

MINUTES

CBA Real Estate Section Council
Date: October 20, 2015 – 3:00 p.m.

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

I. Call to Order

Mr. Sweetser called the meeting to order at 3:00 p.m.

II. Introduction of Guests

Mr. Sweetser welcomed Alex Pankonin, who participated by telephone.

III. Approval of Minutes

The minutes of the September 16, 2015 RESC meeting were approved as submitted.

IV. Financial Report

Mr. Calvin reported that the Real Estate Section has \$65,025.80 in its account as of September 30, 2015.

V. Action Items

No action items were identified.

VI. Reports

A. Documentary Fee/TD1000 Task Force.

Ms. Hance reported on a meeting she had attended with Rep. Lebsock, representatives of LTAC and lobbyists for the County Clerks, County Assessors and Colorado Mortgage Bankers. The sense that there is a problem with the existing documentary fee legislation stems from the fact that title companies prepare deeds that recite as consideration the full contract price rather than nominal consideration or the amount allocated to real property on the real property transfer declaration, or TD1000. The TD1000 forms are typically not distributed in advance of closings, so closing agents are not notified until then that part of the purchase price has been allocated to personal property. This results in a mismatch between the recited consideration in a deed and the documentary fee, which, in some counties, results in the Clerk and Recorder rejecting a deed

submitted for recording. The issues are clouded by the perception of some county assessors that brokers have advised buyers to allocate an unreasonably large portion of the purchase price to personal property, on the theory that an artificially low allocation to real property will result in lower property tax assessments in the future.

Several possible changes were discussed, including modifying contract forms to provide a space for allocation of the purchase price between real and personal property at the time the contract is negotiated, or distributing TD1000 forms before closings. The mortgage bankers' representative argued that documentary fees should be payable on the full contract price, regardless of any allocation to personal property. Kent Levine was reported to have suggested the use of that approach if the amount allocated to personal property is less than \$10,000, but not if the value of personal property exceeds that threshold. No consensus was reached at the meeting.

Mr. Schupbach commented that the county clerks wanted to know what the Bar was willing to do to clarify the existing statute. Mr. Sweetser responded that the threshold approach might be the most practical way of simplifying routine residential transactions while preserving the existing statutory approach for commercial transactions and residential transactions that involved an unusually large amount of personal property. Ms. Hance noted that charging the documentary fee on even small amounts of personal property might be viewed as a tax increase and be objectionable to some legislators on that ground. She suggested that an approach suggested earlier by Mr. Calvin, which would involve charging the documentary fee on the entire contract price unless the closing agent had received written information concerning the parties' allocation of part of the price to personal property a specified number of days before the closing, might be preferable. No consensus was reached at this meeting, either. Mr. Schupbach said that the residential brokers' association wanted to join the discussion, and that he would try to set up a meeting that included them.

B. Real Estate Section Bylaw Amendments.

Mr. Sweetser described the proposed amendments, including cleaning up inaccurate definitions, formalizing the role of the Secretary in relation to the nominating committee, eliminating an obsolete provision for an annual convention committee, and inserting a provision to establish formally the budget committee. He noted that he had already received some comments on the proposed amendments and would likely recommend minor additional changes. Council members are not asked to vote on the changes at this meeting, but probably will be asked to vote at the November 2015 meeting.

C. HELOC Release Proposal.

Mr. Sweetser reported on the background, which would excuse a mortgage lender from releasing its deed of trust pursuant to C.R.S. 38-35-124 when the outstanding balance is paid down to zero, if the borrower has not affirmatively relinquished the right to obtain further advances under the secured loan. The change has been described as relating only to home equity lines of credit, but the language proposed by the mortgage lenders is not limited to residential properties and refers to “loans” as well as “lines of credit”.

Mr. Schupbach commented that the mortgage bankers feel strongly about the need for the change.

Mr. Calvin noted that the existing statute excuses a mortgage lender from any obligation to continue making advances if a borrower requests that the deed of trust not be released, so the lenders’ proposal amounts essentially to a reversal of the existing presumption.

Mr. Sweetser suggested that the Council should probably wait to see what is introduced, but that his inclination would be to oppose the language as presently proposed. Mr. Pankonin said that LTAC agrees with this general view.

D. Uniform Laws.

Mr. Sweetser reported that several members of the Council had met that morning with the Colorado members of the Uniform Law Commission, and that it appeared likely that several proposed uniform acts would be introduced in the upcoming legislative session, although the substitute decision maker documents act might be modified so as to apply only to health care decisions.

Mr. Toth reported on the morning’s discussion of the Uniform Voidable Transactions Act, in which he had tried to focus attention on some potentially undesirable consequences of the choice of law provisions. The chair of the committee had resisted the notion of making any changes and had dismissed concerns regarding the provisions dealing with “series” entities that had been expressed by the Business Law Section. Mr. Toth predicted the act would be introduced in its uniform form. Ms. Arnold commented that Mr. Toth seemed to have struck a nerve with some members of the committee when he pointed out that the uniform language could result in the application of non-U.S. law, not merely non-Colorado law.

