

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THE REAL ESTATE BAR ASSOCIATION)	
FOR MASSACHUSETTS, INC.)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 07-10224-JLT
)	
NATIONAL REAL ESTATE INFORMATION)	
SERVICES, INC. and NATIONAL REAL)	
ESTATE INFORMATION SERVICES, L.P.,)	
)	
Defendants.)	
)	
)	

MEMORANDUM OF THE MASSACHUSETTS BAR ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF PLAINTIFF'S CROSS-MOTION
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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 is comprised of a House of Delegates that consists of a president, president-elect, two vice-presidents, treasurer, secretary, the two most immediate, living past presidents, 18 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.

ARGUMENT

The question presented for decision in this case is this: does the provision by individuals or entities of advice and services in Massachusetts relating to the acquisition or disposition of interests in real estate (“conveyancing”) constitute the unauthorized practice of law proscribed by M.G.L. ch. 221, § 41? For centuries, the provision of such advice and services in the Commonwealth has been considered to be within the province of the legal profession. The Supreme Judicial Court of Massachusetts has held that, except for certain ancillary actions, only lawyers who have achieved a level of knowledge and skill and have sworn to abide by heightened ethical standards, may engage in providing such advice and services. In re Opinion of the Justices, 289 Mass. 607, 194 N.E.2d 313 (1935). Thus, to the extent that persons or entities provide such advice or services, without being lawyers admitted to practice, they are engaging in the unauthorized practice of law in violation of M.G.L. ch. 221, § 41.

To determine whether certain activities constitute the practice of law, it is necessary to define the terms under discussion. “Law practice,” in common parlance, means an occupation conducted by persons professedly expert in the application of public law to public or private actions or needs. Such practitioners form the “legal profession.” Professor James A. Brundage, a leading historian of the development of the law, defines the term as follows:

The term “profession” properly speaking involves something more than simply a body of workers who do a particular kind of job on which they depend for support. A profession in the rigorous sense applies to 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 worker. A profession in addition requires mastery of a substantial body of esoteric knowledge through a lengthy period of study and carries with it a high degree of social prestige. When individuals enter a profession, moreover, they pledge that they will observe a body of ethical rules different from and more demanding than those incumbent on all respectable members of the community in which they live.

James A. Brundage, The Medieval Origins of the Legal Profession, 2 (University of Chicago Press, 2008).

Brundage's summary identifies three signifiers that locate particular occupational conduct within the purview of the "legal profession:" (1) the worker's effort provides specific assistance to members of the public in ways that "promote the interests of the whole community;" (2) the worker prepares to offer services by mastering "a substantial body of esoteric knowledge through a lengthy period of study;" and finally, and of utmost importance, (3) such workers take on the rigors of "a body of ethical rules different from and more demanding than" those that apply to the ordinary occupations of the community. As shown below, application of Professor Brundage's definition to the practice of conveyancing warrants its identification as the practice of law.

I. THE ACQUISITION AND DISPOSITION OF RIGHTS AND INTERESTS IN REAL ESTATE ARE MATTERS OF SIGNIFICANT PUBLIC IMPORT.

The orderly and peaceable creation and 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. In ancient times, holders of property relied on moats and weapons to secure their rights in property. As civilization developed, however, society created rules imposed by legislators and courts to provide a predictable method of protecting interests in real property. Better than weaponry, this complex of publicly enacted and universally applied statutes, cases and regulations, secures the rights of owners and users of land. The public, social purpose of these controls is obvious.

