

COMMONWEALTH OF MASSACHUSETTS  
**SUPREME JUDICIAL COURT**

No. SJC-10744

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**THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC.,**

Plaintiff,

v.

**NATIONAL REAL ESTATE INFORMATION SERVICES and  
NATIONAL REAL ESTATE INFORMATION SERVICES, INC. ,**

Defendants.

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CERTIFICATION OF QUESTIONS FROM UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

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**BRIEF OF APPELLANT THE REAL ESTATE BAR  
ASSOCIATION FOR MASSACHUSETTS, INC.**

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Douglas W. Salvesen (BBO# 550322)  
Anthony B. Fioravanti (BBO# 664823)  
YURKO, SALVESEN & REMZ, P.C.  
One Washington Mall  
Boston, Massachusetts 02108  
(617) 723-6900

Date: September 17, 2010

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A.L. Eno & W.V. Hovey, <u>Real Estate Law</u> (4th ed. 2004) . . . . .	13, 22, 41
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K.M. O'Donnell, et al., <u>Handling Residential Real Estate Transactions in Massachusetts</u> (MCLE 2000) . . . . .	22
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### ISSUES PRESENTED

The Court of Appeals for the First Circuit has certified the following two questions to the Court:

1. Whether NRETS's activities, either in whole or in part, based on the record in this case and as described in the parties' filings, constitute the unauthorized practice of law in violation of G.L. c. 221, §§ 46, et seq.

2. Whether NREIS's activities, in contracting with Massachusetts attorneys to attend closings, violate G.L. c. 221, §§ 46, et seq.

### STATEMENT OF THE CASE

A conveyancer has a critical role in the purchase of a home, itself one of the most significant events in a person's life. After the parties have entered into their respective agreements (seller and buyer; buyer and mortgage lender), they entrust their transactions to a conveyancer. The conveyancer's obligation is to complete those transactions. The conveyancer evaluates the seller's title to the real estate being purchased and undertakes the steps required under the law to transfer the legal interests in that property. Because conveyancing necessarily involves judgments as to the parties' legal rights and obligations under Massachusetts law, it has been undertaken only by lawyers by

custom and long-practice. Indeed, when the Court observed more than 75 years ago that the practice of law included work outside of court, it cited conveyancing as an exemplar of such work. In re Opinion of the Justices, 289 Mass. 607, 613 (1935) (practice of law includes "conveyancing").

This appeal presents two questions. The first is whether conveyancing activities can be undertaken by a non-lawyer either directly or indirectly by subcontracting with attorneys to perform those activities. The second is whether the activity of hiring attorneys for others constitutes the practice of law.

Course of Proceedings.

In November 2007, REBA filed a petition pursuant to G.L. c. 221, § 46B in Suffolk Superior Court seeking to enjoin Defendants National Real Estate Information Services, a Pennsylvania limited partnership ("NREIS"), and its general partner, National Real Estate Information Services, Inc., a Pennsylvania corporation, from the unauthorized practice of law. NREIS removed the action to federal court and filed a Counterclaim which asserted that any restriction on its business practices was a violation of its federal constitutional rights.

Subsequently, the parties filed cross-motions for summary judgment. In April 2009, the District Court granted NREIS's Motion for Summary Judgment and denied REBA's Cross-Motion. In its Decision, the District Court allowed that "the practice of law ... embraces conveyancing," [Record Appendix ("RA") 893] and that there was an "expectation" under Massachusetts law that an attorney have "some involvement" in "preparing for and conducting the closing." [RA.895] However, the District Court also found it significant that this Court had not detailed the attorney's "involvement" in the conveyance. Therefore, it held that REBA's filing of the lawsuit to enjoin NREIS violated its federal constitutional rights. [RA.896-903].

REBA appealed the District Court's decision to the Court of Appeals for the First Circuit and requested certification of questions of state law to this Court. Following a hearing, the First Circuit held that there was no constitutional violation and vacated the judgment. The First Circuit found that there was no controlling precedent from this Court which addressed whether NREIS's activities constitute the unauthorized practice of law and certified the two questions to this Court.



## STATEMENT OF THE FACTS

NREIS provides both conveyancing services and title insurance services to its residential mortgage lender clients for real estate transactions (sales and mortgage refinancings) pending in Massachusetts.

[Scaled Record Appendix ("SRA") 13, ¶¶43-44] For the most part, NREIS, which describes itself as a "vendor manager," does not provide these services itself.

Instead, NREIS subcontracts the work out to attorneys and others whom NREIS "manages." [SRA.13, ¶44]

### A. NREIS's Conveyancing Services.

The Appeals Court has observed that "[o]f 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." Fall River Sav. Bank v. Callahan, 18 Mass. App. Ct. 76, 83 (1984). The commentary detailing and explaining those "appropriate procedures" is voluminous and takes up many shelves in any law library. In brief, the "appropriate procedures" consist of evaluating the title to the real estate being purchased or mortgaged and undertaking the steps required to transfer the legal interests in that property. [SRA.3, ¶5].

1. NREIS Believed That It Hired An Attorney To Conduct A Title Examination.

In the typical purchase and sale agreement, the seller has agreed to sell, and the buyer has agreed to buy, "good and clear record and marketable" title to the property.<sup>1</sup> [SRA.2, ¶2] Consequently, the first step for the conveyancer is to determine whether the seller actually has "good and clear record and marketable" title that he can transfer to the seller, and that there are no defects or "clouds" on the title so that the lender's lien can be perfected. [SRA.4, ¶8]

Mr. Craig Weber, NREIS's Senior Director of Title Operations, agreed that NREIS is unqualified to assess the status of title as none on his employees is an attorney. [SRA.14, ¶47] However, NREIS believed it satisfied Massachusetts law by retaining the services of Massachusetts attorneys to perform title examinations and provide NREIS with their determinations regarding the status of title. [Id.]

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<sup>1</sup> Because Massachusetts is a "title theory state" where a mortgage is a conveyance in fee, the same evaluation of title must be undertaken in a mortgage refinancing to determine whether the buyer will be able to provide the lender with "mortgage covenants." G.L. c. 183, § 19. See Faneuil Investors Group, L.P. v. Bd. of Selectmen of Dennis, \_\_\_ Mass. \_\_\_, 2010 WL 3565780 (Sept. 16, 2010) ("mortgage is a conveyance of title"). The mortgage instrument is actually a deed. G.L. c. 183, §§ 18 and 19.

With respect to the conveyances that NREIS conducts in Massachusetts for its lender clients, it contracted with Connolly Title Services, Inc., which it believed was a law firm,<sup>2</sup> for the provision of such title examinations. [SRA.14, ¶¶48-49] Mr. Weber believed that Connolly Title performed a "plenary search" of the real estate title and that it was "doing a search and establishing that there is clear title to the property or that they've identified the title to the property." [Id.] It is now clear that Connolly Title did not undertake the expected title examination of any properties conveyed by NREIS.

