

## **MINUTES**

**CBA Real Estate Law Section Council**  
**Date: Tuesday, October 17, 2017 – 3:00 p.m.**

**Colorado Bar Association Offices**  
**1900 Grant Street, 9<sup>th</sup> Floor**  
**Denver, Colorado**

Attendees: See attendance sheet attached hereto.

1. Call to Order

Mr. Calvin called the meeting to order at 3:07 pm.

2. Introduction of Guests

No guests were in attendance.

3. Approval of September Minutes

Mr. Cox moved approval of the September minutes. Mr. Schwartz seconded the motion. The minutes were unanimously approved as presented.

4. Financial Report

Ms. Leff reported that the current balance in the Real Estate Section's account as of September 30, 2017, is \$80,121.19.

5. Chair's Report

a. Updated Committee/Task Force Assignments

Mr. Calvin noted that the RESC Committee/Task Force assignment sheet reflects a few changes, as attached to the agenda. Not many people are affected by the updates. The changes primarily involve new or additional assignments rather than changes to original assignments.

b. Holiday Party – November 30 at Nicole Nies' home

Mr. Calvin reported that, even though the September minutes reflect a December party date, the available December dates conflicted with other sections' holiday events, so November 30 was chosen instead. The party will be at the home of the immediate past Chair of the Section, Ms. Nies.

c. CBA Best Practices Update

Mr. Calvin briefed the RESC on the CBA Section Summit held on September 28, 2017. All RESC officers attended the meeting, which included presentations on CBA's Best Practices and break-out

sessions on topics such as legislation, budgeting, and membership. Updates from the meeting include the following:

Each CBA Section must appoint a Treasurer who, among other duties, bears responsibility for making sure the Section does not enter into contracts without CBA approval.

As a reminder to all, no one can speak on behalf of the Bar—or any Section—unless authorized by the appropriate authority within the CBA.

The Best Practices include a recommendation that each Section appoint a communications representative. RESC will need to determine how to do this in conjunction with the pending Bylaws update. Real Estate Section also needs to look to the website as a more robust form of communication with members.

Sometime after the first of the year the Bar Association will acquire and start using a new web-based service to facilitate connections with members.

Also, in about 18 months, the Bar may re-locate from 1900 Grant Street, due to the lease term expiring.

Mr. Chris Payne commented that the Bar is considering composition of the Legislative Policy Committee and the role of sections with regard to the LPC. Mr. Schupbach expanded on Mr. Payne's comments by noting that sections of the CBA do not have formal seats on the LPC. Ten LPC members are appointed by the CBA President and three are selected by the Board of Governors. However, maintaining areas of expertise at the LPC table is a priority, which is why the members of the LPC have historically included members of the Real Estate and Business Law Sections, along with members of the Trust and Estate, Elder Law, and Family Law Sections. In the case of the Real Estate Section, Andy Toft is both a member of the Section and a voting member of the LPC. However, Mr. Schupbach said, Mr. Toft should be seen as an LPC member first and a Real Estate Section member second. Ms. Leff, as Secretary of the Section, is the Section's liaison to the LPC, not Mr. Toft.

d. Cyberfraud/Financial Fraud Kill Chain

Mr. Calvin reported on a pending case that had been discussed at a recent meeting of the POETS organization. The case involved an alleged interception of unencrypted e-mail messages relating to the closing of a residential real estate transaction, which led to the fraudulent redirection of the proceeds of sale to an overseas account through the use of false wiring instructions. The allegations included the wiring bank's alleged failure to invoke a process described as the "Financial Fraud Kill Chain" or "FFKC" which, according to the complaint, could have been used to recover the diverted funds. Mr. Calvin said that he had been unable to verify the existence of the FFKC, but noted that if such a process existed and if it worked as described in various unofficial documents, international wire transfers might be subject to reversal for 72 hours after they were ostensibly completed.

Mr. Chris Payne commented that the severity of fraud, as presented in this case, has caused him to rethink his transactions and how to deal with parties during closing. Big red flags exist for lawyers who conduct closings. Bad actors are identifying transactions, following e-mail traffic, and attacking vulnerabilities. A couple of emerging recommendations include only using secured emails and going back to cashier checks for these transactions.

e. California Affordable Housing Surcharge on Recorded Documents

Mr. Calvin reminded attendees that past discussions in Colorado have considered adding a surcharge to the real property document recording fees, much like the \$2/\$1 technology fee that now attaches to recording transactions. However, no separate surcharge for affordable housing currently applies in Colorado. California has taken a different approach, with a fee ranging from \$75 to \$225 that attaches to non-residential real estate transactions. This information is included to show alternatives and options for affordable housing funding and alert real estate professionals to a model that could potentially come to Colorado.

## **REPORTS AND INFORMATIONAL ITEMS**

6. Real Estate Commission Rulemaking Update

Ms. Waggener reported that the new Rule F-7 passed with all Real Estate Section changes as presented. The Colorado Association of Realtors (“CAR”) supported all RESC changes. Ms. Waggener extended a “thank you” to everyone who put in the time to tighten up the language, especially around the Bar forms and the required legend that such forms must bear related to broker use.

