

MINUTES

CBA Real Estate Law Section Council
Date: Tuesday, September 19, 2017 – 3:00 p.m.

Colorado Bar Association Offices
1900 Grant Street, 9th Floor
Denver, Colorado

Attendees: See attendance sheet attached hereto.

1. Call to Order

Mr. Calvin called the meeting to order at 3:06 pm.

2. Introduction of Guests

Mr. Calvin recognized guests in attendance and invited them to introduce themselves. Susan Hoyt of CBA-CLE and Simon Tolbert of Mountain States Energy Attorneys & Advisors / Tolbert Law Group introduced themselves.

3. Approval of August Minutes

Mr. Mike Payne motioned, and Ms. Arnold seconded, to approve the August minutes. The minutes were unanimously approved as presented. (The record notes that Mr. Lubinski prepared perfect minutes during his time as Secretary.)

4. Financial Report

Ms. Leff reported that the current balance in the Real Estate Section's account as of August 31, 2017, is \$76,895.43.

5. Chair's Report

a. Welcome of New Council Member and Liaisons

Mr. Calvin introduced Liz Deline as the Young Lawyers Division Liaison replacing Nate Osborn. Ms. Deline is three weeks into her work at Montgomery Little & Soran, waiting for her bar exam results. Mr. Calvin also extended a welcome to Jody Alderman, who returns to Council for a fourth year and will fill a vacant position set to expire in 2018.

b. Committee Assignments

Mr. Calvin presented and reviewed committee assignments for 2017-18. Almost everyone was placed in their preferred positions. Mr. Calvin invited people to speak with him if they want to join an additional committee. Mr. Calvin noted the name change for one of the Real Estate Section's publications committees. The new name reflects the focus on internal communications to Real Estate Section members and avoids overlap with the *Colorado Lawyer* committee. As announced a few years ago, no chairs are assigned on the committees; everyone should feel a sense of responsibility. However, the CBA Best Practices Handbook encourages chairs for accountability purposes, so the first person listed on the appointment form is meant to act as chair.

c. Holiday Party

Mr. Calvin announced that the Real Estate Section holiday party will occur in December. No regular RESC meeting is currently scheduled for December, but, with the special session in the legislature, Council may need to meet. The date and location of the party remains to be determined.

ACTION ITEMS

6. Real Estate Commission Rulemaking Task Force

Mr. Calvin discussed the Real Estate Commission's proposed F Rules that are aimed at implementing the 2017 statute defining standard forms. RESC needs to decide what type of input to provide the Commission. Mr. Cox has already offered input on the proposed rules, and he will serve on a task force for this purpose. Ms. Kube and Mr. Mike Payne also volunteered to serve on the task force. Mr. Calvin asked the task force to meet and provide input on the F Rules before the end of next week to allow submission of comments to the Commission prior to its early October meeting.

REPORTS AND INFORMATIONAL ITEMS

7. FinCEN Update

Mr. Lubinski explained that Real Estate Section Council first reviewed an alert a year or two ago about the Federal Crimes Enforcement Network (FinCEN) tracking money laundering in residential real estate transactions in high dollar markets. From the inception of this program, industry professionals knew about possible expansion of tracking into other markets. The program has now expanded to some California markets as well as Dallas, Houston, and San Antonio. No targeting orders focus on Colorado yet, but attention on Colorado is expected eventually. Initially, FinCEN looked at cash transactions only but is now looking at wire transfers too. The forecast is for inclusion of commercial transactions in the tracking program and promulgation of regulations related to "other real estate professionals" as covered by money laundering statutes, which may ultimately include real estate attorneys.

8. Electronic Recording Technology Board Report

Mr. Calvin spoke about the Electronic Recording Technology Board's work on behalf of Mr. Starritt, who serves on the board and submitted the annual report included with the meeting materials. The program has collected the \$2 per document fee for the last eight months, and an executive director was recently selected. With the hiring of the executive director, the board can now start developing regulations. The board will also start accepting and reviewing grant applications soon. The board largely operates independently, without direct oversight from the Secretary of State.