The purpose of a title examination<sup>3</sup> is to make a judgment in light of *in rem* state and federal law that the seller and mortgagor validly hold the quality of title in the real estate that they purport to possess and have agreed to convey. In general, a conveyancing

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<sup>2</sup> In the course of this law suit, NREIS learned for the first time that Connolly Title is not a law firm, is not authorized to practice law, and it has not performed "any legal analysis or review" of any of the titles conveyed by NREIS. [SRA.15, ¶¶50-51]

<sup>3</sup> The steps required to perform a title examination properly are described at ¶¶ 8-24 in the Affidavit of Kathleen M. O'Donnell, Esq. (attached as part of the Addendum). The Affidavit describes generally all of the activities undertaken in order to convey residential real estate in Massachusetts.

attorney responsible for the transaction will begin by reviewing the indices at the registry of deeds to find every deed from every grantor in the chain of title conveying an interest in the property, as well as other instruments that may raise adverse titles or claims, all liens, encumbrances, charges, including judgments against any person during the period the law makes them a lien on land, special assessments, statutory liens, and taxes and every other matter or thing appearing of record that may affect, implicate or impair the title.<sup>4</sup> [SRA.26, ¶ 14]

The examination of these record documents may disclose any number of "clouds" on the title, including those arising from a problem with a right of access to the property, adverse possession, bankruptcy filings, attachments, inaccurate descriptions in a deed, condominium issues, improper mortgage discharges, the pendency of divorce proceedings, easements, executions, homesteads, leases, lis pendens, mechanics' liens, mortgage foreclosures, uncertain powers of attorney, tax liens, or missing heirs, among others. [SRA.27, ¶14] While certain title defects may be labeled as routine,

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<sup>4</sup> It is common for a conveyancing attorney to use the services of a title abstractor to create a title abstract. [SRA.26, ¶11]

such as the identification of outstanding mortgages that need to be discharged, many others are more complex and require a substantive knowledge of Massachusetts real estate law. [SRA.6, ¶15]

Although most documents pertaining to real estate are recorded at the registry of deeds, depending on the property, a conveyancing attorney also may be required to review and evaluate the effect of "off record" matters on the title, including public documents filed at the probate court or at the town or city hall, documents prepared by registered land surveyors, and documents maintained by the tax assessor, among others, to ensure that the lender's interest in the property will be protected. [SRA.6, ¶¶17-18].

2. NREIS Subcontracts With A Non-Attorney Company Based In Las Vegas To Draft Deeds For Properties Being Conveyed.

For conveyances which require a deed, NREIS provides a deed to the parties upon request. NREIS does not prepare the deed itself. Instead, it subcontracts with the North American Deed Company, Inc., a non-lawyer company located in Las Vegas, Nevada, which prepares the deed. [SRA.17, ¶59]

3. NREIS Subcontracts With An Attorney To Conduct The Settlement Meeting.

After Connolly Title completes its work, the next step is the settlement meeting or "closing" of the transaction at which the parties meet, execute the necessary legal documents to effect the conveyance, and exchange the contractual consideration.<sup>5</sup> [SRA.8, ¶24]

NREIS's lender clients require NREIS to "ensure that a Massachusetts attorney is engaged to conduct the closing." [RA.377, ¶32] NREIS maintains a "network" of 70 Massachusetts attorneys for this purpose. [SRA.17, ¶55] Based on the anticipated date and place of the settlement, NREIS chooses one of these attorneys to conduct the settlement meeting. [SRA.17, ¶56] NREIS contacts the attorney it has chosen and tells him or her where the meeting will take place. NREIS provides the attorney the telephone numbers for the parties who are expected to attend. It also informs the attorney how he or she will receive the documents prepared by the lender (by mail, fax, e-mail). [Id.]

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<sup>5</sup> On occasion, persons unfamiliar with conveyancing will mistake this meeting, which is a single step in the process, for the entire settlement. Describing this meeting as a "closing" or "settlement" is somewhat misleading as there are significant actions that must be taken afterwards to complete the settlement and perfect the parties' legal interest in the property.

The attorney has no contact with the lender. The attorney is not involved in the preparation or review of documents to be executed by the parties at the settlement meeting, the examination or review of title to the property, the recording of the title documents, or the disbursement of funds. [SRA.17, ¶57] Following the settlement meeting, the executed documents are sent to NREIS. Finally, NREIS - not the lender - pays the attorney for his or her services. [SRA.17, ¶58]

The parties to a real estate transaction almost always have questions regarding the loan documents, the disbursement of the funds, the mortgage obligations, and other matters. [SRA.10, ¶32] While the attorney hired by NREIS can answer general questions about real estate law, because he or she has not done the title examination, the attorney cannot answer any questions about the property being conveyed. [SRA.17, ¶57] The attorney cannot even state that the buyer or mortgagee is receiving a valid property interest.

For the same reason, because the attorney performs no title examination, the attorney cannot provide the buyer with a certification required by law. G.L. c. 93, § 70. That statute requires that the mortgagor receive a certification of title based on a 50-year title

examination that, at the time the mortgage is recorded, the mortgagor holds "good and sufficient record title to the mortgaged premises free from all encumbrances." Id. NREIS has admitted that it does not provide the certifications of title to the purchaser that are legally required. [SRA.16, ¶53]

4. NREIS Completes The Parties' Transaction By Recording The Title Documents And Disbursing The Funds Pursuant To The Parties' Contracts.

Following the settlement, after it receives the documents executed by the parties, NREIS reviews them to ensure that they are properly completed. [RA.376, ¶28] Likewise, a conveyancing attorney would review and pass on all title documents before recording. [SRA.9, ¶29] The deed tendered by the seller would be reviewed to confirm that it conforms to the terms of the parties' purchase and sale agreement, is properly dated, contains the correct property description (as determined by a title examination), signed and acknowledged, and is legally enforceable. [Id.]

Following this review, NREIS ensures that the title documents are properly recorded. [RA.376, ¶28] The "Closings Instructions" from one of NREIS's lender clients require NREIS to ensure that the mortgage to



the lender "create[s] a valid lien on the property."  
[RA.843] Other instructions require NREIS to make  
certain judgments as to "applicable state law." For  
instance, NREIS is instructed that if the mortgagor is:

marrried to a person of ... same sex, or is in  
a Registered Domestic Partnership, a Civil  
Union or any other relationship recognized by  
applicable state law, [NERIS] agrees to take  
all necessary actions to ensure that Lender's  
lien is superior to any legal or equitable  
rights, title or interest that person may  
have in the Property.

[Id.]

The process for properly recording legal instru-  
ments with the registry of deeds requires specialized  
knowledge. In particular, in Massachusetts each reg-  
istry of deeds has within it two independent systems of  
land record-keeping. [SRA.4, ¶11] The first is a  
registered land system, a Torrens-type system under the  
control of the Land Court and implomented by separate  
local county officials in each registry of deeds. [Id.]  
The second is the unregistered land system managed by  
the local registries of deeds. [Id.] Property is  
generally either registered land or unrostered land,  
though it can sometimes be a combination of both. [Id.]

As to the recording requirements, the Land Court  
has issued a set of 63 "Guidelines" to "assist regi-  
stry personnel and the bar in determining the suitabi-

lity of documents presented for filing and affecting registered land.”<sup>6</sup> The Guidelines consist of 136 pages and refer to over 80 different statutes. Although issued as to registered land filings, the Guidelines “are also helpful as checklists for unregistered land transactions.” A.L. Eno & W.V. Hovey, Real Estate Law § 4.46 at 97-98 (4th ed. 2004).