7. Legislative Update

a. Proposed Changes to Foreclosure Statutes

Mr. Lubinski reported that the foreclosure statute working group met again on October 4<sup>th</sup>. The working group members are helping to distill the revisions proposed by Denver’s Public Trustee to a shorter list of potential items that may get included in a bill. The next working group meeting will take place on October 25. Mr. Schupbach speculated that a bill will get drafted as a result of the working group’s efforts, though support for any such bill by the public trustees’ trade organization, PTAC, remains to be seen. The Garfield County Public Trustee, who currently serves as chair of PTAC, has expressed skepticism about the working group’s proposals. Per Mr. Schupbach, Denver’s Public Trustee continues to push for some changes and sometimes diverges from PTAC on legislative initiatives. Mr. Calvin commented that Denver has identified some legitimate issues, whether prevalent or not.

b. Remote Notarization Update

Mr. Calvin reported that discussions continue concerning possible remote notarization legislation. A Bar group is working on identifying elements that CBA hopes to see in any such legislation. The Secretary of State has convened a larger group that includes Notarize, Inc., which is the vendor of a proprietary remote notarization platform and employs notaries public based in Virginia. The Bar group’s voice is being heard, but Sen. Bob Gardner will provide direction to the bill drafters in the Legislative Legal Services office. Sen. Gardner seems to have heard the Bar’s concerns, though the direction he will take is not yet apparent.

c. Uniform Laws 2018

Mr. Schupbach reported that the Uniform Law Commission is scheduled to meet on November 3. No agenda has circulated yet. Mr. Schupbach will need to catch up with RESC over email once the agenda

hits. Real estate specific issues (receivership and landlord-tenant) seem dead for the year, leaving little for the RESC to address. The Colorado Trust Code seems like the focus, with a debate over whether to allow this modified code to attain uniform code status. Mr. Schupbach will circulate a list of bills that may be on the agenda of the upcoming legislative session, and asked that anyone with an interest in working on any of those get in touch with him. Mr. Schupbach noted some overlap between real estate and wills on the remote notary law and the need to track input from both groups. Beyond uniform laws, likely issues center on oil and gas, including required well setbacks, domestic taps, forced pooling, and pipeline safety. Some of these may have impacts on real estate and will need to be watched.

#### 8. Commercial Real Estate Lending and Loan Opinions

Mr. Chris Payne prefaced his remarks by saying that this informational topic on loan opinions comes on the heels of a presentation that he and others recently gave at the Business Law Institute. He then offered summaries of two cases dealing with loan opinions provided by attorneys. In the first case, the court held that the property owner did not waive limitations on deficiency liability because those claims were tied to the foreclosure process, which was governed by Florida law, rather than to the secured debt, which was governed by Texas law. The case reinforces the importance of limiting legal opinions to the law of the opinion-giver's state, and the danger inherent in opining on documents that are governed by the laws of multiple jurisdictions. In the second case, the law firm gave a fact opinion about the borrower's representations in the loan agreement, including an opinion that the borrower was not involved in litigation to the knowledge of the author of the opinion. Other lawyers in the same firm had extensive knowledge of litigation affecting the borrower, but the author of the opinion apparently did not, and the firm avoided liability. This case serves as a reminder to practitioners to define the knowledge of a law firm or other organization as narrowly as possible, or, for opinion recipients, the need to insist on stronger opinions. Mr. Payne added that in his view, the second case raised a question as to whether a lawyer can ethically give an opinion that purports to address an issue of concern to the recipient, when the lawyer is aware that his or her knowledge is so limited that the opinion is essentially meaningless. Ms. Brimah reminded everyone that loan opinions should contain legal opinions and avoid representations of fact.

#### 9. Board of Governors

Ms. Dunn circulated the October Board of Governors report and noted that it covers items of interest to the Bar as a whole and not specific to real estate attorneys.

Ms. Dunn separately distributed a title commitment page bearing a note from the title company that no closing or insurance extends to land involving marijuana activity. Conversation ensued about other title companies that include or do not include this statement. Mr. Calvin used this opportunity to remind people about other notable exclusions or areas where coverage will not apply, such as legal malpractice insurance policies that do not cover claims arising out of remote notarization.

#### 10. Education/Topical Lunches Committee

Ms. Alderman reported that the November 2<sup>nd</sup> luncheon will focus on due diligence in special districts. No luncheon will occur in December. Ms. Mowry suggested that the committee should work on recruiting a 1031 exchange speaker, with some discussion of 1033 as well. Mr. Calvin asked about working with the Tax Section on this topic.

11. Interprofessional Committee

Mr. Cox read from the written report provided by Ms. Kube. Wire fraud remains a regular topic of interest among Interprofessional Committee members. The level of sophistication of the criminal behavior continues to rise. LTAC is now receiving phone calls from people who follow real estate transactions via email. The new Seller's Property Disclosure ("SPD") form goes into effect on January 1, 2018. The biggest change on the SPD is the removal of the "no" and "do not know" representations. Work continues on the definition of "family" under the MLO rules. CAR expects a bill to address *Vallagio* and oil and gas issues stemming from Firestone.