Ms. Arnold reported on discussion of the proposed Uniform Residential Landlord Tenant Act. She commented that Rep. Levy is driving this bill, and that former Senate Majority Leader Brandon Shaffer was also very interested in it. Ms. Arnold has been working with an intern who has been researching the

changes in the uniform language made by other states that have adopted the uniform act, and who will shortly shift his focus to identifying the changes the uniform act would make in existing Colorado law. She noted that of the states that have adopted some version of the uniform act, New Mexico seemed to have done the most thoughtful and extensive job of melding the uniform language with existing legal concepts, and that the New Mexico statute should be looked at in the context of any changes in the uniform language Colorado might consider.

Mr. Calvin reported on discussion of the Uniform Commercial Real Property Receivership Act. Commissioner Mielke had pointed out that the ULC had just released a new version of the act, in which many of the former “reporter’s notes” had been transformed into official comments, and that in the Commissioner’s view, the additional comments would provide the guidance to courts and practitioners that the uniform act had previously lacked. Sen. Steadman had asked whether, if the Bar had to choose between adoption of the uniform act and adoption of a statute based on last session’s S.B.15-181, which of the two it would prefer. Mr. Calvin had acknowledged that, as between the two, the uniform act would probably be less detrimental. Mr. Lubinski said that he had been invited to, and would be attending, a meeting on October 21 with Sen. Wood, who had sponsored S.B.15-181 and was rumored to be considering a similar bill this year, perhaps combined with a broader bill curtailing the powers of court-appointed fiduciaries generally.

E. Statements of Authority.

Mr. Sweetser reported that he had spoken with Bill Callison of the Business Law Section, and that both agreed that the two sections had each waited for the other to move forward. He asked Mr. Bergstrom, who would be attending Business Law Section meeting the following day, to try to get a working group organized to begin considering changes in the existing statutes.

F. POETS.

Mr. Sweetser summarized the discussion from the Council’s last meeting on September 16. He reported that he had met informally with several past chairs of the Real Estate Section to discuss the situation, but had nothing definitive to report.

G. Law Student/Real Estate Section Mixer Event.

Mr. Calvin reported that the event would be held October 29 at the Black Shirt Tavern, but said that early returns suggested there would be more law students than lawyers attending. He asked Council members who had not yet responded to consider attending and notifying the RSVP-collector that they would do so. Ms.

Collier Smith said that she would send out a reminder invitation to Real Estate Section members.

H. Reception for Legislators.

Mr. Schupbach reported that on November 2, the Legislative Policy Committee would conduct a training session for LPC liaisons on the use of legislation tracking software, followed by a brief meeting and then a reception for legislators, in an effort demonstrate the desire of the CBA to be helpful to legislators in the upcoming session.

I. Trust & Estate Fiduciaries Reform Legislation.

Mr. Lubinski reported on a call in which he had participated on October 16. The call had focused on probate fiduciary issues, and particularly on the need for a factual response to an October 19 report on Channel 4 that was expected to reprise the “horror stories” involving court-appointed guardians and personal representatives that had been reported earlier in the year in a series of articles in The Denver Post.

J. 2016 Symposium Update.

Ms. Nies reported that the Symposium would be held July 21 – 23. The venue is likely to be in Breckenridge, but that decision is not absolutely final. She is filling in the roster of speakers, and invited suggestions from Council members for speakers and topics.

K. Legislative Policy Committee.

Mr. Toft noted that the LPC has not met yet this fall, but would begin doing so in preparation for the legislative season. For the moment, there was nothing new to report.

L. Address Confidentiality Program.

Mr. Sweetser reported on a meeting the previous week with Rep. Carver, leadership of the ACP and other stakeholders. A title company representative had expressed the view that participants in the ACP program should simply not own real property, and Mr. Sweetser emphasized that this was not the Bar’s view. Although problems had been identified with various approaches, the Bar was committed to trying to find a workable solution; at the moment, perhaps the use of nominees in title documents seemed less complicated than other alternatives. At the urging of Rep. Carver, he had agreed to pull together a group of lawyers from different disciplines to consider particular legislative approaches and, if possible, come up with draft legislation. He envisions a group of five or six, with

backgrounds in real estate, business law, trusts and estates, banking and tax. The initial target would be to come up with a substantive outline of issues and potential solutions by November 20.

M. Publications/Newsletter, Website and Discussion List Committee.

Mr. Killean reported that the committee expected to get the next newsletter out around the end of this month or early in November. Joey Lubinski is doing a CLE lecture on the ILSA condominium amendments, and would turn his talk into a newsletter article for a subsequent issue.

N. Education/CLE Committee.

Mr. Mayo reported that the fall “Hot Topics” program on October 16 had been a success, with some 55 web participants in addition to those attending in person. One speaker had been unable to appear due to a last-minute problem, but Suzanne Leff had found a substitute speaker to step in and fill the slot. Ms. Decker added that the committee had scheduled a brainstorming session to come up with plans for a Spring CLE event.