9. Legislative Update

Mr. Schupbach provided an update regarding the anticipated special session of the legislature. This year, Governor Hickenlooper put SB17-267, the Hospital Provider Fee bill, on the "call" for the special session. After review, this special session does not present real concerns for the RESC. The special session will consist of at least three days at the Capitol for all 100 legislators, who are each entitled to one bill. Mr. Schupbach feels fairly confident that the Bar will not have issues to address during the special session. However, political skirmishes may begin to incubate during the special session, with carryover into the regular session beginning January 2018. The forecast for legislative topics in 2018 suggests that oil and gas issues (setbacks, leases, Firestone—close to 20 bills on those alone) are likely to predominate.

a. Address Confidentiality Program

Mr. Calvin provided background on the Address Confidentiality Program (ACP) and the Real Estate Section Council's work with Rep. Carver on potential legislation. This statutory program under the supervision of the Colorado Department of Personnel allows victims of domestic violence or stalking to register and use a fictitious address. The ACP currently prohibits county clerks and recorders from making documents available online that include addresses of ACP participants. Rep. Carver wants additional protections for program participants who own their homes. Representatives from the Bar, including members of the Real Estate Section and Trust and Estate Section, with input from Tax and Business Law sections, met with Rep. Carver to discuss options for what might work in residential real estate transactions. Discussions have included the use of trusts, nominees, and LLCs with unrelated managers. Rep. Carver is looking at ways to provide the desired protections without the need for a bill. The Bar representatives have stressed, and Rep. Carver has agreed, that a solution must not make real estate records secret or allow fictitious names.

b. Proposed Changes to Foreclosure Statutes

Mr. Lubinski updated RESC on the working group discussion of proposed changes to foreclosure statutes. Colorado foreclosure statutes underwent a significant re-write in 2007, with several subsequent years of revisions, then a break for a couple of years. The changes currently proposed fall into three categories: (1) clean up; (2) substantive; (3) single purpose/incident changes. Two more meetings are scheduled for October, with the hope for a direction and plan on proposed legislation. Mr. Calvin reported that these efforts are led by the Denver Public Trustee's office and not necessarily supported by the Public Trustees Association. One issue that may get addressed via a bill involves the status of unrecorded certificate of purchase holders, which may ripen into title before the first mortgagee forecloses.

c. Colorado Trust Code Task Force

Mr. Schupbach indicated that a Colorado Trust Code bill will run in the 2018 legislative session. The proposed bill has undergone significant changes from the uniform law but may garner support for introduction as a Uniform Law Commission (Colorado) bill. Ms. Pasquini reported on the three outstanding issues as of the August RESC meeting and the resolution of those concerns. Ms. Arnold reported that, after consultation with trust attorneys, the draft looks good. Mr. Kirch reported that the Trust and Estate Section approved the Code, with revisions, at the last meeting, and it will move forward to a bill. The Uniform Law Commission is expected to review the Code and consider it for uniform law status as an upcoming meeting. Mr. Calvin observed that the RESC does not seem to need to monitor the Trust Code unless or until other changes occur.

d. Uniform Laws 2018

Mr. Schupbach reported that he has spoken with the Uniform Law Commissioners about the agenda for 2018 and feels confident that the largest concerns—landlord-tenant and receivership—will not go forward this year. The Colorado Trust Code is anticipated to get introduced, though its status as a uniform law remains undetermined. The Uniform Law Commission meets on Friday, September 22, 2017. The agenda includes the Residential Landlord-Tenant Act, Receiverships, and the Trust Code, in addition to other potential bills not within the RESC's subject area.

10. Board of Governors

Ms. Dunn reported that there is nothing of note from the Board of Governors. The next meeting will take place in October in Breckenridge.

