

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.: 09-1809

THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC.

Plaintiff – Appellant,

v.

NATIONAL REAL ESTATE INFORMATION SERVICES, INC. and
NATIONAL REAL ESTATE INFORMATION SERVICES, L.P.,

Defendants – Appellees

**BRIEF OF THE MASSACHUSETTS BAR ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT'S APPEAL
AND SUPPORTING REVERSAL**

The Massachusetts Bar Association,

By its attorneys,

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CORPORATE DISCLOSURE

The Massachusetts Bar Association (“MBA”) is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The MBA is a state-wide bar association that serves the legal profession and the public. There is no parent corporation or publicly-held corporation that owns 10% or more of MBA’s stock.

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Massachusetts Bar Association (“MBA”), founded in 1910, is a non-profit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence and respect for the law. The MBA is the largest bar association in Massachusetts, with approximately 14,000 members state-wide. It comprises a House of Delegates that consists of a president, president-elect, two vice-presidents, treasurer, secretary, the two most immediate, living past presidents, eighteen regional delegates, seven at-large delegates, chairs of the sixteen section councils and others. The MBA is governed by a set of bylaws, which were most recently approved by the members in October of 2008.

The mission of the MBA is to provide professional support and education to members and advocacy on behalf of lawyers, legal institutions and the public. As part of its advocacy goal, the MBA has formed an Amicus Curiae Committee (“ACC”) to evaluate certain litigation in which the MBA may be interested in participating. Upon the receipt of a proposal from the ACC, the House of Delegates votes on whether the MBA should participate in the cause through the filing of an amicus curiae brief. The ACC has determined that the issues raised in this case so affect the public policy of the Commonwealth of Massachusetts that a

brief amicus is warranted. The House of Delegates unanimously has approved its filing.

II. INTRODUCTION

In its order granting summary judgment for defendants-appellees (collectively “NREIS”), the District Court adopted a definition of the practice of law which is contrary to the policy of the Commonwealth of Massachusetts – namely, that the protection of laws governing the practice of lawyers should be afforded to those relying on the advice and services of individuals and/or entities for the purpose of transferring property rights. The District Court’s opinion was, in essence, that the benefit of promoting competition in the real estate market outweighed the benefit of protecting the public’s interest with respect to the transfer of real property. *See* Record Appendix (“R.A.”) at 901-903. The Court justified its conclusion by finding that not every step involved in the chain of events necessary to effectuate a transfer of real property required the practice of law, save the actual closing, so there was no basis for finding that NREIS had violated M.G.L. ch. 221, § 41. *See* R.A. at 892-895. This is too narrow a reading of established law and custom in Massachusetts and fails to adequately protect both the individual and public interest.¹

¹ The MBA also joins the Boston Bar Association’s arguments set-forth in its amicus curiae brief in support of the Plaintiff-Appellants’ appeal in that the Real Estate Bar Association’s (REBA) suit was not state action and the imposition of

III. SUMMARY OF THE ARGUMENT

The steps identified by the District Court as necessary to effect a legal transfer of real estate are more than a collection of unrelated parts, but rather the application of a series of publicly enacted statutes and common law which secure significant legal rights for owners and users of land, and the public generally. The provision of advice and services in connection with the transfer of real estate therefore falls within the province of the legal profession. Thus, to the extent that persons who provide such advice or services are not admitted to practice law in the Commonwealth, they are engaging in the unauthorized practice of law in violation of M.G.L. ch. 221, §41.

The Commonwealth's requirements with respect to the conduct of lawyers, as well as the vigorous review process upon application for admission to the Bar, are the best means by which to protect the significant interests at stake in the conveyance process. The legal profession is carefully monitored and controlled by means of extensive disciplinary measures and a careful judiciary. The same cannot be said of trade associations of which NREIS may or may not be a member.

Finally, the numerous steps taken by NREIS prior to the closing, if done properly, may give rise to a need to apply legal judgment. There is no assurance from NREIS, however, that a legal professional supervises, reviews or pays any

liability on REBA under 40 U.S.C. § 1983 penalizes the free exercise of the constitutionally protected right to bring reasonably based claims for judicial relief.

attention to these steps. It is this fact which ultimately leads to the conclusion that NREIS is engaged in the unauthorized practice of law.

