certain circumstances (such as those present in this case)" an acknowledgment that omitted the mortgagors' names may be cured by a §5B affidavit, and that in such a case the affidavit in combination with the mortgage does provide constructive notice to a bona fide purchaser.

The work of the Amicus Committee continues. As this article is being written, we await the decision of the SJC in an additional case on which a brief has been submitted by the Committee, and are working with our members in yet a further case to ready another brief for filing.

As co-chairs of the Amicus Committee, we encourage members to bring to the Committee's attention for consideration cases on appeal which may be of importance to the real estate bar and which satisfy the criteria outlined above. In addition, we welcome volunteers willing to take on the task of preparing briefs for submission on behalf of the Committee and REBA.

We would also like to publicly acknowledge and thank those who have stepped up in recent years, often more than once, to prepare those briefs, which continue to shape the law of the commonwealth in areas of foremost concern to REBA's members and their clients.

Both former presidents of REBA, Dan Ossoff and Ed Bloom co-chair the association's Amicus Committee. Ossoff chairs the real estate department at Rackemann, Sawyer & Brewster, P.C. His practice concentrates on all aspects of commercial real estate development and finance with an emphasis on land acquisition and disposition, leasing, title and land use planning matters. He can be contacted by email at dossoff@rackemann.com.

A partner at Sherin & Lodgen, Bloom practices in the firm's real estate department. He concentrates on development, sale, leasing and mortgaging of residential, office, shopping center, industrial and condominium properties. His email address is embloom@sherin.com.

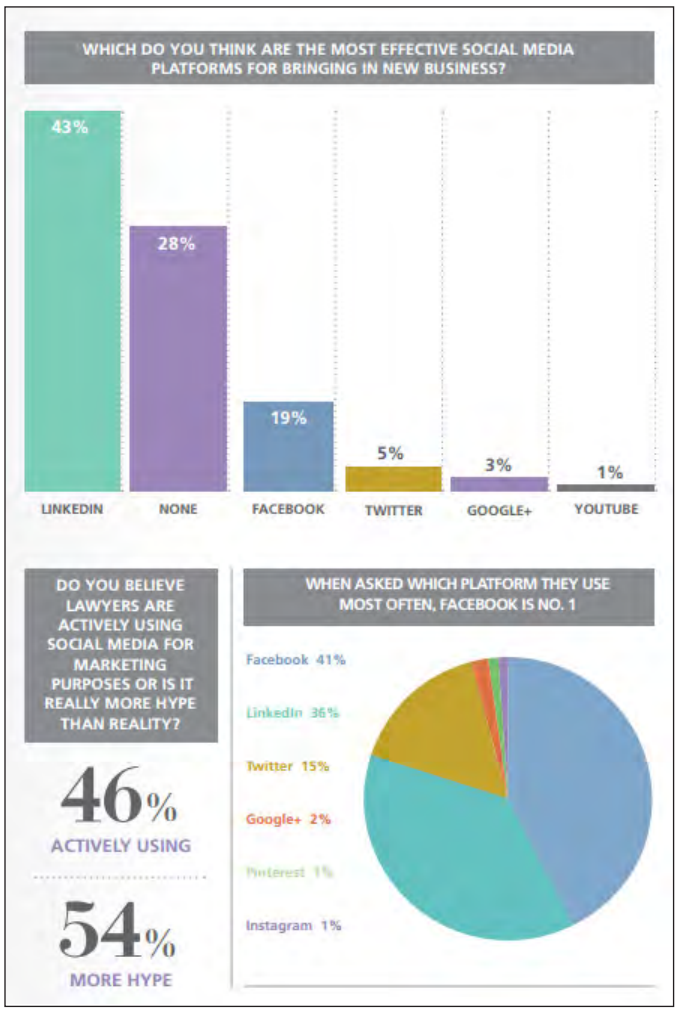
Tips for increasing your daily use of social media

