COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-10744

THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC.,

Plaintiff

v.

NATIONAL REAL ESTATE INFORMATION SERVICES and NATIONAL REAL ESTATE INFORMATION SERVICES, INC.,

Defendants

CERTIFICATION OF QUESTIONS FROM UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE, THE MASSACHUSETTS BAR ASSOCIATION FOR THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Massachusetts Bar Association ("MBA"), founded in 1910, is a non-profit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence and respect for the law. The MBA is the largest bar association in Massachusetts, with approximately 15,000 members statewide. It comprises a House of Delegates that consists of a president, president-elect, two vice-presidents, treasurer, secretary, the two most immediate living past presidents, eighteen regional delegates, seven at-large delegates, chairs of the sixteen section councils and others. The MBA is governed by bylaws, which were most recently approved by the members in July, 2010.

The MBA provides professional support and education to its members, and advocacy on behalf of lawyers, legal institutions and the public. As part of its advocacy, the MBA has formed an Amicus Curiae Committee ("ACC") to evaluate certain litigation in which the MBA may be interested in participating. Upon the receipt of a proposal from the ACC, the House

of Delegates votes on whether the MBA should participate in the case through the filing of an amicus curiae brief. The ACC has determined that the issues raised in this case so affect the public policy of the Commonwealth of Massachusetts that they warrant an amicus brief.

INTRODUCTION

On June 21, 2010, the United States Court of Appeals for the First Circuit certified two questions to the Supreme Judicial Court:

1. Whether National Real Estate Information Services, Inc., and National Real Estate Information Services' activities, (collectively "NREIS") either in whole or in part, based on the record in this case and as described in the parties' filings, constitute the unauthorized practice of law in violation of Mass. Gen. Laws, ch. 221, §§46, et seq.

2. Whether NREIS's activities in contracting with Massachusetts attorneys to attend closings, violate Mass. Gen. Laws, ch. 221, §§46, et seq.

ARGUMENT

The question presented for decision in this case is this: does the provision by individuals or

entities of advice and services in Massachusetts relating to the acquisition or disposition of interests in real estate ("conveyancing") constitute the unauthorized practice of law proscribed by G.L. c. 221, §§46, et seq. For centuries, the provision of such advice and services in the Commonwealth has been held to be within the province of the legal profession. Thus, except for certain ancillary actions, only lawyers who have achieved a sufficient level of knowledge and skill and have sworn to abide by heightened ethical standards, may engage in providing such advice and services. See In re Opinion of the Justices, 289 Mass. 607, 613 (1935). To the extent that persons or entities provide such advice or services, without being lawyers admitted to practice, they are engaging in the unauthorized practice of law.

A determination whether a particular activity constitutes the practice of law requires a precise and contextually grounded definition of the terms of discussion. "Law practice," in common parlance, means an occupation conducted by persons professedly expert in the application of public law to public or private actions or needs. Such practitioners form the "legal

profession." Professor James A. Brundage, a leading historian of the development of the law, defines the term as follows:

> "the term "profession" properly speaking involves something more than simply a body of workers who do a particular kind of job on which they depend for support. A profession in the rigorous sense applies to a line of work that is not only useful, but that also claims to promote the interests of the whole community as well as the individual worker. A profession in addition requires mastery of a substantial body of esoteric knowledge through a lengthy period of study and carries with it a high degree of social prestige. When individuals enter a profession, moreover, they pledge that they will observe a body of ethical rules different from and more demanding than those incumbent on all respectable members of the community in which they live."

James A. Brundage, The Medieval Origins of the Legal Profession 2 (University of Chicago Press 2008).

Brundage's summary identifies three signifiers that locate particular occupational conduct within the purview of the "legal profession:" (1) the worker's effort provides specific assistance to members of the public in ways that "promote the interests of the whole community;" (2) the worker prepares to offer services by mastering "a substantial body of esoteric knowledge through a lengthy period of study;" and, of utmost importance, (3) such workers assume the rigors

of "a body of ethical rules different from and more demanding than" those that apply to the ordinary occupations of the community. As shown below, application of Professor Brundage's definition to the practice of conveyancing warrants its identification as the practice of law.