IV. ARGUMENT

A. The Series Of Events Culminating In The Transfer Of Real Property Implicates Significant Legal Rights Which The Legal Profession Should Regulate.

The legal and orderly transfer of property rights is essential to the well being of society. In the realm of private life, ownership or tenancy of real property ranks at the top of human needs. Consequently, legislators and courts have created rules to provide a predictable method of protecting interests in real property. The District Court identified the following steps as necessary to a legal transfer of property: (1) the title examination; (2) resolution of any clouds on title; (3) the closing; and (4) the recordation of title documents and disbursements. *See* R.A. at 884-886. The District Court cited to some of the many Massachusetts statutes that regulate transfers of property and acknowledged that the “[title] examination may also require review of off-record matters to determine the state of title,” and that “the cure [to a title defect] may require judicial intervention.” *Id.* Nevertheless, relying on a narrow interpretation of *In re Opinion of the Justices*, 289 Mass. 607, 194 N.E. 313 (1935) and the Black’s Law Dictionary definition of “conveyancing,” the Court held that the “closing” was the only step in the process

of transferring real property that encompassed the practice of law.² *See* R.A. at 890-891.

The Court's opinion overlooks the fact that in Massachusetts, the transfer of interest in land is replete with statutes, codes and judicial decisions touching on contractual rights and obligations; land use doctrines dealing with easements, restrictions and rights of third parties; the creation and validity of mortgages; public health requirements; hazardous materials removal and control; building and zoning codes, and the like. The legal consequences which may result from the misapplication of these statutes, codes and judicial decisions are extremely significant for both the individual and the public generally. There are numerous ways in which a transfer of real estate may require advice as to certain rights, obligations and duties of a buyer or a seller, a borrower or a lender, or a landlord or a tenant. In addition, the possible complications in a real estate transaction are endless: undischarged mortgages, newly discovered covenants, disclosure obligations, environmental violations, tax liens, adverse possession, improper disbursements of proceeds, improper escrow, and more. "Of the many areas of law

² To the extent there exists any question about the scope of the practice of law as it relates to conveyancing in Massachusetts, the appropriate resolution would be to obtain an explicit determination by certifying a question to the Supreme Judicial Court ("SJC") of Massachusetts, as the Plaintiff-Appellant has requested. This is particularly pertinent where the District Court acknowledged that the point had not been addressed by the full bench of the SJC, *see* R.A. at 893-894, the case was brought under M.G.L. ch. 221, § 46B and involves the interpretation of state law.

practice, conveyancing is one which lends itself particularly to formulation through decisional law and commentary as to what are appropriate procedures.” *Fall River Sav. Bank v. Callahan*, 18 Mass. App. Ct. 76, 83, 463 N.E.2d 555, 561 (1984).

Contrary to the District Court’s finding, “conveyancing” is a practice of law and is not limited to “the act or business of drafting and preparing legal instruments” as defined by Black’s Law Dictionary. *See* R.A. at 891. Nor is it the case that only the final step in the conveyance process, the closing, constitutes the “practice of law” within the scope of M.G.L. ch. 221, §41. *See* R.A. at 890-891. If anything, *In re Opinion of the Justices* suggests the opposite by highlighting the integral role of the “office lawyer” who lays “the groundwork for future possible contests in court[,]” and has a “profound effect on the whole scheme of the administration of justice.” 289 Mass. at 614, 194 N.E. at 317. Except for marriage, the acquisition of an interest in land is probably the most important legally consequential act a citizen can undertake and the interests at stake should not be minimized for the purpose of promoting competition in the real estate market.

In sum, an individual’s interests are best served by ensuring the tasks, which eventually provide legally enforceable rights in matters of private property, be undertaken or managed by an individual admitted to practice law in Massachusetts. The steps to a proper conveyance articulated by the court are not a series of

random events any more than the human body is merely a collection of parts.