In Massachusetts, the transfer of interests in land is hedged about with an immense number of 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. Some of these considerations stem from colonial enactments; some from acts of the contemporary General Court. See Fall River Sav. Bank v. Callahan, 18 Mass. App. Ct. 76, 83, 463 N.E.2d 555, 561 (1984) (“Of the many areas of law practice, conveyancing is one which lends itself particularly to formulation through decisional law and commentary as to what are appropriate procedures.”). All, however, have the potential to affect a proposed transfer of property rights. No buyer or seller, lessor or lessee, mortgagor or mortgagee is required to obtain outside assistance in navigating the network of legal requirements affecting land transfers. Nevertheless, recognizing the public importance of having a citizenry well-informed on these matters, the legislature has imposed certain standards on those who would undertake to assist the public in determining their rights and obligations under the law relating to land transfers. We call those persons “lawyers.” We call what they do “conveyancing.” Obviously,

in preparation for a [real estate] closing, there is indeed a great deal of work that is not itself the delivery of legal services, and that the concept of a company to provide the administrative tasks of locating and organizing the documents, is, at least in theory, a valid one. It remains the case, however, that those administrative tasks are undertaken to provide the support for what will ultimately comprise the delivery of legal services to the parties – those documents form the basis for the various legal opinions and advice that ultimately allow the transaction to go forward.

Matter of Levine, 19 Mass. Att’y Disc. R. 239, 2001 WL 5214985 (Ma. St. Bar. Disp. Bd. 2004).

**II. THE PUBLIC POLICY OF THE COMMONWEALTH
REQUIRES THAT THOSE WHO OFFER ADVICE
AND SERVICES RELATING TO LAW-CONTROLLED
TRANSACTIONS IN LAND OBTAIN TRAINING AND
EXPERTISE.**

“The great body of questions which have made the subject of property so large and important are questions of conveyancing” O.W. Holmes, Jr., The Common Law, 287 (Dover Publ. Ed. 1991). The object of conveyancing practice in Massachusetts is to secure rights in land in compliance with the standards that the state imposes on the land transaction. To serve that purpose, a series of interconnected events occurs, starting, for example, when a potential buyer of land executes a document delivered to a potential seller offering to buy the seller’s property, and the seller accepts the offer. That document, at the threshold of a transaction, may create enforceable rights between the parties. See, e.g., McCarthy v. Tobin, 429 Mass. 84, 706 N.E.2d 629 (1999). That consequence may not be apparent to signatories who are not familiar with the state’s rules for determining when exchanges such as these create enforceable rights. For that reason, the people of Massachusetts have determined (a) that it would be prudent for citizens proposing to buy, sell, lease, mortgage or otherwise acquire or dispose of interests in land, to have advice on the legal consequences of their acts and (b) that those who would offer to provide that advice should receive a license to provide such service after meeting certain standards of training and expertise. “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, 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). It follows that, in order to

protect the public from “the activities of incompetent or unreliable persons,” the Commonwealth requires that a person offering such assistance “show his qualifications before engaging in a particular occupation and . . . obtain a license attesting his skill and character.” McMurdo v. Getter, 298 Mass. 363, 366, 10 N.E.2d 139, 141 (1937).

From colonial beginnings, Massachusetts has required increasingly extensive education and training in the law for those who would follow that profession. The Supreme Judicial Court, established in 1693, controls the gate to law practice, requiring that applicants for bar admission attain college and graduate law degrees, S.J.C. Rule 3:01, § 3.2-3.3; undergo a difficult written bar examination and a separate written ethics examination, id. §§ 2.1, 3.6; submit to an investigation of their moral “character, acquirements and qualifications,” id. § 1.3, and, finally, since 1701, as their first act as lawyers, to solemnly swear

. . . [To] do no falsehood, nor consent to the doing of any in court . . . [to] not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same . . . [to] delay no man for lucre or malice; but [to] conduct [oneself] in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God.

M.G.L. ch. 221, § 38.

Except for marriage, the acquisition of an interest in land is probably the most important legally consequential act a citizen can undertake. Such an act is 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. The Commonwealth has determined that, in the public interest, those who would advise, serve, and provide competent legal judgment in land transactions meet high standards of education and expertise.

III. THE PUBLIC POLICY OF THE COMMONWEALTH REQUIRES THAT THOSE WHO WOULD PROVIDE LAW-RELATED ADVICE AND SERVICES ADHERE TO A STRINGENT ETHICAL CODE.