I. THE ACQUISITION AND DISPOSITION OF RIGHTS AND INTERESTS IN REAL ESTATE ARE MATTERS OF SIGNIFICANT PUBLIC IMPORT.

The orderly and peaceable creation and transfer of property rights is essential to the well-being of society. Thus, even in the case of the purchase and sale "of a single private house ... there is a public interest ... as there is in every [such] purchase and sale..." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (Holmes, J.). In ancient times, holders of property relied on moats and weapons to secure their rights. As civilization developed, society created rules imposed by legislatures and courts to provide a predictable method of protecting interests in real property. Better than weaponry, this complex of publicly enacted and universally applied statutes, cases and regulations, secures the rights of owners

and users of land. The public and social purpose of these controls is obvious.

In Massachusetts, the transfer of interests in land is hedged about with an immense number of statutes, codes and judicial decisions touching on contractual rights and obligations, land use doctrines dealing with easements, restrictions and rights of third parties, the creation and validity of mortgages, public health requirements, hazardous materials removal and control, building and zoning codes, and the like. Some of these considerations stem from colonial enactments, some from acts of the contemporary General Court. See Fall River Sav. Bank v. Callahan, 18 Mass. App. Ct. 76, 83 (1984) ("Of the many areas of law practice, conveyancing is one which lends itself particularly to formulation through decisional law and commentary as to what are appropriate procedures."). All of these procedures have the potential to affect any proposed transfer of property rights. The law does not require any buyer, seller, mortgagor or mortgagee to obtain outside assistance in navigating the network of legal requirements affecting land transfers. Nevertheless,

recognizing the public importance of having a citizenry well-informed on these matters, the state has imposed certain standards on those who would undertake to assist the public in determining their rights and obligations under the law relating to land transfers. We call those persons "lawyers." We call what they do "conveyancing." It follows that,

> "in preparation for a [real estate] closing, there is indeed a great deal of work that is not itself the delivery of legal services, and that the concept of a company to provide the administrative tasks of locating and organizing the documents is, at least in theory, a valid one. It remains the case, however, that those administrative tasks are undertaken to provide the support for what will ultimately comprise the delivery of legal services to the parties - those documents form the basis for the various legal opinions and advice that ultimately allow the transaction to go forward."

In re Levine, 20 Mass. Att'y Disc. R. 311 (2004). (Emphasis added.)

II. THE PUBLIC POLICY OF THE COMMONWEALTH REQUIRES THAT THOSE WHO OFFER ADVICE AND SERVICES RELATING TO LAND TRANSACTIONS OBTAIN RELEVANT EDUCATION AND EXPERTISE.

"The great body of questions which have made the subject of property so large and important are questions of conveyancing..." O.W. Holmes, Jr., The

Common Law 246 (Little, Brown and Company 1923) (1881). The object of conveyancing practice in Massachusetts is to secure rights in land in compliance with standards that the state imposes on the components of any land transaction. To serve that purpose, a series of interconnected events occurs, starting, for example, when a potential buyer of land executes a document delivered to a potential seller offering to buy the seller's property, and the seller accepts the offer. That document, at the threshold of a transaction, may itself create enforceable rights between the parties. See, e.g., McCarthy v. Tobin, 429 Mass. 84, 88 (1999). That consequence may not be apparent to signatories who are not familiar with the state's rules for determining when exchanges such as these create enforceable rights. For that reason and others, the public policy of Massachusetts is (a) that it would be prudent for persons proposing to buy, sell, mortgage or otherwise acquire or dispose of interests in land, to have advice on the legal consequences of their acts, and (b) that those who would offer to provide that advice should receive a license to provide such services only after meeting certain publicly ordained standards of education,

expertise, and ethics. "The purpose of the requirement of a license as a condition of the right to practice law, as in the instances of the physician, the insurance broker, the auctioneer and of others where licenses are required, is not to protect the practitioner, but to protect the public." In re Shoe Mfrs. Protective Ass'n., 295 Mass. 369, 372 (1936); see also In the Matter of Tocci, 413 Mass. 542, 547 (1992). It follows that, in order to protect the public from "the activities of incompetent or unreliable persons," the Commonwealth requires that those offering such assistance show their "qualifications before engaging in a particular occupation ... [and] obtain a license attesting ... skill and character." McMurdo v. Getter, 298 Mass. 363, 366 (1937).