Following the recording, NREIS completes the parties’ transaction by disbursing the settlement funds in accordance with the Settlement Statement. [SRA.18, ¶61] Disbursement typically includes paying any real estate taxes due, paying any other encumbrances on the property, obtaining discharges or releases, consistent with the parties’ obligations and instructions, and paying commissions due to the real estate brokers in a purchase transaction. [SRA.11, ¶35]

B. NREIS’s Title Insurance Services.

In addition to providing conveyancing services, NREIS issues title insurance policies (both owner’s and lender’s policies) on behalf of a number of title insurers. [SRA.18, ¶62] An owner’s policy insures that

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<sup>6</sup> The Guidelines are available as a PDF file at [www.mass.gov/courts/courtsandjudges/courts/landcourt/](http://www.mass.gov/courts/courtsandjudges/courts/landcourt/) and are printed in Eno & Hovey, supra, Ch. 63.

the legal title to the property is properly vested in the purchaser and that the title is free of defects, liens and encumbrances except those listed. [SRA.12, ¶38] A lender's title policy is similar but insures the legal validity and enforceability of the lien of the lender's mortgage. [Id.] Those title policies are predicated on the same title examinations conducted by Connolly Title and require the same legal skills and acumen needed for the conveyance.

The decision to issue or not to issue a policy is typically made by the conveyancer/agent on behalf of the title insurer. The policy is predicated on the title examination undertaken by the conveyancer/agent. [SRA.12, ¶¶39-41] The title insurer does not control the manner in which the conveyancer/agent determines the "quality of title." [Id.] For these reasons, title insurers operating in Massachusetts expect their agents to have a professionally reliable knowledge of Massachusetts real estate law. [Id.]

In accordance with the underwriting guidelines of the title insurer, and based on the title examination, the conveyancer/agent makes a determination as to the "quality of title." [Id.] Whether a policy will issue depends on this evaluation of the status of the title

and the conveyancer/agent's determination regarding the defects, liens or encumbrances that impair the title. [Id.] The determination as to which defects or encumbrances to identify as exceptions, which do not affect the use and enjoyment of the property, and which should be reported to the title insurer and the parties, are all decisions made by the conveyancer/ agent. [Id.]

With respect to NREIS, its various agency agreements similarly provide that the issuance of a policy by NREIS is to be based on its full and complete title examination. [SRA.18-19, ¶¶63-65] For example, NREIS's agreement with Stewart Title Guaranty Co. provides that title policies issued by NREIS must be based on a title report resulting from a "complete search and examination of those public records, surveys and inspections." [SRA.19, ¶65] NREIS's agreement with Old Republic National Title Insurance Company also requires NREIS to show as an exception all "matters which constitute a defect or question as to the validity and/or marketability of the title being insured." [SRA.19, ¶65]

Since NREIS has no understanding "as to what the examination of title consists of" for Massachusetts property [SRA.19, ¶66], it concedes that the issuance of a title insurance policy is based on the examination

it receives from Connolly Title, a non-attorney. [SRA.20, ¶67] NREIS relies on Connolly Title to determine the status of the title and NREIS simply inserts that determination into the title insurance policy. [Id.]

#### SUMMARY OF THE ARGUMENT

The Court should answer "YES" to each question certified to it by the First Circuit.

Since 1935, this Court has recognized that conveyancing, which includes evaluating title to the real estate being conveyed and undertaking the steps required under the law to transfer the legal interests in that property, is the practice of law to be conducted by attorneys. It cannot be seriously disputed that the practice of conveyancing requires the exercise of one's professional judgment and the application of legal principles to establish, alter, or extinguish a client's legal rights in real property. [Pages 18-25].

NREIS's activities fall squarely within this area reserved for those who have met strict educational requirements, have proven their knowledge of the law by passing a rigorous bar examination, have been certified of honest demeanor and good moral character, and are subject to the ongoing and direct oversight of the

judiciary. The title examination, provision of a deed, conducting the settlement meeting, and recording of the parties' title documents - all parts of conveyancing - all require the knowledge and application of the law. [Pages 25-40]. The fact that these activities have historically been conducted by attorneys indicates that they are the practice of law. [Page 40].

Because a title examination is also the predicate for the issuance of a title insurance policy, it is the practice of law when it is undertaken on behalf of another. NREIS's argument that the Court broadly has excepted all "title insurance" from the unauthorized practice of law is based on a misreading of Mass. R. Prof. C. 5.7, 426 Mass. 1412 (1998), and the applicable Comment to the Rule. [Pages 41-45].

NREIS's activities, in seeking to hire a law firm to conduct title examinations, and in contracting with Massachusetts attorneys to attend closings, also constitutes the unauthorized practice of law. A corporation cannot practice law indirectly by employing lawyers to practice for it. NREIS's business model, which consists of "managing" attorneys, destroys the direct, personal relationship that must exist between attorney and client. [Pages 45-50].

## ARGUMENT

I. THE PRACTICE OF LAW DESCRIBES THOSE ACTIVITIES THAT REQUIRE THE APPLICATION OF THE LAW AND LEGAL PRINCIPLES TO EVALUATE, ESTABLISH, ALTER OR PROTECT A CLIENT'S RIGHTS.

The law is that vast normative system of enforceable social rules which govern each individual's life, freedom, social relations, and property. Backed by the coercive power of the Commonwealth, the law includes constitutional provisions, statutes, administrative regulations, municipal ordinances, and the common law.

To give force and effect to this complex legal system, the Commonwealth has sanctioned an independent profession of men and women to practice law and relate the general body and philosophy of the law to a client's specific legal concern. The legal profession, which serves as the bridge between the law of the Commonwealth and its citizens, "is public in its nature and intimately connected with the highest functions of the State." In re Keenan, 314 Mass. 544, 546-47 (1943). Without lawyers, the benefits, protections and obligations of the law would be largely inaccessible.

The Commonwealth has an exceptionally strong interest in ensuring that the "peculiar privilege" of advising its citizens as to their legal rights, the procedures to be followed to secure those rights, and

the authority to act on their behalf as to such rights is conducted only by those persons "worthy of trust and confidence in matters pertaining to the law." In re Bergeron, 220 Mass. 472, 477 (1915). The basis for excluding all others from the practice of law "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, over whom the judicial department could exercise little control." Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 180 (1943). See also In re Margow, 77 N.J. 316, 325 (1978) ("the amateur at law is as dangerous to the community as an amateur surgeon").