11. Education/Topical Lunches Committee

Mr. Mike Payne reported that the October 5th downtown luncheon will feature Peter Griffiths speaking on title insurance endorsements. Alan Pogue will cover special district due diligence on November 2nd at the Magianno's DTC location.

12. Interprofessional Committee

Ms. Leff presented noteworthy topics of discussion from the August Interprofessional Committee meeting. Committee members are tracking the evolution of remote notarization and options for Colorado. Cyberfraud incidents continue to impact real estate brokers, title companies, and purchasers/sellers. The Colorado Mortgage Lenders Association (CMLA) intends to weigh in on the proposed definition for "family member" as part of the mortgage loan originator statutory changes; CMLA considers the proposed definition overly broad. The committee also discussed unauthorized practice of law in the preparation of warranty deed exceptions and notes and deeds of trust on seller-carry transactions.

13. Publications/Newsletter, Website, Discussion Group

Mr. Lubinski reported on the newly named Communications Committee. A newsletter draft for this fall is already prepared and will be transmitted to new committee members. Other tasks include reducing institutional knowledge to writing. Also, this committee adds things to the website, through Ms. Sreenen, and monitors the discussion group.

14. Education/CLE Committee

Ms. Arnold reported that the Fall Update CLE is set, with a focus on landlord-tenant law. Mr. Cox will moderate, and Ms. Arnold will teach the ethics class. Ms. Hoyt asked for verification of the new CLE Committee membership, which includes Ms. Mowry, Mr. Cox, and Ms. Arnold.

15. CBA ADR/Mediation Committee

Mr. Anderson introduce the ADR/Mediation Committee, on which he serves as a Real Estate Section liaison. The committee is new and does not meet regularly but has recently prepared a draft guidebook on ADR and mediation. The guidebook is meant to educate judges, members of the public, and others. Many judges come from criminal law backgrounds and may not use mediation a lot before sitting on the bench. In the process of developing this guidebook resource, committee members have raised the topic of unauthorized practice of law in the context of different types of mediation, including evaluative and facilitative mediation. Facilitative mediation is often used in domestic relations cases and seems to take an approach more focused on emotions and personalities. Mr. Anderson discussed his own regular use of evaluative mediators, who are attorneys, and his unfavorable experience in his single mediation with a non-attorney. Committee members have voiced concerns that evaluative mediation crosses into the unauthorized practice of law because of information and direction provided to opposing sides and the potential for problems when parties to the mediation are not represented. The committee would like comments by the end of the month on the draft guidebook. Julie Waggner offered her thoughts as a mediator, commenting on the use of engagement agreements to describe the relationship between the mediator and the parties and the fact that parties value evaluative mediation. Council members offered

additional feedback on the draft guidebook, including a request that the book specifically include disputes over contracts to buy and sell real estate. Mr. Calvin called for a task force to review the guidebook and input to the committee by the end of September. Ms. Brimah, Mr. Tueller, and Ms. Waggener volunteered to serve on this task force with Mr. Anderson.

16. CBA Ethics Committee

Ms. Leff read from the written report submitted by Ms. Stodden, which noted that the Ethics Committee formed a subcommittee to address questions about AVVO and Legal Zoom and referral fees.

17. CBA Cannabis Law Committee

Ms. Dunn highlighted the upcoming ethics CLE scheduled for September 29th. In addition, the City and County of Denver has promulgated rules for the marijuana consumption clubs. Ms. Dunn will forward the website with information about the rules to RESC. Mr. Sonnenheim will now serve as the Cannabis Law Committee liaison.

18. Young Lawyers Division

Ms. Deline reported on general YLD announcements. The YLD conference is scheduled from October 5th to 7th and will focus on unbundled legal services. YLD continues to hold coffee sessions around the state that serve as networking opportunities for young lawyers to meet and discuss topics of interest.

NEW MATTERS

Mr. Calvin noted the expectation that committees and liaisons provide regular monthly reports. Future meeting agendas will not assume “inactive” status for any committee or liaison.

ADJOURN

The meeting adjourned at 4:29 pm.