From the offer to purchase, to the delivery of a deed, each step produces legal consequences and connects to each other step in the process, eventually resulting in the creation of significant legal rights and obligations.

B. The Public Interest Is Best Served By Ensuring Individuals Engaged In Land Transactions Are Advised By Members Of The Legal Profession.

The benefits of ensuring that the legal profession is solely responsible for the transfer of property rights are not limited to individual parties to the transaction. Members of the legal profession are individuals who have adopted “a line of work that is not only useful, but that also claims to promote the interests of the whole community as well as the individual [attorney].” James A. Brundage, *The Medieval Origins of the Legal Profession 2* (University of Chicago Press, 2008). Furthermore, “the purpose of the requirement of a license as a condition of the right to practice law, as in the instances of the physician, the insurance broker, the auctioneer and of others, where licenses are required, is not to protect the practitioner, but to protect the public.” *In re Shoe Mfrs. Protective Ass’n, Inc.*, 295 Mass. 369, 372, 3 N.E.2d 746, 748 (1936); *see also In the Matter of Tocci*, 413 Mass. 542, 547, 600 N.E.2d 577, 581 (1992). The fundamental public policy justification for permitting only licensed attorneys to conduct conveyances for their clients, and excluding all others, “is to be found, not in the protection of the bar

from competition, but in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons[.]” *Lowell Bar Ass’n v. Loeb*, 315 Mass. 176, 180, 52 N.E.2d 27, 31 (1943). The promotion of market competition over community concerns is inconsistent with this policy of the Commonwealth.

First, under Massachusetts law “an attorney owes a duty to non-clients who the attorney knows will rely on the services rendered [to his client.]” *Robertson v. Gaston Snow & Ely Bartlett*, 404 Mass. 515, 524, 536 N.E.2d 344, 349-50 (1989). This policy ensures that others involved in the conveyance process can benefit from the involvement of trained and educated legal professionals, not the least of these benefits being the possibility of holding these professionals accountable through the legal malpractice process, if they are negligent in their services and/or advice. Second, allowing an individual who has not shown his “qualifications before engaging in [the practice of law and] . . . obtain[ed] a license attesting [to] his skill and character,” *McMurdo v. Getter*, 298 Mass. 363, 366, 10 N.E.2d 139, 141 (1937), may not only result in the possible complications cited earlier with respect to an individual’s rights, but would also threaten the integrity and reliability of the Commonwealth’s registries of title. The reliability and soundness of the public records of conveyances are of great public significance since accurate records impede fraud, foster the alienability of real property, and provide for

predictability and integrity in real estate transactions. “Property owners, prospective purchasers, potential lenders, title searchers and title insurers alike must each be able to rely confidently on the integrity of the land records.”

Lichtman v. Beni, 280 Conn. 25, 35, 905 A.2d 647, 653 (2006).

C. The Commonwealth’s Requirement That Attorneys Adhere To A Stringent Ethical Code Weighs In Favor of Entrusting the Transfer Of Legal Interests To The Legal Profession.

For more than a thousand years, the Anglo-American legal tradition has required that those who would provide law-related advice and services, which includes the practice of conveyancing, must “agree to observe specific ethical standards in carrying out their work as a condition of entrance into practice.” Brundage, *supra* at 491. These rules are “different from and more demanding than those incumbent on all respectable members of the community in which they live.” *Id.* at 2. The expectations of the profession have turned into a form of “social contract” with the public: “[t]he public grants a profession autonomy to regulate itself through peer review, expecting the profession’s members to control entry into and continued membership in the profession, [and] to set standards for how individuals perform their work so that it serves the public good[.]” Neil Hamilton, *Professionalism Clearly Defined*, 18 NO. 4 PROF. LAW. 4, 4-5 (2008). The legal profession is distinct from corporations and other for-profit business entities in that its members are subject to extensive disciplinary controls, statutes and regulations.