Because the "law pervades all human affairs," it is "not easy to define the practice of law" or to list comprehensively the activities that can be undertaken only by lawyers and by no one else. Lowell Bar Ass'n, 315 Mass. at 180. Under the methodology employed by this Court, whether a particular activity is the practice of law depends on: (a) whether the activity requires an understanding and application of the law or legal principles to address a client's needs, In re Chimko, 444 Mass. 743, 750 (2005) (activity is the practice of law where it requires the exercise of one's



"professional judgment in applying legal principles to address [the client's] individualized needs"); and (b) whether the activity does, or has the potential to, establish, alter, or extinguish the client's legal rights, In re Shoe Mfrs. Protective Ass'n, Inc., 295 Mass. 369, 372 (1936) (practice of law includes managing the "establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them").<sup>7</sup>

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<sup>7</sup> Most other jurisdictions use a similar methodology. See, e.g., Baron v. City of Los Angeles, 2 Cal.3d 535, 543, 86 Cal.Rptr. 673, 469 P.2d 353 (1970) (practice of law includes all activities that "reasonably demand the application of a trained legal mind"); Denver Bar Ass'n v. Public Utils. Comm'n, 154 Colo. 273, 279, 391 P.2d 467 (1964) ("[g]enerally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law"); People ex rel. Ill. State Bar Ass'n v. Schafer, 404 Ill. 45, 53, 87 N.E.2d 773 (1949) ("weight of authority seems to be that if the advice given or the service performed requires legal skill or knowledge, or more than ordinary business intelligence, it constitutes the practice of law"); In re Jackman, 156 N.J. 580, 586, 761 A.2d 1103 (N.J. 2000) ("One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required"); R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 419-20 (Okla. 1972) (prohibiting a person from "the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent"); Board of Comm'rs of Utah State Bar v. Petersen, 937 P.2d 1263, 1267-68 (Utah 1997) (prohibiting a person from providing services

An activity that is otherwise the practice of law may nevertheless be performed by a non-lawyer if it (1) is merely a necessary and incidental part of the non-legal service being provided, Lowell Bar Ass'n, 315 Mass. at 181, or (2) is the preparation of an instrument that is "seldom" drafted by attorneys, id. at 186. To determine which instruments fall into this last category, the "actual practices of the community have an important bearing." id.

A. The Practice Of Law Includes Conveyancing.

It is axiomatic that the practice of law extends beyond litigation and "consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court." Opinion of the Justices, 289 Mass. at 613. As an illustration of this truism, the Court cited conveyancing as the practice of law. See also In re Levine, 20 Mass. Att'y Disc. R. 311 (2004) (rejecting as "not credible" assertions of vendor management company that it was not

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requiring the "knowledge and application of legal principles to serve the interests of another"). See also American Bar Association's Proposed Model Definition of the Practice of Law (practice of law is "the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law").

engaged in practice of law).

"Generally, all state courts agree that conveyancing does in fact constitute the practice of law."<sup>8</sup> Note, The Model Rules of Professional Conduct and the Unauthorized Practice of Law, 37 Suffolk U. L. Rev. 169, 176 (2004). See also Formal Advisory Opinion No. 04-1, 280 Ga. 227, 626 S.E.2d 480 (2006) ("The closing of a real estate transaction in this State constitutes the practice of law"); Bump v. District Court of Polk

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<sup>8</sup> A complete description of the activities that constitute the practice of conveyancing is necessarily beyond the scope of this Brief. A number of treatises provide a more complete account of the extensive amount of legal work involved in completing a residential real estate transaction. See, e.g., F.T. Talty, et al., Methods of Practice, (4th ed. 2000) (Chapters 5-9 devoted to residential real estate closings); Eno & Hovey, supra (Chapters 28-31 devoted to aspects of residential closings); K.M. O'Donnell, et al., Handling Residential Real Estate Transactions in Massachusetts (MCLE 2000) (two volumes); L.M. Breen, et al., Representing Lenders in Residential Transactions: Step-by-Step, Practical Advice (MCLE 2004); P. Wittenborg, et al., Real Estate Title Practice in Massachusetts (MCLE 2003); Peter M. Heintzelman, et al., Handling Residential Condo and Multi-Family Transactions: A Step-by-Step Guide (MCLE 1998); W.V. Hovey, et al., Massachusetts Nuts & Bolts of Residential Real Estate Transactions (1998); G. Stone-Turesky, et al., Residential Real Estate Basics: From Offer to Closing (MCLE 1996); W.P. Graham, et al., Residential and Commercial Title Insurance: What It Is, What It Does and How It Works (MCLE 2004); R.A. Dillingham, et al., How To Search a Residential Real Estate Title: A Practical Introduction to Title Abstracting (MCLE 2005). See also K.M. O'Donnell, Massachusetts Real Estate Law Sourcebook (MCLE 2007) (compilation of federal and state statutes and regulations affecting real estate).

County, 232 Iowa 623, 637, 5 N.W.2d 914 (1942) ("practice of law ... includes conveyancing"); Howton v. Morrow, 269 Ky. 1, 3, 106 S.W.2d 81 (1937) (same); People v. Aliani, 227 N.Y. 334, 337-38, 125 N.E. 671 (1919) (same); Dayton Supply & Tool Co. v. Montgomery Cty. Bd. of Revision, 111 Ohio St.3d 367, 369, 856 N.E.2d 926 (2006) (same); R.I. Bar Ass'n v. Auto. Serv. Ass'n, 55 R.I. 122, 134, 179 A. 139 (1935) (same); S.C. Medical Malpractice Joint Underwriting Ass'n v. Froelich, 297 S.C. 400, 377 S.E.2d 306 (1989) (same); 7 Am. Jur. 2d Attorneys at Law § 119 ("The practice of law is not limited to the conduct of cases or litigation in court; it embraces ... conveyancing").

Since the practice of conveyancing is a necessary adjunct to the complex array of statutes, regulations, ordinances, and common law precedents established in the Commonwealth by which rights in real property are created, modified, extinguished, and transferred, there is a strong public policy interest in ensuring that persons who perform conveyances for others are properly trained and qualified to do so.

This public policy interest extends well beyond the parties to the transaction. The Commonwealth has an equally strong interest in maintaining the reliabi-

lity and integrity of its recording system,<sup>9</sup> since accurate records impede fraud, foster the alienability of property, and provide for predictability on which these transactions depend. The Commonwealth has further protected that interest (a) by establishing a Land Court to provide a legal means to make troubled titles "marketable"; (b) by enacting the Good Funds Statute, G.L. c. 183, § 63B, following the Abbey Financial, Inc. scam, to require that the mortgage loan proceeds in certain real estate transactions be held by an attorney; and (c) by enacting the Title Certification Statute, G.L. c. 93, § 70, which requires the lender's attorney to provide the buyer with a certification that the buyer holds good and sufficient record title.<sup>10</sup>

By permitting only attorneys to convey real property for others, the Court protects not only the interests of the parties to the transaction, but the

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<sup>9</sup> From 1641 up until 1715, the registration of deeds was a function of the court system with the Clerks of the Courts acting as registers. See Pidge v. Tyler, 4 Mass. 541, 544 (1808) (describing the origin and history of the Commonwealth's registry system).

<sup>10</sup> NREIS does not comply with either the Good Funds Statute or the Title Certification Statute. All mortgage loan proceeds are held out-of-state by NREIS and disbursed by it. No certifications of title are provided in any real estate transaction closed by NREIS.

public interest as well. When conveyancing is entrusted to non-attorneys, who have not demonstrated a thorough knowledge of the law by passing a rigorous bar examination, have not been certified of honest demeanor and good moral character, are not subject to the ongoing and direct oversight of the judiciary to ensure that they maintain high intellectual and moral standards, these protections are lost.

II. NREIS'S CONVEYANCING ACTIVITIES, BY WHICH IT UNDERTAKES TO EVALUATE AND TRANSFER A LEGAL INTEREST IN PROPERTY ON BEHALF OF ITS CLIENTS, CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW.