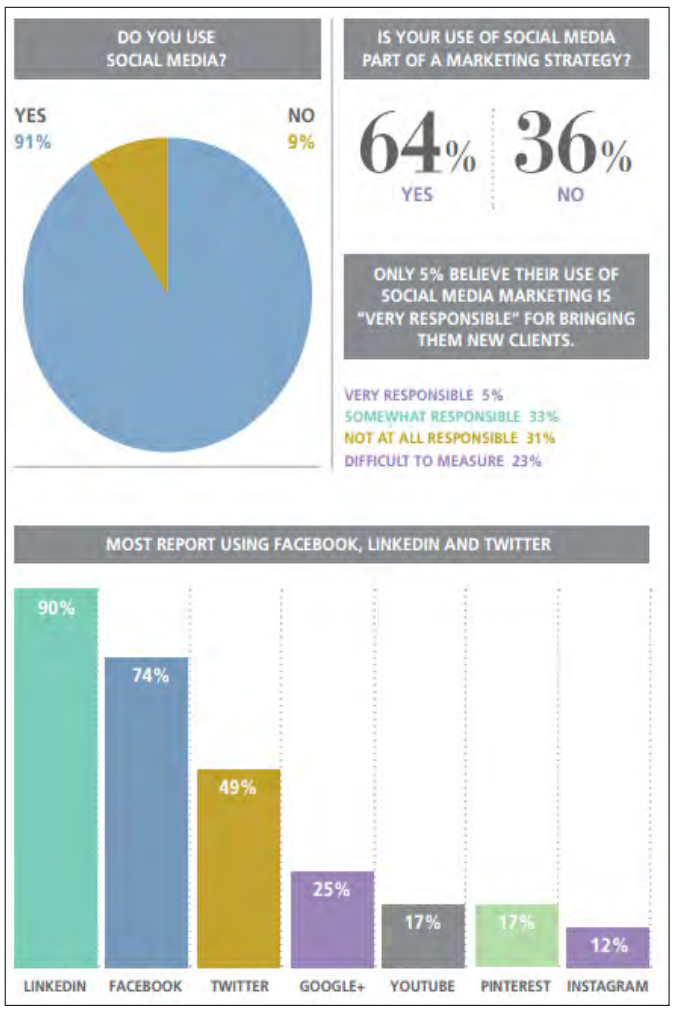
BY JULIE P. BARRY

By now, even the most stridently resistant among us in the legal profession are likely to be using at least one social media platform, like Facebook, if only for socializing with friends.

In fact, as shown in one of the graphs below, approximately 91 percent of attorneys who participated in the Attorney At Work poll used social media, with LinkedIn considered the most effective for bringing in new business. A 2013 ABA Legal Technology Survey found that 98 percent of attorneys identified themselves as LinkedIn users.

These numbers are too big to ignore. If you don't routinely use social media as part of your marketing, you may be missing out on potential opportunities. At our panel discussion at REBA's spring 2016 conference, my co-panelists, Kim Bielan and Justin Tucker and I shared some tips on how to increase your social media use and presence. Here are just a few of those tips that you can incorporate into your daily schedule:





• **Update your contacts and use those business cards**. Take the pocketful of business cards from your last networking event, enter them into your contacts and mine them for social media information. Then follow, subscribe, and link in or connect to those accounts.

This is a great opportunity to connect or reconnect with clients, referral sources and others. And it may bring you great insights into what your contacts are doing, which can make any outreach more personal and timely.

• **Don't ignore those birthday or new job prompts**. Use social media generated opportunities to connect. But don't just "like" that your contact has a new job or is celebrating an anniversary at a long-time position. Send a personal message along with those well wishes and an invitation to have coffee or meet up at a REBA networking event. You might be surprised how often you'll get a positive response to those messages.

• **Use social media to publicize events you're attending**. You can tweet or post about a panel discussion you'll be participating in, or an event you're attending before, during and after, and include addresses of the organizer and the venue for additional likes and retweets. It's all about starting a conversation, and encouraging as many others as possible to join you.

> If you don't routinely use social media as part of your marketing, you may be missing out on potential opportunities.

• **Add your photo**. Put a face to your name. Think about it: all things being equal, are you more drawn to the faceless egg or a photo? Adding a recent photo brings an approachable point of contact, whether you're looking to find a new position or are recreating a brand as a thought leader. And consider updating your photo on a regular basis. If you have the good fortune of getting a meeting out of a social media contact, you want them to recognize you.

