

MINUTES

CBA Real Estate Section Council
Date: November 17, 2015 – 3:00 p.m.

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

I. Call to Order

Ms. Nies called the meeting to order at 3:02 p.m.

II. Introduction of Guests

Ms. Nies welcomed guest Alex Pankonin.

III. Approval of Minutes

The minutes of the October 20, 2015 RESC meeting were approved as submitted.

IV. Financial Report

Mr. Calvin reported that the Real Estate Section has \$62,154.10 in its account as of October 31, 2015.

V. Action Items

A. Real Estate Section Bylaw Amendments

Ms. Nies reminded RESC members of the background and reasons for the proposed amendments to the Bylaws of the Section, which had been discussed at the September meeting. Mr. Sweetser noted that a few changes had been made in response to comments at or before the September meeting, including the removal of language that called for automatic consideration of each member in his or her third year on the Council for a position on the “officer track”. Mr. Calvin inquired whether the Council had the ultimate power to amend the Section’s Bylaws, and Ms. Collier Smith responded that changes must be approved by the Council but would only become effective upon approval by the CBA Executive Board.

Mr. Alt moved that the Bylaw amendments, *attached*, be approved. Mr. Killian seconded the motion. There was no further discussion, and the motion was adopted on a voice vote.

B. TD1000/Documentary Fee Legislation

Ms. Nies reported on the probability that the Council will need in the near future to recommend to the Legislative Policy Committee whether the Bar should take a position on proposed legislation affecting the Colorado documentary fee imposed at the time of recording of a deed conveying real property for consideration of \$500 or more. This issue is commonly referred to as the “TD1000” issue, after the Department of Revenue designation of the Real Property Transfer Declaration form pursuant to which the documentary fee is required to be calculated under present law. The TD1000 form contains a space in which the value of any personal property included in the total sale price may be separately stated.

Under the existing statutes, the documentary fee is to be calculated with respect to the portion of the sale price attributable to real property but not with respect to any portion of the sale price attributable to personal property. This has caused problems for some counties, because title companies often recite the total sale price as the consideration in a deed, and do not submit the TD1000 form – which is not to be recorded – when the deed is recorded electronically; they use the same total sale price in preparing closing statements, because, in many cases, the TD1000 forms are not finalized until closing. Some Clerks and Recorders calculate the documentary fee based on the erroneously-recited consideration and either make, or refuse to make, an adjustment when they receive a TD1000 showing that part of the price was allocated to personal property. If an adjustment is made, then there is likely to be a discrepancy between the title company’s closing statement calculation of the documentary fee and the Clerk and Recorder’s more accurate calculation.

Ms. Hance reported on a meeting, the latest of several, at which alternative legislative fixes were discussed. The Denver Clerk and Recorder has proposed language which has the effect in most cases of ignoring the distinction between real and personal property and charging the documentary fee on the entire sale price. The RESC task force had proposed several alternatives that would have preserved the existing distinction between real and personal property but would also have allowed closing agents to assume that the entire purchase price was allocable to real property unless they received contrary information a sufficient time before the closing to prepare correct closing statements. LTAC and the Denver Clerk and Recorder object to this approach because it would require title companies to stop reciting the total purchase price as deed consideration, or require Clerks and Recorders to provide a channel by which they received information as to the breakdown between real and personal property, or changes of both types.

No decision needs to be made until legislation is introduced in January, Ms. Nies said. At that point, the RESC will need to decide whether to recommend to LPC that the Bar oppose the legislation or remain neutral.

VI. Reports

A. HELOC Release Proposal

Mr. Schupbach reported that he, Mr. Sweetser and Mr. Calvin had met with lobbyists for the Colorado Mortgage Lenders Association to discuss changes in their proposed amendment of C.R.S. 38-35-124. The changes proposed by the Section were acceptable to the CMLA representatives, subject to a minor addition. Mr. Calvin said he would send the revised language, including the requested insert, to Mr. Schupbach, who would confirm it was still acceptable to the CMLA.

B. Uniform Voidable Transactions Act

Mr. Toth reported that representatives of the Uniform Laws Commission in Chicago were attempting to set up a conference call with the drafters, to consider the concerns (principally choice of law and *sub rosa* recognition of series entities) expressed by the Colorado Bar. The call has not yet been scheduled but will probably take place in early December. One of Andy's objectives will be to learn whether other states have voiced similar concerns.