A. The Examination Of The Title To The Property Being Sold And/Or Mortgaged Requires The Professional Judgment Of A Lawyer And Is The Practice Of Law.

The initial step in every conveyance for which NREIS is responsible, or in any conveyance for that matter, is an assessment of the seller's title to the real estate being sold or mortgaged to determine whether the seller can "convey a title in accordance with the terms of a purchase and sale agreement."

Richards v. Saveway Oil Co., 2 Mass. App. Ct. 514, 517 (1974). See also T.M. Friedman & J. Smith, Friedman on Contracts and Conveyances of Real Property § 1:1 at 2-3 (7th ed. 2010) ("[t]he closing merely carries out the provisions, express and implied, of the contract").

As noted above, the typical purchase and sale requires that the seller tender "good and clear record and marketable" title by quitclaim deed.<sup>11</sup> Therefore, NREIS must determine whether, under the law, the seller actually has "good and clear record and marketable" title or whether there are "clouds" on the title that would defeat the sale. J. Palomar, Patton and Palomar on Land Titles § 48, p. 169 (3d ed. 2003) ("It is the role of counsel for the buyer or mortgagee to determine whether the vendor has a marketable title").

A title is good, or "marketable," if it is not "subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title, or rights incident to it." Jeffries v. Jeffries, 117 Mass. 184, 187 (1875). The term "marketable title" is a judicially-created term which "means a title which [a court of] equity requires a purchaser to take." Queenin v. Blank, 268 Mass. 432 , 436 (1929) (citation omitted).

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<sup>11</sup> Because most property is transferred by quitclaim deed, by which a seller conveys not "an indefeasible estate, but only his own title," Conte v. Marine Lumber Co., Inc., 66 Mass. App. Ct. 505, 512-13 (2006), it even more important that the title examination be conducted properly to determine the status of that title.

Therefore, the determination of whether a title is "marketable" requires a judgment as to whether a Massachusetts court, if presented with the issue, would require the buyer to complete the purchase. Richmond v. Gray, 85 Mass. 25 (1861) (title is not marketable if a "court of equity will not now compel a purchaser to accept a title which is so doubtful that it may expose him to litigation, though the court may believe it to be good"); Smith v. Albion, 17 Mass. App. Ct. 712, 716 (1984) (a person buying title to real property is not required "to buy a law suit"). Where the conveyancer is in the position of a Massachusetts court and must make judgments as to the likelihood of litigation concerning the validity of the title and the strength of any competing claims, the conveyancer is undoubtedly practicing law. See also E. Mendler, Massachusetts Conveyancers' Handbook with Forms 79(4th ed. 2008) (title examination "inevitably and necessarily involves consideration of many points of substantive real estate law"); P.F. Hall, The Examination of Land Titles in Massachusetts preface (1902) ("[c]xamination of title involves the consideration of the state of the law during the whole period covered by the abstract"); Beach Abstract & Guaranty Co. v. Bar Ass'n, 230 Ark.



494, 501, 326 S.W.2d 900 (1959) ("title examination and curative work, when done for another, constitutes the practice of law in its strictest sense and has long been considered as such").

The potential title issues that may arise in the course of a title examination to determine if the seller has "marketable title" cannot be listed completely in any comprehensive way. But, they include:

- Adverse Possession. Under G.L. c. 260, § 21, adverse rights of others may affect the title resulting from easements over the property.
- Attachments. The assessment of the validity of attachments placed on the property requires an understanding of G.L. c. 233, §§ 1, et seq., and the case law construing those statutory provisions.
- Condominiums. Condominiums are statutory creations and the Massachusetts condominium law, G.L. c. 183A, §§ 1, et seq., includes many statutory requirements that could affect the validity of the master deed, G.L. c. 183A, § 8, the unit deed, G.L. c. 183A, § 9, and any appurtenant rights.

- Descriptions. Massachusetts law requires that the description of the property must identify the property with sufficient particularity. See McHale v. Trewargy, 325 Mass. 381 (1950) (conveyance is void if it does not describe property with sufficient particularity).

- Discharge of Mortgage. The legal requirements governing the proper discharge of a mortgage are set forth in G.L. c. 183, §§ 54, 55.

- Divorce. Under Massachusetts law, if the grantor is divorced or involved in a divorce action, the property may be subject to an attachment pursuant to G.L. c. 208, § 13 or an equitable lien existing pursuant to G.L. c. 184, § 15. If the conveyance is part of an alimony judgment, there must be full compliance with the provisions of G.L. c. 208, § 34A.

- Easements. Easements can be created by express grant, G.L. c. 183, § 13, by implication, by estoppel, by necessity, G.L. c. 185, § 53, by statute, G.L. c. 187, § 5, or by prescription, G.L. c. 187, § 2.

- Executions. The validity of a title resulting from a sheriff's sale depends on strict

compliance with relevant statutes, G.L. c. 236, §§ 1, et seq.

- Homeslead. As a purely statutory freehold estate, a homestead must be claimed and terminated in the manner provided by G.L. c. 188, §§ 1, et seq.

- Leases. A title examination may disclose that the property is encumbered by a lease if it is recorded and satisfies the statutory requirements. G.L. c. 183, § 4 (unregistered land); G.L. c. 185, § 71 (registered land).

- Lis Pendens. Memoranda of lis pendens recorded pursuant to G.L. c. 184, § 15 encumber the property and the procedures for terminating them is specified in G.L. c. 184, § 7.

- Mechanics' Lien. Mechanics' liens that are created under G.L. c. 254, § 1 (lien for personal labor) or G.L. c. 254, §§ 2-4 (for labor or materials furnished under a written contract). The statutes must be strictly complied with in order to create and perfect a lien. Cook Borden & Co. v. Commonwealth, 293 Mass. 174 (1936). The procedures for dissolving a lien are also statutory. G.L. c. 254, §§ 10, 12, 15.

- Mortgage Foreclosures. Massachusetts law provides for foreclosure by action, G.L. c. 244, §§ 1-10, by bill in equity, G.L. c. 185, § 1(k), by entry and continuation of possession for three years, G.L. c. 244, §§ 1, 2, or by sale under the power of sale in a mortgage, G.L. c. 244, §§ 11, 17. A recent decision of the Massachusetts Land Court places many recent foreclosures in doubt. U.S. Bank Nat. Ass'n v. Ibanez, slip op., C.A. 08 MISC 384283(KCL) (Mass. Land Ct. Oct. 14, 2009).

- Power of Attorney. In Massachusetts, property can be conveyed by a durable power of attorney provided it satisfies the requirements of G.L. c. 201B, §§ 1, et seq. and there is an affidavit executed in accordance with G.L. c. 201B, § 5.

- Trusts. Where the property being conveyed is held by a testamentary trust, an inter vivos trust, a business trust, a nominee trust, a spendthrift trust, or a charitable trust, the ability to sell the property depends on the powers contained in the trust instrument, DeLongchamps v. Duquette, 24 Mass. App. Ct. 976 (1987), and how those powers are construed.