From its colonial beginnings, Massachusetts has required increasingly extensive education and training in the law for those who would enter that profession. This Court controls the gate to law practice, requiring that applicants for bar admission obtain college and graduate law degrees, S.J.C. Rule 3:01, §§ 3.2-3.3, as appearing in 382 Mass. 753 (1981); undergo

a difficult written bar examination and a separate written ethics examination, id. § 2.1, as appearing in 382 Mass. 753 (1981), and § 3.6, as amended in 437 Mass. 1302 (2002); submit to an investigation of their moral "character, acquirements and qualifications," id. § 1.3, as appearing in 382 Mass. 753 (1981), and, finally, since 1701, as their first act as lawyers, to solemnly swear to

> "do no falsehood, nor consent to the doing of any in court … [to] not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same … [to] delay no man for lucre or malice; but [to] conduct [oneself] in the office of an attorney within the courts according to the best of my knowledge and discretion, and with all good fidelity as well to the courts as my clients. So help me God."

G.L. c. 221, § 38.

Except for marriage, the acquisition of an interest in land is probably the most important legally consequential act anyone can undertake. Such an act is not a series of random events, any more than the human body is merely a collection of parts. From the offer to purchase to the recording of a deed, each step produces legal consequences and connects to each other step in the process. The Commonwealth has

determined that, in the public interest, those who would advise, serve, and provide competent legal judgment in land transactions meet such high standards of education and expertise. Nothing in the record of this case suggests that NREIS's personnel have the remotest degree of such education or expertise. NREIS, however, tries to "bless" its transactions by hiring Massachusetts lawyers to attend closings as oath-taking notaries public. Notaries, of course, need not be lawyers. By sending a lawyer in to take oaths at the end, however, NREIS believes that it can escape the bar of § 46 et seq. The Court should see this as nothing other than a transparent attempt by NREIS to immunize itself from the consequences of its unauthorized practice of law.

III. THE PUBLIC POLICY OF THE COMMONWEALTH REQUIRES THAT THOSE WHO WOULD PROVIDE LAW-RELATED ADVICE AND SERVICES ADHERE TO A STRINGENT ETHICAL CODE.

For more than a thousand years, the Anglo-American legal tradition has required that those who would provide law-related advice and services, must "agree to observe specific ethical standards in carrying out their work as a condition of entrance

into practice." Brundage, supra op. cit. at 491. These rules are "different from and more demanding than those incumbent on all respectable members of the community in which they live." Id. at 2. The expectations of the profession have turned into a form of "social contract" with the public: "[t]he public grants a profession autonomy to regulate itself through peer review, expecting the profession's members to control entry into and continued membership in the profession, [and] to set standards for how individuals perform their work so that it serves the public good." Neil Hamilton, Professionalism Clearly Defined, 18 No. 4 Prof. Law. 4, 4-5 (2008).

Starting with the 1701 lawyer's oath through the latest amendments to the Massachusetts Rules of Professional Conduct, S.J.C. Rule 3:07, this Court has recognized the need for heightened ethical standards governing those who would assist the public in something as immensely important as transactions involving land, whether for shelter or for business. "One source of expressed public policy is the body of rules governing the conduct of lawyers[.]" See McLaughlin v. Amirsaleh, 65 Mass. App. Ct. 873, 881

(2006). Where doubts arise about the character or fitness of an applicant to the Massachusetts bar, the Court will resolve them "in favor of protecting the public by denying admission[.]" In re Admission to Bar of Com., 444 Mass. 393, 415 (2005) (quoting Matter of Prager, 422 Mass. 86, 100 (1996)). When reviewing an attorney disciplinary decision of the Board of Bar Overseers, the Court "must consider what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior." Matter of Concemi, 422 Mass. 326, 329 (1996) (emphasis added). Thus, in Levine, supra, a single justice of this Court (the late Sosman, J.) considered the application of ethical rules in the public interest in the context of conduct nearly identical to that of NREIS in this case. Levine, a suspended attorney, was charged with providing legal services and advice through his company, "Closing Tek," which provided both legal and non-legal services to real estate lenders. "The general character of [Closing Tek] is to provide real estate title examinations for residential and commercial mortgage lenders and related services and products." Id.