12. Communications Committee

Per Ms. Arnold, the communications committee will meet to discuss the draft newsletter prepared by the last committee. Mr. Lubinski commented that the draft follows a shorter newsletter format.

13. Education/CLE Committee

Ms. Arnold reported that the Fall Update is set for Friday, October 20<sup>th</sup>. Mr. Cox will moderate, and Ms. Arnold will talk about ethics. This Fall Update will occur in person at the CBA-CLE classroom, with webcasting also available.

14. Colorado Housing Council

Ms. Pasquini reported that last month's Housing Council meeting included a discussion with the City of Boulder's Energy Strategy Department Director concerning the City's efforts to municipalize the City's electric utility services. The City's franchise agreement with Xcel expired in 2010. Right now Xcel continues to provide electric and gas services but Boulder has not been satisfied with Xcel's clean energy efforts and has pursued municipalization. See [BoulderEnergyFuture.com](http://BoulderEnergyFuture.com) for more information. Or see Xcel's website for a different perspective. Per Ms. Alderman, Boulder is actually seeking to condemn Xcel's facilities and easement rights. Per Mr. Calvin, an issue arises from the fact that Boulder will serve Boulder and Xcel will serve surrounding areas, but the assets and transmission are not so easily divided. He noted that the initiative presents interesting overlap between PUC oversight and court jurisdiction.

15. *Colorado Lawyer* Committee

Ms. Arnold reported that Dan Wennogle has written an article on construction defect issues. Ms. Arnold and Mr. Wennogle may offer a point/counter-point article on these issues that discusses the statute and offer pointers to practitioners. Per Mr. Kirch, the *Colorado Lawyer* editorial policy has changed to promote shorter articles of this nature.

16. Community Service/Charitable Committee

No report.

17. Membership and Practice Development Committee

Mr. Starritt reported that the Committee has been largely inactive, but he will call a meeting within the next month and report back at the November meeting. Mr. Calvin stressed that attracting and serving members is the Real Estate Section's reason for existence as far as the CBA is concerned, so action is appreciated.

18. CBA ADR/Mediation Committee

Mr. Anderson reported that the RESC task force provided comments back to the ADR/Mediation Committee on the draft guidebook. The Committee will present the draft guidebook and comments at the ADR conference next month, with the goal of presenting a next draft in December. Mr. Tueller commented on his initial impression that the draft primarily focused on family law and commended Mr. Anderson for addressing the evaluative mediation concept and engaging RESC on this topic.

19. CBA Business Section

Mr. Chris Payne reported that the Business Law Section had its retreat a couple of weeks ago and appointed new officers. Mr. Herrick Lidstone plans to work on revisions to the Crowdfunding Act. Information about an upcoming forum at the University of Colorado School of Law on the Crowdfunding Act was presented. Mr. Tony van Westrum is poised to present changes to the Colorado Business Corporation Act but now appears not quite ready; RESC will want to stand ready to address this issue. The Business Law Section is also looking at the Address Confidentiality Program. Holly Shilliday is now the Business Law liaison on this issue.

20. CBA Cannabis Law Committee

Mr. Sonnenshein reported that the Marijuana Enforcement Division's public rulemaking process comment period on medical and retail marijuana rules has been extended until Monday, October 23<sup>rd</sup>. Regulations related to real estate are limited but a new fencing regulation caught Mr. Sonnenshein's attention. He will circulate redlined regulations.

21. CBA Forms Committee

Mr. Anderson reported that the Committee is getting ready to start talking about the contract to buy and sell. The screening committee also met and will decide what to move forward with on the forms in 2018. Section 13 of the contract is on the agenda. Mr. Tueller reported that a title company representative reached out to him to ask about the status of this item.

22. CBA Tax Section

No report.

23. CBA Trust and Estate Section

Mr. Kirch reported that the Trust and Estate Section has not met since the last RESC meeting. Mr. Calvin noted a *High Altitude* topic regarding a beneficiary deed when the grantee is a testamentary trust and recommended reviewing that thread about this arcane issue that proves a trap for the unwary.

24. Young Lawyers Division

Ms. Deline reported limited activity with the YLD since last meeting. New members will be inducted on October 30<sup>th</sup>. Beyond that, the YLD seeks more participation in the ongoing roadshow. One idea for additional participation is to get members from other sections involved in these roadshows on unbundled legal services.

**NEW MATTERS**

Ms. Mowry questioned whether a Natural Resources Section Liaison has ever been a part of the Real Estate Section Council. With the anticipated oil and gas legislation, having a contact may make sense. Ms. Mowry volunteered to inquire about opportunities. Mr. Schupbach suggested the immediate past chair, Katie Bock, as a resource.

Mr. Schupbach reported that the Colorado Homebuilders Association just named its new CEO. Ted Leighty from CAR has taken this position.

**ADJOURN**

The meeting was adjourned at 4:43 pm.