C. Uniform Residential Landlord/Tenant Act

Ms. Alderman reported that an intern, working under the supervision of Ms. Arnold, has prepared an extensive memorandum comparing the Revised Uniform Landlord Tenant Act with existing Colorado statutory and case law. She, Ms. Arnold and Mr. Sweetser will work on modifying the format of the memorandum in order to make the comparisons more readily apparent to casual readers, and hope to finish the revisions in time to deliver the memo to the Colorado ULC commissioners at their November 30 meeting.

D. Uniform Commercial Real Property Receivership Act

Mr. Lubinski reported that the American Bar Association has formally approved the proposed uniform act. He has spoken with Wilson Freyermuth, the reporter for the uniform act, regarding the concerns expressed by the Colorado Bar.

E. Mortgage Loan Originator Legislation

Mr. Clark reported on the potential legislation he and Mr. Killean had drafted. The need for legislation arises from the fact that both federal regulations and the Colorado mortgage loan originator statute exempt from the definition of "mortgage loan originator" sellers who carry back, in limited instances, purchase money financing, but the Colorado statute provides no exemption for non-seller

third parties (often friends or family members, but sometimes employers) who may also provide financing on a casual basis. The federal regulations exempt such casual lenders who make up to five residential loans in a 12-month period, and the proposed legislation circulated by Messrs. Clark and Killean adopts the same five-loan threshold.

Mr. Calvin asked whether this number might be too small to exempt employers who were transferring large numbers of employees to a new facility in Colorado. Ms. Wendel said the Trust and Estate section would be interested in the this proposed legislation, but might also want to see an exemption for more than five loans per year.

Mr. Clark observed that legislative approval of a change might be more likely if it tracks the federal exemption level, and Mr. Sweetser commented that although the Section had often opposed enacting Colorado legislation to track the details of federal regulations, this might be an occasion where that should be done.

F. Warranty Deed Form Task Force Report

Ms. Alderman reported that as far as she knew, the task force had not met. Mr. Sweetser reported on a conversation with Jim Benjamin, a member of the task force, who had said broker members of the group were pursuing the idea of creating a new statutory deed form, to be known as a “grant deed”. This deed form would be defined by statute to have essentially the same characteristics as the existing statutory form of special warranty deed, without the supposedly negative connotations associated with the “special warranty” label.

Ms. Waggener reported on a discussion she had had with another lawyer who often represents brokers, and who had expressed a negative view of the “grant deed” proposal and had said he intended to speak out against it.

G. Trust & Estate Fiduciaries Reform Legislation

Mr. Lubinski reported that he and Mr. Schupbach had attended a stakeholders’ meeting with Sen. Woods on November 12. Fiduciaries appointed under the Probate Code seem to be the focus of Sen. Woods’ concern, but as of now she intends to include receivers in her bill.

The cases that had sparked Sen. Woods’ concern seemed to have involved lawyer misconduct, and existing attorney regulation standards and mechanisms seem to be strong enough to address those issues without new legislation, but Sen. Woods did not agree with that view.

Mr. Lubinski said that he and Don Allen, from the Business Law Section, had suggested that excluding receivers from any legislation might be prudent to avoid

triggering opposition from a variety of business interests, and Sen. Woods appeared to be considering that suggestion.

H. 2016 Symposium Update

Ms. Nies reported that the Symposium would be held at the Beaver Run resort in Breckenridge, July 21-23. She is continuing to work on lining up speakers and topics.

I. 25 Cases – Fred Skillern's January CLE

Mr. Sweetser reported on the background, and asked that anyone with cases to suggest contact Fred Skillern. Ms. Ray commented that similar “best of” case law formats had been used for CLE presentations in other states, and had received positive reactions from attendees.

J. News Article on Deed and LLC Fraud

Mr. Calvin commented on the New York Times article that had been circulated, which described equity skimming and other frauds and forgeries that had been committed in the New York City area by untraceable limited liability companies or corporations. Mr. Lubinski reported that he had run into similar timeshare resale scams in Colorado mountain resort projects. Mr. Clark said he had dealt with a situation in which fraudulent affidavits of service had been filed in a legitimate foreclosure proceeding, tainting the foreclosure decree.

K. Legislative Policy Committee

Mr. Toft reported that the committee has not met yet this fall, but would begin meeting in December.