• **Join social media discussion groups** (and start with REBA's LinkedIn page). This is another way to increase your potential outreach. There are alumni groups, charitable groups, industry groups and sports fan groups. All of these provide an opportunity to develop deeper connections with group members. Staying on top of trends in the group will help you stay current and relevant while providing new sources of information to share with your contacts. Be sure to join discussion groups that will contribute substance with various perspectives on new information and inquiries within your field. You'd be surprised at the types of information you may learn and other thought leaders you can meet in these groups.

• **Embrace your summary**. Your summary is where you get to shine! Create a condensed summary that is conversational in tone that differs from your firm's bio. You are giving a short pitch to someone. Tell them how you differentiate from others in the field. Make yourself known as a thought leader.

• **Republish!** If you've written an article for another publication, blog or website, use this content to post on social media. REBA's LinkedIn page is a great place for this. Make sure to include a source to the original publication. You will begin to develop a list of written works on your profile to demonstrate your involvement in your practice or industry.

• **Make social media a daily habit**. Pick a time that works best, whether it's morning, lunch time, or after work, and take 15 minutes to "like" a post, share an article you've read, post a blog, or look for new contacts.

These are just a few tips to get you started and make social media a daily habit that will help you quickly build a following, and make new contacts that may someday lead to business.

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Remote electronic acknowledgments

ACKNOWLEDGMENTS, CONTINUED FROM PAGE 1

fore a notary public . . .” There is no ambiguity there. “In person” means just what it says, so remote electronic acknowledgments are clearly prohibited.

However, what of an “in-person” electronic acknowledgment? Would that be legal in Massachusetts? While not expressly authorizing an in-person electronic acknowledgment, Chapter 289 of the Acts of 2016 does not expressly prohibit it.

§4 of the new law (which amends G.L. c.222, §8) directs the notary to type his name directly beneath his signature “and affix thereto the date of the expiration of such person’s commission.” No problem doing all of that electronically. But the next section requires the notary to have an official seal or stamp and describes what information should be contained on it. While this section does not explicitly require the notary to affix the stamp to the acknowledgment, another section of the law that prescribes the form of the acknowledgment includes a line that is labeled, “official signature and seal of notary public.”

So is a seal required for a valid acknowledgment? The same section of the law that requires the notary to have a seal also states, “failure to comply with this section shall not affect the validity of any instrument . . .” and the Deed Indexing Standards state the registry of deeds will record a document even if the acknowledgment does not contain a seal.

So is a seal required for a valid acknowledgment? The same section of the law that requires the notary to have a seal also states, “failure to comply with this section shall not affect the validity of any instrument . . .” and the Deed Indexing Standards state the registry of deeds will record a document even if the acknowledgment does not contain a seal. While omitting the seal from an acknowledgment might cause the notary to run afoul of the new statute, a document lacking a seal would still be valid and could still be recorded.

Still, the wisest course would be to address electronic acknowledgments legislatively and to do so sooner rather than later. As the real estate industry moves aggressively towards transactions that are entirely paperless, Massachusetts registries of deeds and the conveyancing bar should strive to keep pace.

A regular and welcome contributor to REBA News, Dick Howe has served as register of deeds in the Middlesex North Registry since 1995. He is a frequent commentator on land records issues and real estate news. Howe can be contacted at richard.howe@sec.state.ma.us.

Homeownership rate keeps falling

HOUSING, CONTINUED FROM PAGE 4

coming less viable for an increasing number of young citizens in Massachusetts, particularly in Greater Boston.

A few points worth noting:

• First, there is no immediate, sweeping solution, as the single family mortgage business is a retail business.

• Second, there is an opportunity for some light to pierce this darkness, particularly in Gateway Cities and perhaps, most particularly, in Gateway Cities with good rail links to the downtown Boston core.

• Third, never forget that much of this is the result of our anemic housing production efforts.

• Finally, even for a potential borrower with a healthy income and excellent credit, the so-called “wealth barrier” – accumulating a sufficient down payment – remains a nearly insurmountable hurdle on the path to homeownership.