Where there are doubts about the character or fitness of an applicant to the Massachusetts bar, the Court will resolve them “in favor of protecting the public by denying admission[.]” *In re Admission to Bar of Com.*, 444 Mass. 393, 415, 828 N.E.2d 484, 501 (2005) (quoting *Matter of Prager*, 422 Mass. 86, 661 N.E.2d 84 (1996)). Moreover, when reviewing an attorney disciplinary decision of the Board of Bar Overseers, the Court “must consider what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior.” *Matter of Concemi*, 422 Mass. 326, 329, 662 N.E.2d 1030, 1033 (1996).

In *In re: Eric Levine*, 19 Mass. Att’y Disc. R. 239, 2004 WL 5214985 (Ma. St. Bar. Disp. Bd. 2004), a single justice of the Supreme Judicial Court (*Sosman, J.*) considered the application of ethical rules in the public interest in the context of conduct strikingly similar to that of the defendants in this case. Levine, a suspended attorney, was charged with providing legal services and advice through his company “Closing Tek” which provided both legal and non-legal services to real estate lenders. “The general character of [Closing Tek] is to provide real estate title examinations for residential and commercial mortgage lenders and related services and products.”” *Id.* at *1.

After his original suspension went into effect, Levine continued to operate Closing Tek. He then enlisted an admitted attorney, Michael Levin, to attend the closings. He attended almost sixty closings; his only role was to physically attend

the closing; he did none of the legal or non-legal work to prepare the “closing package”. He was acting, therefore, “as a mere straw.” *Id.* at *2. The Court stated, “I do not find credible the suggestion that none of those [sixty] transactions required any form of legal services whatsoever other than the physical appearance of an attorney at a closing.” *Id.* Thus, the Court added four years to Levine’s suspension, holding that he had engaged in the unauthorized practice of law in violation of M.G.L. ch. 221, §41.

The *Levine* decision illustrates the high importance that the Court accords (a) to the fact that conveyancing is a process, not independent units, and is to be considered in that light; and (b) to the importance of stringent ethical standards applicable to that process.

D. The Activities Of NREIS Are The Unauthorized Practice Of Law.

NREIS characterizes its services as a concatenation of separable events that only requires legal attention at closing. As the District Court found, NREIS provides “services related to residential real estate transactions,” including “title examinations, settlement services, deed preparation, and disbursement of mortgage loan proceeds.” *See* R.A. at 883. NREIS has one vendor that performs title examinations and another vendor for deeds. *Id.* NREIS then “schedules the real estate closing with, and transmits the relevant closing documents to, a Massachusetts attorney,” but then the file is transferred back to NREIS, which

“disburses the settlement funds, reviews the transaction documents to guarantee their proper completion, and ensures that the relevant documents are properly recorded.” *Id.*

The trouble with NREIS’s services is that, except for the lawyer who attends the closing and receives the relevant documents, none of the other steps in the process receive the supervision, oversight, review, or attention of a legal professional. Nothing guarantees that NREIS’s “vendors” or NREIS itself, have had the requisite education or training. Nothing assures that they will adhere to a strict set of ethical guidelines or abide by a duty of loyalty to their client. As in *Levine*, it is simply “not credible” that none of these events leading up to NREIS’s closings require legal judgment. As noted earlier, the possible complications in a real estate transaction are endless. Without the guidance of a lawyer throughout the process, the untrained or undisciplined eye could miss or choose to ignore these complications in order to finish the deal. There is no public policy justification for allowing this to happen.

However NREIS may wish it otherwise, history, custom and law compel the conclusion that what NREIS and its operatives do is the practice of law. The District Court’s adoption of NREIS’s position that the rights-creating and the rights-protecting services that lawyers provide are nothing more than products for sale “in the markets” should not be allowed to stand. *See* R.A. at 902-903.

V. CONCLUSION

For the reasons stated and upon the authorities cited, the MBA prays that the judgment in favor of NREIS be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,810 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), (6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(D)(1)(B), I certify that the BRIEF OF AMICUS CURIAE OF THE MASSACHUSETTS BAR ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT AND SUPPORTING REVERSAL, filed electronically with the Clerk's Office of the United States Court of Appeals for the First Circuit, was served on the following parties by way of electronic delivery to counsel who are registered participants or by U.S. mail, as noted, on February 12, 2010.

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