After his original suspension took effect, Levine continued to operate Closing Tek. He enlisted an admitted attorney, Michael Levin, to attend the closings. Levin attended almost sixty closings; his only role was to attend the closing; he did no legal work to prepare the "closing package." Id. He was acting, therefore, "as a mere straw." Id. The Court stated, "I do not find credible the suggestion that none of those [sixty] transactions required any form of legal services whatsoever other than the physical appearance of an attorney at closing." Id. Thus, the Court added four years to Levine's suspension, holding that he had engaged in the unauthorized practice of law.

The Levine decision illustrates the high importance that this Court accords (a) to the fact that conveyancing is a process, not a series of independent units, and is to be considered in that light; and (b) to the importance of stringent ethical standards applicable to that process. NREIS believes just the opposite: (a) that a conveyance merely bundles up several discrete elements, none of which require legal services except, amazingly, the

notarization of papers at closing; and (b) none of its operatives need have the slightest acquaintance with any code of ethics, except, perhaps, the last-minute lawyer whose only service is to attach a seal and signature to papers proffered by strangers around a table.

The Court should not allow this charade to continue.

CONCLUSION

As shown above, the real estate closing services that the defendants offer amount to conduct with significant public import, performed, however, by individuals with no known training and education designed to make them knowledgeable about Massachusetts law governing real estate, and not subject to the exceptionally high ethical code which Massachusetts requires of those who offer such services.

NREIS argues that what it does is not the practice of law. That is pure sophistry. First, NREIS contends that the acquisition and disposition of

interests in land is not a process, but a concatenation of separable events none of which require the exercise of legal judgment. Second, it wrenches quotations from some judicial decisions in support of the fallacious contention that, because some stages in the process of closing may be performed by non-lawyers, such as the collection of recorded data, then none of the stages are the practice of law. Third, *conceding* that some semblance of a lawyer's imprint should be on the proceedings, NREIS hires a lawyer to notarize documents at closings. In short, the defendants acknowledge the need for legal cover and find it in the use of the closing lawyer as fig-leaf. Justice Sosman, in Levine, supra, put paid to that contention. A lawyer who is brought in as "a mere straw" is no lawyer at all.

NREIS's argument assumes that the transfer of land is no more legally risky than the purchase of a newspaper. It disdains the centuries-long public policy that those who assist parties in the transfer of rights in land be subject to rigorous public regulation.

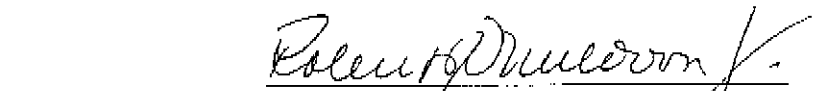
Justice Sosman's rationale in Levine, supra, irrefutably bars NREIS's business practices as the unauthorized practice of law. Admittedly, NREIS agents can perform purely administrative tasks involved in the ultimate transfer of legal rights in property, such as those tasks law firms often delegate to legal secretaries or paralegals. But never, not even in the simplest of conveyances, does the transaction end without the need for "various legal opinions and advice that ultimately allow the transaction to go forward," and secure the interests of the individual and the public. Levine, supra. The public policy of the Commonwealth demands no less.

The Massachusetts Bar Association, which seeks to vindicate the long-standing public policy governing conveyancing as the practice of law, requests that the Court (1) declare that NREIS is engaged in the unauthorized practice of law in violation of G. L. c. 221, § 46 et seq.; and (2) respond to the two questions certified by the First Circuit with an unequivocal "Yes."

Respectfully submitted,

The Massachusetts Bar Association,

By its attorneys,



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