What can be done?

With any luck, teaser rates, no document liar loans, and similar vices from the last great boom will remain consigned to the ash heap of history. Nonetheless, riskier low down payment loans are going to be a part of any solution, but they must be coupled with strong buyer education programs. If the last crash taught us anything, it is that an educated consumer can make a riskier loan product viable.

MassHousing’s Mortgage Insurance Fund, the MassHousing Partnership’s One Loan Program and FHA low down payment loans will be more in demand than ever.

One of the more creative suggestions heard recently at an industry meeting was for the state’s quasi-governmental agencies, particularly MassHousing, to work with the management companies within its rental portfolio to identify (and groom) future homeowners from the leading ranks of tenants. Employer-based programs to foster homeownership may also need to move beyond the beta stage. Some additional original thinking along these lines is very much needed.

Bob Ruzzo is senior counsel in the Boston office of Holland & Knight, LLP. He possesses a wealth of public, quasi-public and private sector experience in affordable housing, transportation, real estate, transit-oriented development, public private partnerships, land use planning and environmental impact analysis. Ruzzo is also a former general counsel of both the Massachusetts Turnpike Authority and the Massachusetts Housing Finance Agency. He also served as chief real estate officer for the Turnpike and as deputy director of MassHousing. Ruzzo can be contacted by email at robert.ruzzo@hklaw.com.

Diane Rubin joins REBA Dispute Resolution

RUBIN, CONTINUED FROM PAGE 1

a matter does not settle at the initial session, Rubin is committed to working diligently with all parties to continue to dialogue, explore open issues and opportunities and work with the parties to find a path forward.

Rubin has a law degree from Boston University School of Law and a bachelor’s degree from Brandeis University, magna cum laude, Phi Beta Kappa.

She has received mediation and arbitration training from the Community Dispute Settlement Center, the American Arbitration Association and Getting to Yes: Alternative Dispute Resolution at Harvard Law School.

At REBA, Rubin is president-elect and also serves as co-chair of REBA’s Condominium Law and Practice Section. She is a member of Commercial Real Estate Women (CREW), the Women’s Bar Association (Dispute Resolution Section), Community Associations, Inc. and the Abstract Club.

Rubin believes that each dispute is unique and works with the parties to fashion the optimal dispute resolution process. She confers with counsel in advance of mediation sessions to ensure an efficient and effective session. She is committed to proper preparation ahead of time to gain a thorough understanding of both background and legal issues involved.

About REBA Dispute Resolution

REBA Dispute Resolution (REBA/DR) was established to meet the growing needs of the current and future real estate and transactional practice. By combining the talents and resources of senior Association members, who are highly recognized in their field of expertise, including retired Appeals Court, Housing Court, Superior Court and Land Court judges, with a respected 150-year-old state-wide bar association dedicated to excellence, REBA/DR brings much needed specialized dispute resolution alternatives to the legal and real estate communities as well as the general public.

Founded in 1995 and incorporated as a G.L.c. 156B corporation in early 1996, REBA/DR emerged from the Association’s strategic planning initiatives in the early 1990s. It is a wholly-owned subsidiary of The Real Estate Bar Association for Massachusetts, Inc., a G.L.c. 180 nonprofit corporation.

REBA/DR is the only dispute resolution provider in Massachusetts with a long-established franchise and a high level of name recognition concentrating in real estate and business disputes and bringing a market-driven philosophy to dispute resolution management. REBA/DR is an approved dispute resolution provider for the Land Court.

To schedule a mediation, arbitration or case evaluation with Diane Rubin, contact Andrea Morales, REBA/DR’s Manager, at morales@reba.net.

Cyber fraud and the conveyancing attorney

FRAUD, CONTINUED FROM PAGE 2

one of the commonly used methods, the imposter could have gained access to Mr. Jacob's computer or the password to Mr. Jacobs' email account. He would then be able to send a request to the "personal banker" that appeared to be genuine. Probably by the same means, the imposter was also able to determine Mr. Jacobs' travel plans, so he would know when it would be difficult to verify the instructions by making a phone call to the account holder.

