



BEARING WITNESS: REBA v. NREIS and Witness-Only Closings

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As we have just now passed the second anniversary of the Supreme Judicial Court decision in *Real Estate Bar Association v. National Real Estate Information Services, Inc. (REBA v. NREIS)*, 459 Mass. 512 (2011), it seems an appropriate time to review what that case did and did not hold.

The decision, among other concerns, deals with the question of whether so-called “witness only” closings are the unauthorized practice of law in Massachusetts. In general, a witness-only closing occurs when a nonlawyer settlement services provider is hired by a title company or lender to close the transaction. The settlement company retains a Massachusetts lawyer, but limits the scope of the lawyer’s services to acting as a witness and notary to the signing of required documents. The other aspects of a closing, such as drafting the seller’s deed in a purchase transaction, collecting and disbursing the line items on the HUD-1 settlement statement, certifying title to the buyer or to the title insurance company, and recording or registering documents, are performed by the settlement company. Typically, the “witness only” closing lawyer contracts with the settlement company, not the lender, and has no direct contact with the lender.

In *REBA v. NREIS*, the SJC was faced with two questions certified to it by the U.S. Court of Appeals concerning the unauthorized practice of law in Massachusetts, *REBA v. NREIS*, 608 F.3d 110 (1st Cir. 2010). REBA had sued NREIS for declaratory and injunctive relief, alleging that NREIS’s business of providing lenders with settlement services to close residential real estate mortgage transactions in Massachusetts involved the unauthorized practice of law. In its decision, the SJC reviewed each step of a real estate transaction and concluded that many of the steps, such as performing a title examination, preparing a title abstract, preparing HUD-1

settlement statements and “mortgage-related forms”, and issuing title insurance policies, did not involve the practice of law. On the other hand, the Court identified steps that clearly involve the practice of law, such as drafting a deed or other instrument to convey a legal interest in real property and determining marketability of title.

The Court then turned to a functional analysis of the traditional role of closing attorneys in Massachusetts real estate transactions, describing the closing as “a critical step in the transfer of title and the creation of significant legal and real property rights” and opining that “many of the activities that necessarily are included in conducting a closing constitute the practice of law and the person performing them must be an attorney.” Specifically, the Court noted that the lender’s closing attorney must assure that the grantor has marketable title. The closing attorney also has “a duty to effectuate a valid transfer of the interests being conveyed at the closing,” including both title to the real estate and the consideration for the transfer, including the mortgage proceeds. In certain types of mortgage transactions, an attorney is also required to certify title under G.L. c. 93, § 70. Finally, compliance with the good funds statute, G.L. c. 183, § 63(B), generally mandates the involvement of an attorney to hold the mortgage proceeds prior to closing.

A Massachusetts real estate closing thus requires the “substantive participation of an attorney.” The Court found that, because of the lawyer’s obligations at the closing as described above, it is not an appropriate course for the lawyer’s only function “to be present at the closing to hand legal documents that the attorney may never have seen to the parties for signature, and to witness the signatures.” The Court stated that “a closing attorney’s professional and ethical responsibilities require actions not only at the closing but before and after it as well.”

A “witness only” appearance by an attorney would necessarily be inadequate , professionally and ethically, except in the (perhaps unlikely) event that the attorney is first assured that steps constituting the practice of law are being or have been properly

handled by other Massachusetts attorneys. To the extent that the other activities required to be done by lawyers are being conducted by nonlawyers, the “witness only” attorney might be assisting in the unauthorized practice of law, in violation of Mass. R. Prof C. 5.5(a). Other disciplinary rules may also be implicated; for example, the borrower may reasonably be misled as to the “witness only” attorney’s role at the closing table.

The professional responsibility questions that arise in conjunction with closings, and particularly those relating to unauthorized practice, can be thorny and difficult. As a service to the Bar, the Office of the Bar Counsel operates an ethics helpline to discuss ethical questions that confront attorneys. An attorney who wishes to discuss an ethical question with an Assistant Bar Counsel can call (617) 728-8750 between the hours of 2:00 and 4:00 on Monday, Wednesday, and Friday.

ⁱ The author is Assistant Bar Counsel. The opinions expressed herein reflect the opinions of the Office of Bar Counsel but not necessarily those of the Board of Bar Overseers or the Supreme Judicial Court.