O. Education/Topical Lunch Committee.

Ms. Alderman reported that the November lunch will be in downtown Denver and will cover environmental issues in real estate transactions. After that, the next topical lunch will be in January.

P. Business Law Section Liaison.

Mr. Bergstrom noted that the next meeting would be on October 21, and will be covered in his November report.

Q. Interprofessional Committee.

Ms. Dunn provided a written report, *attached*, regarding the September meeting. Ms. Waggener had also distributed an e-mail message to Council members, regarding recent software changes by a national vendor used by many closing agents that generated closing statements which comply with federal law but not with Colorado Real Estate Commission requirements. Mr. Sweetser noted that Ms. Dunn’s report indicated the warranty deed task force had been meeting, seemingly without notice to the Real Estate Section; he will contact Jim Benjamin for additional information. Ms. Decker added that she had recently attended the October meeting of the Interprofessional Committee meeting, which covered much of the same ground, with an extended discussion of documentary fee/TD1000 issues as well.

R. Supreme Court Civil Rules Committee Liaison.

Mr. Sweetser reported that a final version of the proposed new Rule 120 had finally been transmitted by the Civil Rules Committee to the Supreme Court, which will presumably schedule a public hearing on the proposed Rule.

S. Publications/Colorado Lawyer Committee.

Mr. Killian reported that the committee had found it necessary to hold up publication of a pending article on 1031 exchanges, because the author's approach to citations did not measure up to the rigor expected for articles in The Colorado Lawyer. The shortcomings had been pointed out to the author, and the committee was waiting to learn whether the author would be willing to do the additional work needed to create a publishable article.

T. Community Service/Charitable Committee.

Mr. Mayo reported that the LawLine 9 event on September 23rd had been a success, with real estate lawyers on the panel receiving more calls than the lawyers practicing in any other area. Most of the callers wanted to talk about HOA issues or meth labs.

Mr. Mayo also reported that the available dates for Habitat for Humanity programs did not mesh well with the dates on which respondents could be available. November and December are typically even more difficult months in which to schedule volunteer activities, so the committee had decided to postpone until Spring any further efforts to organize a project in concert with Habitat for Humanity. Ms. Arnold pointed out that Habitat for Humanity had also asked for volunteers to staff a "pumpkin patch" sale in Lakewood, before Halloween, to raise money for home construction. She will circulate information on that opportunity to Council members.

U. Trust & Estate Section Liaison.

Ms. Wendell, standing in for Mr. Kirch, reported that the last meeting of the Trust & Estate Section been devoted to a discussion of how to use standard real estate forms, including the proper way to describe trustees and other fiduciaries in those documents.

V. Colorado Housing Council.

No report this month.

W. Young Lawyers Division Liaison.

Mr. Sweetser welcomed Nate Osborn as the new liaison to the Real Estate Section from the Young Lawyers Division. Mr. Osborn reported on a call he had had with Mr. Killean and Nicole Brown, the head of the Young Lawyers Division, regarding opportunities for service available to young lawyers. He added that the Business Law Section had held a series of breakfast meetings for members of the Young Lawyers Division, followed by “nuts and bolts” training sessions, and hoped that the Real Estate Section might be able to do something similar. Mr. Lubinski mentioned that he had conducted a training session for the Young Lawyers Division on title insurance over the summer, and noted that the American Bar Association publishes outlines for similar kinds of training programs.

X. Cannabis Law Committee.

Ms. Dunn reported that the committee wants to reach out to other bar associations, to encourage them to form similar committees. The focus is on CLE and general business education for non-lawyers.

Y. Tax Section Liaison.

Tyler Murray reported that the Tax Section had met in September. Greg Martin of the CBA is coming to the section’s next meeting to speak about financial statements for the Bar.

Z. CBA Ethics Committee Liaison.

Deanne Stodden submitted a written report, *attached*. She noted that the committee is working on updates to two formal opinions: No. 09 – Acquiring an interest in a client, and No. 93 – Ex parte contacts with a government official. The committee is also working on several new formal opinions, including one relating to lawyers’ accepting payments from third parties (outside the insurance context), lawyers’ responsibilities in adult protective services proceedings, and potential solicitation issues in public “Ask a Lawyer” situations.

AA. Title Standards Committee.

Ms. Hance said that the committee is looking for new substantive projects. Mr. Sweetser observed that the committee might have a role to play in connection with any ACP (address confidentiality program) legislation, and invited the committee to designate a member to participate on the ACP task force.

BB. CBA Board of Governors Liaison.

No report this month; the next meeting will be in October.

CC. Membership and Practice Development Committee.

No report this month.

DD. Forms Sub-Committee Liaison.

Geoff Anderson noted that the new Real Estate Commission approved forms were available on its web site. Use of the new forms by brokers will be mandatory beginning January 1, 2016.

EE. Eminent Domain Committee.

Ms. Alderman reminded the group that there would be an eminent domain CLE program on November 4, and suggested that Council members, or colleagues in their firms, should consider attending.

VII. Adjournment

The meeting was adjourned at 4:40 p.m.



Charles D. Calvin, Secretary