L. Address Confidentiality Program

Mr. Starritt reported that the working group had held weekly telephonic meetings and was working on a white paper to provide legal background for stakeholders. He said that 36 states have some kind of address confidentiality statute, but only three of those deal with real property records: Minnesota, which allows redaction of records upon request by a program participant; Arizona, which permits a program participant to seek a court order calling for redaction; and Iowa, where the statute merely requires the Secretary of State to provide a program participant upon request with information concerning the possibility of holding title in a trust or other entity. The working group has spent considerable time looking at the possibility of taking title in the name of a nominee, but issues having to do with creditors’ rights may be impossible to resolve without new legislation.

Mr. Sweetser noted that the ACP stakeholders' meeting previously scheduled for today had been postponed, probably until the second week of December. He said he would remind Rep. Carver that the working group would provide research information, but could not propose or commit to support legislation without LPC approval.

Ms. Collier Smith pointed out that if a decision to support legislation needed to be made on short notice, that decision might be made by the "troika" without waiting for the next meeting of the full LPC.

M. Publications/Newsletter, Website, Discussion Group

Mr. Killean reported that the latest newsletter had been distributed to the officers for review, and would be distributed to the Section as soon as the review was complete.

N. Education/CLE

Mr. Mayo reported that the committee is working on the Spring 2016 CLE program, which will focus on the nuts and bolts of residential real estate transactions. Heidi Ray has lined up most of the speakers. The program will be held on March 17.

O. Education/Topical Lunches

Ms. Alderman reported that the November speaker had been great. The committee will take December off, but is beginning to think about programs for next year.

P. Business Law Section Liaison

Mr. Bergstrom reported that the Business Law Section Council is meeting tomorrow, but has nothing to report today.

Q. Interprofessional Committee

Ms. Leff said that she had nothing to report beyond the information in the written report *attached* that she and Ms. Decker had submitted and that was circulated before today's meeting.

R. Supreme Court Civil Rules Committee Liaison

Mr. Sweetser reported that Rule 120 was still being reviewed by the committee, and that there were no developments to report.

S. Publications/Colorado Lawyer

Mr. Killean reported that Paul Noto's article entitled "Water Law Basics for Real Estate Practitioners" was published this month in The Colorado Lawyer. He is following up with Chris Bryan on the status of other real estate articles in queue for publication.

T. Community Service/Charitable Committee

Mr. Mayo said that the committee would not be meeting again until after the first of the year, and had nothing to report at this time.

U. Colorado Housing Council

Ms. Dunn said she had nothing to add to the written report *attached* that was circulated before today's meeting.

V. Trusts & Estates Section Liaison

No developments to report.

W. Young Lawyers Division Liaison

No developments to report.

X. Cannabis Law Committee Liaison

Ms. Dunn had no developments to report.

Y. Tax Section Liaison

Mr. Murray reported that the section is getting ready for the January tax law update luncheon, which will include speakers from the real estate, tax and business law sections. He added that a volunteer speaker from the real estate section was needed.

Z. Title Standards Committee

Ms. Hance reported that the committee was ruminating on several possible new projects, but had not yet settled on one.

AA. Membership and Practice Development Committee

Mr. Killean had no developments to report.

BB. Forms Sub-Committee Liaison

Mr. Anderson reported that the sub-committee had met. One topic of discussion was whether the three-year moratorium on changes in commission-approved forms applied to all forms or only to contract forms. Guidance is being sought from the Real Estate Commission. The sub-committee had also discussed closing statement forms: Colorado has its own, commission-approved form, but title companies use forms provided by software suppliers. Brokers often delegate closing responsibilities to title companies, which raises questions concerning compliance. Some discussion was also had regarding the use by brokers of post-closing occupancy agreements, which, depending on the extent of post-closing occupancy by a seller, may begin to resemble leases rather than closing documents. The sub-committee also discussed the earnest money release form, which tracks the language of listing agreements in providing for a split between owner and listing broker of forfeited earnest money. Brokers say they do not often enforce such provisions, but the brokerage community does not want to change the forms.

CC. Board of Governors

Mr. Alt noted that most of his report was contained in the written report and attachments distributed before today's meeting. He noted that the Board of Governors had approved the change in the language of the note in Title Standard 3.4.1, and had also approved a change in the Bylaws of the Young Lawyers Division. He added that the Board of Governors anticipated that the legal directory would eventually move online, but that the Board did not want to abandon the paper publication while it remained profitable. He also noted that the Board of Governors recognized that, as is true of bar associations across the country, penetration rates were declining. A strategic planner has been hired to work on ways of responding to this trend.

VII. Adjournment

The meeting was adjourned at 4:10 p.m.



Charles D. Calvin, Secretary