The "appropriate procedures" for considering any matters disclosed in a title examination and "passing on a title" have evolved through "decisional law and commentary." Fall River Sav. Bank, 18 Mass. App. Ct. at 83. Although many of the procedures are standardized, their application to a particular property requires the judgment of a person trained in the law.<sup>12</sup>

Because the assessment of the title to the real property requires a legal assessment of all pertinent and applicable public and private records, court decisions, municipal ordinances and statutes from which a legal opinion as to the title to the property can be determined, it has long been held to be the practice of law. See Opinion of the Justices, 289 Mass. at 615 (practice of law includes examination of real estate records in order to assess the legal validity of those documents and of title); In re Behenna, 9 Mass. Att'y Disc. R. 17 (1993) ("title examination, even without the rendering of advice, would constitute the practice of law"); In re Oates, No. 81-11BD (Aug. 6, 1986) (Liacos, J.) ("Title searching is commonly perceived by the

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<sup>12</sup> For instance, even determining the appropriate period for a title search "involves an element of judgment." Cornwall v. Forger, 27 Mass. App. Ct. 336, 342 n.6 (1989).

general public to be a pursuit, if not exclusively within the realm of the legal profession, closely associated with it"); Mass. Conveyancers' Ass'n, Inc. v. Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001 WL 669280 at \*8 (Mass. Super. 2001) ("[e]valuating title to real estate to determine the interest created, transferred or terminated and communicating that evaluation to any interested party to a residential real estate transaction" constitutes the practice of law).

B. The Preparation Of A Deed Requires The Professional Judgment Of A Lawyer And Is The Practice Of Law.

NREIS also is engaged in the unauthorized practice of law when it provides a deed to the parties that it has purchased from a Las Vegas company.<sup>13</sup> A deed is the legal instrument that establishes a buyer's property rights. Drafting one requires knowledge of and facility with a wide array of statutes and the common law specifying, among other requirements, the necessary elements of a deed, the acceptable words of grant, the

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<sup>13</sup> In its First Circuit Brief, NREIS stated that "drafting deeds" is one of the "activities that [is] likely to fall wholly within the legal sphere" and that for this reason NREIS contended (inaccurately) that it leaves this activity "to lawyers." NREIS First Circuit Brief at 33, lines 1-2.

descriptions, the various types of deeds (warranty, quitclaim, foreclosure, fiduciary), the statutory covenants (G.L. c. 183, §§ 16, 19), all of which are prescribed by statute or modified by common law.

There is little question that the drafting of a deed is the practice of law. In re Shoe Mfrs. Protective Ass'n, Inc., 295 Mass. at 372 (practice of drafting documents in which legal rights are "created, modified, surrendered or secured" is the practice of law); Opinion of the Justices, 289 Mass. at 615 (preparation of deeds falls outside of the practice of law only "when not conducted as an occupation or yielding substantial income"). See also State Bar of Ariz. v. Ariz. Land Title & Trust Co., 366 P.2d 1, 12-13 (Ariz. 1961) (preparation of deed is the practice of law); In re Matthews, 57 Idaho 75, 62 P.2d 578, 581 (1936) (same); People ex rel. Ill. State Bar Ass'n, 404 Ill. at 53-54, 87 N.E.2d 773 (same); Ky. State Bar Ass'n v. Cent. Ky. Enterps., Inc., 503 S.W.2d 483, 483 (Ky. 1972) (same); Eisel v. Midwest Bank-Centre, 230 S.W.3d 335, 337 n.3 (Mo. 2007) ("There can be no question that the preparation of the deed of trust and the promissory note constitutes the practice of law"); State ex rel. Wright v. Barlow, 131 Ncb. 294, 268 N.W. 95, 96 (1936)

(same); People v. Alfani, 227 N.Y. 334, 340, 125 N.E. 671 (1919) (same); Cain v. Merchants Nat'l Bank & Trust Co., 66 N.D. 746, 268 N.W. 719, 723-24 (1936) (same); Ohio State Bar Assn. v. Newburn, 119 Ohio St.3d 96, 97, 892 N.E.2d 431 (2008) ("practice of law embraces the preparation [of] deeds which convey real property"); In re Easler, 275 S.C. 400, 401-02, 272 S.E.2d 32 (1980) (holding that the preparation of a deed for another constitutes the unauthorized practice of law); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 516; 179 S.W.2d 946 (1944) (preparation of deed is the practice of law); Wash. State Bar Ass'n v. Great Western Union Fed. Sav. and Loan Ass'n, 91 Wash.2d 48, 55, 586 P.2d 870 (1978) (same); Malia v. Giles, 100 Utah 562, 114 P.2d 208, 212 (1941) (same). NREIS's provision of a deed to the parties to a real estate transaction constitutes the unauthorized practice of law.

C. The Activities Undertaken At The Settlement Require The Professional Judgment Of A Lawyer And Are The Practice Of Law.

There can be no serious dispute that the actions undertaken by the attorney chosen by NREIS to conduct the closing of the real estate transaction constitute the practice of law. NREIS has clearly stated that it



expects the attorney to act in the "capacity" of an attorney and "in full compliance with the applicable legal and ethical requirements," and "consistently with their professional obligations as attorneys." [RA.377, ¶33]. See Opinion of the Justices, 289 Mass. at 613-14 (the "customary functions of attorney" constitute practice of law).

The substantive activities undertaken by the attorney in conducting the closing require the knowledge of Massachusetts law. In directing the execution of the stacks of legal documents in any closing, the attorney must be familiar with G.L. c. 183, §§ 1, et seq. and the decisions construing these statutory provisions as to how the documents must be executed. An instrument that does not comply with any one of these requirements imposed by Massachusetts law may be invalidated. E.g., In re Giroux, slip op., C.A. No. 08-14708-JNF, 2009 WL 1458173 (Bkrtcy. D. Mass. May 21, 2009) (voiding mortgage that contained materially defective acknowledgment not in compliance with G.L. c. 183, § 29). To answer any questions the parties may have regarding those documents, their rights or obligations, or other matters, the attorney must also be familiar with Massachusetts law. See Private Lending &

Purchasing, Inc. v. First Am. Title Ins. Co., 54 Mass. App. Ct. 532, 537 n.9 (2002) ("Explanation of the legal effect of liens or encumbrances [to a non-client] may fall within the practice of law, to be conducted by a lawyer rather than the insurer"). See Colonial Title & Escrow, Inc., 13 Mass. L. Rptr. 633, 2001 WL 669280 at \*8 ("[e]xplaining at the closing any documents relating to the interest in the real estate being created, transferred or terminated and relating to the agreement of the parties" is the practice of law).

Even the decision whether or not a form provided by the lender must be completed potentially involves the practice of law because it requires legal training to recognize when a form is appropriate to use and when it must be altered to accomplish a client's goals. E.g., Grievance Comm. of the Bar of Fairfield County v. Dacey, 154 Conn. 129, 141, 222 A.2d 339 (1966) ("the determination that a given form should be followed without change is as much an exercise of legal judgment as is a determination that it should be changed in given particulars"). Cf. In re Bergeron, 220 Mass. at 476 ("every attorney ought to possess learning sufficient to enable him either to ascertain the law or to determine his limitations in that regard for the

purpose of giving safe advice").

D. Properly Recording The Title Documents  
Requires The Knowledge And Professional  
Judgment Of A Lawyer And Is The Practice  
Of Law.