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* op. cit. 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).

Starting with the 1701 lawyer’s oath through the latest amendments to the Massachusetts Rules of Professional Conduct, S.J.C. Rule 3:07, Massachusetts has recognized the need for heightened ethical standards governing those who would assist the public in something as immensely important as transactions involving land, whether for shelter or for business. “One source of expressed public policy is the body of rules governing the conduct of lawyers.” See McLaughlin v. Amirsaleh, 65 Mass. App. Ct. 873, 881, 844 N.E.2d 1105, 1112 (2006). 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, 1032-1033 (1996). Thus, in the Matter of Levine, 19 Mass. Att’y Disc. R. 239, 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 2.

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 3. 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.

IV. THE DEFENDANTS' ACTIVITIES CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW.

As shown above, the real estate closing services that the defendants offer amount to conduct with significant public import, performed, however, by individuals with no known periods of training and education designed to make them knowledgeable about the Massachusetts law governing real estate, and not subject to the exceptionally high ethical code which Massachusetts requires of those who offer such services.

It needs no citation to Marbury v. Madison, 5 U.S. 137 (1803), to assert that a court's primary purpose is to say what the law is. Whether conveyancing practice such as the defendants' conduct is the practice of law is itself a question of law and the Supreme Judicial Court has continually affirmed that it is. See Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment.

The defendants' argument that what they do is not the practice of law is a sophist's delight. First, they contend that the acquisition and disposition of interests in land is not a process, but a concatenation of separable events none of which require the exercise of legal judgment. Second, they wrench quotations from some judicial decisions in support of the fallacious contention that, because some stages in the process of closing may be performed by non-lawyers, such as the collection of recorded data, then none of the stages are the practice of law. Third, conceding that some semblance of a lawyer's imprint should be on the proceedings, they argue that they provide a lawyer to attend closings and notarize documents. In short, the defendants acknowledge the need for legal cover and find it in the use of the lawyer as fig-leaf. Justice Sosman, in Levine, supra, put paid to that contention. A lawyer who is brought in as "a mere straw" is no lawyer at all.

The defendants' argument is not only sophistical, illogical and dependent on mis-readings of Massachusetts decisional law. Worse still, it is an argument that condemns the idea of law itself. It assumes that the transfer of land is no more legally filled with risk than is the purchase of a newspaper. It disdains the centuries-long public policy that those who assist parties in the transfer of rights in land be subject to rigorous public regulation.

Justice Sosman's rationale in Matter of Levine irrefutably bars defendants' business practices. Admittedly, defendants can perform purely administrative tasks involved in the ultimate transfer of legal rights in property, tasks which law firms often delegate to legal secretaries or paralegals. But never, not even in the simplest of conveyances, does the transaction end without the need for "various legal opinions and advice that ultimately allow the transaction to go forward," Levine, supra, and assure that the interests of the individual and the public are secure. The public policy of the Commonwealth demands no less.

CONCLUSION

The defendants' atomistic analysis of the process of conveyancing must fail. What they do in the marketplace of land transactions falls, beyond doubt, within the confines of the practice of law. They nevertheless deny that any of their operatives must comply with the laws requiring education, training, examination, proof of character and fitness, the taking of oaths and compliance with ethical rules promulgated for the protection of the very persons and entities they serve. They proffer the charade of a lawyer at a closing, notarizing documents, as a substitute for the actual protection public policy demands. The Massachusetts Bar Association, which seeks to vindicate the long-standing public policy governing the legal profession, requests that the Court declare that the defendants are engaged in the unauthorized practice of law in violation of M.G.L. ch. 221, § 41 and bar them from continuing these unlawful practices.

Respectfully submitted,

THE MASSACHUSETTS BAR ASSOCIATION,

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document was served on all counsel of record in this action on March 13, 2009 via CM/ECF.

/s/ Jessica G. Gray