Because the bank had good security for online financial transactions and access to customer financial information was protected with user names, passwords and perhaps even two factor authentication, the thieves decided to ignore the secure part of the system and to just ask for the money by sending an email to a vulnerable employee. Such a request did not require a signature, a withdrawal slip, a picture ID, the last 4 digits of the social security number, or mother's maiden name. Just an email purporting to be from a customer saying, "Here are some wire instructions, please send the money."

What happened to Berkshire Bank and Mr. Jacobs is very similar to the fraud used to steal closing funds from attorneys. According to my sources, this is how it works:

1. The thieves identify properties for sale through one of many online listing services or brokers' websites.

2. They send the chosen brokers an email containing a link that, when opened, either enables the thief to obtain the email or computer password of the broker or the imposter claims to be the system administrator asking the broker to change his or her password, which the link then transmits to the thief. Real estate brokers do not typically invest in good internet security, and many individual brokers have their own private email accounts with little or no security.

3. Once the thief penetrates the broker, all the information regarding the sale is potentially available: names and email addresses of parties, closing date, copies of offers and purchase agreements, amount of proceeds, etc. and most importantly, the name and email address of the conveyancing attorney who is going to be distributing the seller proceeds.

4. Other participants including buyer and seller are likewise vulnerable to infiltration because of weak security, but it is more work to find them than it is to identify properties that are on the market from online listings.

5. Based on the information obtained, the thief sends the closing attorney an email asking that the wire instructions formerly given be changed to a different account (sometimes even in the same bank as the authentic instructions), which will be cleared and closed by the thief as soon as the money is received. Using the information obtained from the infiltrated computers, it is not difficult to make these emails look authentic.

If the conveyancing attorney has not avoided the dilemma by declaring in advance that wire instructions transmitted by email will not be honored, it is at this point in the transaction that the conveyancing attorney must intervene either to authenticate the instructions or to ignore the instructions and decide to send a check by overnight carrier (in such a situation, it is unlikely that the conveyancing attorney would be bound by any contrary payment provisions of the purchase and sale agreement).

As in the *Berkshire Bank* case, the thieves gain access to the well-secured resource through a poorly defended access point. Without going into great detail, many of the forged emails are extremely hard to identify and you cannot rely on broken English or suspicious-looking return addresses. They may have genuine-looking logos which are easy to cut and paste from the original documents, and I have even seen an otherwise genuine email from an attorney in which only the account name and number had been changed.

For these reasons, many attorneys now refuse to accept wire instructions delivered by email, and are especially cautious about emails that purport to give new instructions shortly before or after the documents are recorded. In any event, if such instructions are to be honored, as a minimum they must be confirmed by a reliable source at a telephone number known to be valid (not one contained in the email giving the instructions).

But keep in mind that if you are unable to reach the confirmation number, you need to hold the funds until satisfactory confirmation or reliable, alternative delivery instructions have been obtained. In general, it should be presumed that last minute changes in wire instructions are per se fraudulent.

It has been my recommendation that any purchase and sale agreement that provides for the payment of proceeds by wire transfer, include language that specifies that "notwithstanding any agreement to the contrary, the transmittal of proceeds of the sale by wire transfer shall be subject to the satisfaction in the discretion of the conveyancing attorney that the instructions given are accurate and duly authorized," together with a "wet ink" indemnity from the party giving the instructions.

> When asked why he robbed banks, the well-known stickup artist Willie Sutton said, "Because that's where the money is."

In addition, I am seeing more and more attorneys adding to the footer of their email signature line a statement in bold type stating they will not honor wire instructions given or changed by email.

Great care is justified, not just because of the potential financial loss to the attorney and his or her client, a loss which can only be recovered with good luck, but also because the availability of insurance coverage for resulting losses remains unclear.

Co-chair of REBA's ethics section, Henry Dane has practiced law in Concord for 45 years with a broad-based practice including real estate, zoning and land use, permitting, civil litigation and appeals, municipal law, medical employment law, medical ethics and research integrity, non-profit and charitable corporations and commercial lending. Dane can be contacted at hdane@danelaw.com.