Recording the title documents is the final step<sup>14</sup> undertaken by NREIS to complete the parties' transactions, to establish that the buyer has received good title, and to ensure that its lender client will receive a "valid" lien in the property. Like the other conveyancing activities, it also requires the professional knowledge and judgment of an attorney. See Doc Law Firm v. Richardson, 371 S.C. 14, 18-19, 636 S.E.2d 866 (2006) ("recording of documents is the 'final phase' of the real estate loan process and must be done under the supervision of an attorney").

NREIS must determine initially whether the title documents are recorded in the registered or unregistered sides of the registry (or both). Depending on

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<sup>14</sup> As noted in Attorney O'Donnell's Affidavit, conveyancing attorneys typically perform a final run-down of the title before they record the title documents to ensure that the status of the seller's title has not changed. See Lee v. Dattilo, 26 Mass. App. Ct. 185, 189 (1988) ("Unless the buyer is given an opportunity to examine all the papers on record at a time when the deed from the seller can be recorded, the buyer cannot ascertain that there is a clear record title"). There is no evidence in the Record to suggest that NREIS conducts a final run-down before recording.

the circumstances of the transaction, there are a large number of statutory requirements<sup>15</sup> that must be satisfied for documents to be recorded. As with the other aspects of the conveyancing process, the parties rely on the conveyancer to record properly the deed and other title documents so that their interests in the

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<sup>15</sup> See G.L. c. 36, § 13 (specifying procedure for recording where land lies in more than one registry district); G.L. c. 65C, § 14 (requiring that affidavit from executor be recorded to discharge estate tax liens); G.L. c. 183, § 6 (register will not accept a deed for recording unless it contains a recital of the full consideration paid for the property); G.L. c. 183, § 6A (no instrument concerning unregistered land may be recorded unless it includes a "same as" reference to a prior deed); G.L. c. 183, § 6B (document to be recorded must set forth street address in margin); G.L. c. 183, § 6C (to be recorded, mortgage must contain residence or post office address of mortgagee); G.L. c. 183, § 29 (no deed may be recorded unless it is acknowledged); G.L. c. 183, § 30 (specifying methods of making an acknowledgment of a deed or other written instrument, within and outside Commonwealth); G.L. c. 183, § 32 (power of attorney to convey real estate must be recorded); G.L. c. 183, § 54 (specifying forms of acknowledgments); G.L. c. 183, § 54 (mortgage discharge must be acknowledged to be recorded); G.L. c. 183, § 63B (mortgage may not be recorded until mortgage proceeds are paid to mortgagor); G.L. c. 183A, § 6 (certificate from condominium association stating amount of unpaid common charges is binding when recorded) G.L. c. 183B, § 18 (specifying instruments to be recorded with respect to conveyance of a time-share estate); G.L. c. 184, § 35 (stating requirements for trustee's certificate); G.L. c. 203, § 2 (requiring recording of trust instrument or certificate conforming to G.L. c. 184, § 35 where deeds, mortgages and other instruments convey title to a trustee); G.L. c. 131, § 40 (conservation committee may require that its orders be recorded).

property are established. Undertaking the task of recording the appropriate documents to establish the parties' interest in the property, and ensuring that the recorded documents satisfy the requirements of Massachusetts law, requires specialized knowledge of the law beyond that of the average citizen, and is the practice of law.

E. That These Conveyancing Activities Have Historically Been Conducted By Attorneys Supports The Determination That They Are The Practice Of Law.

It is significant that conveyancing in Massachusetts has traditionally been conducted by attorneys. One of the practical tests often used to decide whether an activity is the practice of law is to determine whether it ordinarily has been performed by lawyers. The fact that the public has long entrusted certain activities to lawyers is a further indication that they require the knowledge and skill of a person trained in the law. Opinion of the Justices, 289 Mass. at 613-14 ("customary functions of attorney" constitute practice of law); Lowell Bar Ass'n, 315 Mass. at 186 ("The actual practices of the community have an important bearing on the scope of the practice of law").

III. NREIS'S ISSUANCE OF A TITLE INSURANCE POLICY,  
WHICH IS BASED ON A TITLE EXAMINATION, IS THE  
PRACTICE OF LAW.

A. The Title Insurance Policies Issued By NREIS  
Are Premised On An Examination Of Title That  
Can Only Be Conducted By An Attorney.

Title insurance is now a modern adjunct to most mortgage loan transactions. Eno & Hovey, supra, § 30.1 at 789. It provides "protection against defects in, or liens or encumbrances on, title." Somerset Sav. Bank v. Chicago Tit. Ins. Co., 420 Mass. 422, 428 (1995). Unlike other forms of insurance that are based on actuarial tables, a title insurance policy is based on a thorough title examination to identify what, if any, defects, liens or encumbrances exist as of the date that the policy will issue. See Colonial Title, 13 Mass. L. Rptr. 633, 2001 WL 669280 at \*4 (title examination for the issuance of the title insurance policy is the same as conveyancing attorney's certification of title). See also C.A. Yzenbaard, Residential Real Estate Transactions 5:17 at 182 (1991) (a title insurance policy "indicates an opinion of the title company regarding the status of the title and if that opinion is wrong, the company will pay").

If the title examination has disclosed a defect, it is corrected or it becomes the basis of an exception

from coverage written into the policy. Therefore, if it is done correctly, the title examination will have eliminated the grounds of any potential loss. Not surprisingly, because of the importance of the title examination, most of the cost of the premium is used to pay its costs with a relatively small fraction of the premium being used to pay actual claims. J.D. Palomar, Bank Control of Title Insurance Companies: Perils to the Public that Bank Regulators have Ignored, 44 Sw. L.J. 905, 930 (Fall 1990) ("title examination is the main focus of title insurance, with as much as ninety percent of the title insurance premium paying for its cost").

As discussed above, a title examination of the status of title to residential property constitutes the practice of law. See supra pages 25-33. Consequently, courts have also specifically held that the activities of a title agent, which largely consist of undertaking the title examination to the property being insured, constitute the practice of law. E.g., Colonial Title & Escrow, Inc., supra, 13 Mass. L. Rptr. 633, 2001 WL 669280 at \*7 (issuing title certification or policy of title insurance is the practice of law); United States v. City of Flint, 346 F. Supp. 1282, 1286 (E.D. Mich.

1972) (title insurance is "predicated upon careful examination of the muniments of title, an exhaustive study of the applicable law and the exercise of expert contract draftsmanship ... the existence of title defects will depend upon legal doctrines and judicial interpretations of various applicable statutes"); Beach Abstract & Guaranty Co., 230 Ark. at 501, 326 S.W.2d at 903 (title insurance agent who reviewed title abstract to determine state of title was practicing law). Consequently, other than the title insurer itself, only an attorney may issue a title insurance policy that insures the title to real estate in Massachusetts.

B. Rule 5.7(b) Of The Massachusetts Rules Of Professional Conduct Does Not Permit A Non-Attorney, Like NREIS, To Engage In Activity That Is Otherwise The Unauthorized Practice Of Law.

Instead of refuting the argument that the activities of a title agent do not require the agent to make judgments as to legal rights, NREIS seeks to rely on a misreading of Mass. R. Prof. C. Rule 5.7(b)<sup>16</sup> to argue that it may engage in such activities. That Rule

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<sup>16</sup> NREIS's argument is misplaced since the Rule only applies to the ethical obligations of attorneys. See also Mass. R. Prof. C., Scope [6] ("Rules are designed to provide guidance to lawyers"). It does not apply to non-attorneys, like NREIS.



specifies certain responsibilities of an attorney with respect to "law-related services." Comment 9 lists "title insurance" as a "law-related service." From this thread, NREIS seeks to weave a security blanket that protects its activities as a title agent.

The text of Rule 5.7(b) does not support NREIS's argument. To qualify as a "law-related service," the service must satisfy two conditions. First, it must be a service "that might reasonably be performed in conjunction with and in substance are related to the provision of legal services," and, second, it must be a service "not prohibited as unauthorized practice of law when provided by a nonlawyer." Since REBA has demonstrated in its Brief that the issuance of a title insurance policy by an agent requires the exercise of legal judgment, the conditions of Rule 5.7(b) are not satisfied, a conclusion that NREIS has not refuted.

It is doubtful that the Comments to the Rules of Professional Conduct were intended to be read to authorize a non-attorney title agent to engage in the very same activities that are the unauthorized practice of law when undertaken as part of conveyancing. In the Scope of the Comments which is included as part of the Preamble to the Rules, the Court has provided that the

Comments are not "authoritative." Mass. R. Prof. C., Scope [9]. They are intended only "as guides to interpretation" of the Rules and do not displace them. Id. Consequently, where the Rules themselves do not authorize such conduct, there is no basis to find any such sanction in the Comments. Any other result would contravene the well-established precedent that practice of law determinations are to be decided upon their "own particular facts." In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 372.

IV. NREIS ENGAGES IN THE UNAUTHORIZED PRACTICE OF LAW BY HIRING ATTORNEYS TO APPEAR AT THE SETTLEMENTS OF THE REAL ESTATE TRANSACTIONS AND BY SEEKING TO "MANAGE" THE PRACTICE OF CONVEYANCING.

NREIS's provision of legal services to its lender clients by hiring licensed Massachusetts attorneys from its "network" to provide those services constitutes the unauthorized practice of law. A corporation cannot practice law and it cannot circumvent that restriction by subcontracting the services of attorneys. See In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 372-3 (collection agency engaged in the unauthorized practice of law where it hired attorneys to pursue litigation on behalf of its clients). See also State Bar Ass'n v. Conn. Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958)

(as a company "cannot practice law directly, it cannot do so indirectly by employing competent lawyers to practice for it, since that would be an evasion which the law will not tolerate"); People by Lefkowitz v. Lawrence Peska Assoc., Inc., 90 Misc.2d 59, 61-62, 393 N.Y.S.2d 650 (1977) (corporation held to be engaged in the unauthorized practice of law where it received a fee for legal services by referring patent applications to attorneys and charging its customers for those services provided by attorney); In re Otterness, 181 Minn. 254, 257, 232 N.W. 318 (1930) ("neither a corporation nor a layman not admitted to practice can practice law nor indirectly practice law by hiring a licensed attorney to practice law for others for the benefit or profit of such hirer"); Doughty v. Grills, 37 Tenn. App. 63, 94, 260 S.W.2d 379 (1952) ("corporation cannot legally practice law, either directly or indirectly, by employing competent lawyers to practice for it"); W. Va. State Bar v. Earley, 144 W.Va. 504, 527, 109 S.E.2d 420 (1959) ("corporation or other lay agency can not practice law or hire lawyers to practice law for it").

A. The Practice Of Law - It's Not Business,  
It's Personal.

Whether the legal services are provided directly by NREIS, or indirectly through attorneys hired by it, there is no direct, personal relationship between the attorney and the client which this Court requires. Sears, Roebuck & Co. v. Goldstone & Sudalter, 128 F.3d 10, 15 (1st Cir. 1997) ("The attorney-client relationship is 'highly fiduciary' in Massachusetts"). The rationale for requiring such a relationship was definitively stated by the Court in 1935.

The practice of the law is personal. It is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and adequate special qualifications as to learning in the law and to be of good moral character. After one has been sanctioned in these respects, the oath as an attorney must be taken, whereby one becomes an officer of the court and subject to its discipline for violation of his obligations even to the extent of removal from his office. A dual trust is imposed on attorneys at law: they must act with all good fidelity both to the courts and to their clients. They are bound by canons of ethics which have been the growth of long experience and which are enforced by the courts. [citation omitted] The relation of an attorney to his client is preeminently confidential. In addition to adequate learning, it demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity, and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of his client.

Only a human being can conform to these exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites.

Opinion of the Justices, 289 Mass. at 613.

Although NREIS has hired attorneys to conduct the settlements, it has interposed itself as an intermediary between its lender clients and those attorneys. The attorneys are chosen and hired by NREIS from its "network" of seventy attorneys. The lender clients have no role in choosing the attorney. There is no communication between the lender client and the attorney. There is no indication that the lender ever knows who the attorney is that is representing it at the settlement. As a practical matter, NREIS controls the attorney. It provides the attorney with the information as to where the settlement is to occur, the telephone numbers for the parties who will attend the settlement (the lender does not attend), and how the attorney will receive the documents. Following the settlement, the attorney returns the executed documents to NREIS and is paid by NREIS.

The attorneys that NREIS engages "are in effect its [NREIS's] agents and whose dealings are with it alone, thereby furnishing or selling legal services and destroying the relation of direct personal confidence

and responsibility which ought to exist between attorney at law and client and attempting to assume that relation in its own corporate capacity." In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 373. This practice violates Massachusetts law and is not permitted. Id.

B. In Managing Activities That Establish Legal Rights In Real Property, NREIS Is Engaged In The Practice Of Law.

In Massachusetts, managing the processes by which legal rights are established - which is exactly what NREIS claims it does - is the practice of law. The Court has observed that while it might be difficult to articulate a comprehensive definition of the practice of law, "at least it may be said that in general the practice of directing and managing ... the establishment of the legal rights of others, ... constitutes the practice of law." In re Hrones, \_\_\_ Mass. \_\_\_, 2010 WL 3505381 (Sept. 10, 2010), citing, In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 372.

Conveyancing indisputably results in the establishment of important legal rights in real estate on behalf of the borrower and the lender. Under Massachusetts law, the establishment of such legal rights cannot be "managed" by a non-attorney, even where the

underlying activity is performed by an attorney. The attorney-client relationship is necessarily direct, confidential and personal and cannot be permitted to exist through intermediaries. In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 373 (noting "direct personal confidence and responsibility which ought to exist between attorney at law and client"); Graustein v. Barry, 315 Mass. 518 (1944) (contract to sell legal services is the unlawful practice of law).

#### CONCLUSION

For the reasons specified above, REBA requests that the Court answer "YES" to both Questions certified to it by the Court of Appeals for the First Circuit.

THE REAL ESTATE BAR ASSOCIATION  
FOR MASSACHUSETTS, INC.

By its Attorneys,

/s/Douglas W. Salvesen  
/s/Anthony B. Fioravanti

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Douglas W. Salvesen (BRO# 550322)  
Anthony B. Fioravanti (BBO# 664823)  
YURKO, SALVESEN & REMZ, P.C.  
One Washington Mall, 11th Floor  
Boston, Massachusetts 02108  
(617) 723-6900

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