

# *Unfulfilled Promise? Witness Closings and Other Proscribed Practices 11 Years After NREIS*



## **Conrad J. Bletzer Jr., Esq.**

Bletzer & Bletzer, PC  
300 Market Street  
Brighton, MA 02135  
(617) 254-8900  
[conrad@bletzerlaw.com](mailto:conrad@bletzerlaw.com)

Conrad Bletzer is the senior real estate litigation partner at Bletzer & Bletzer, PC. Before joining the firm, Conrad had a successful career as an assistant district attorney for Suffolk County from 1980 to 1983. From 1982 to 1983, he was the supervisor of the District Attorney's office in the Roxbury District Court. He also served as a member of the Homicide Response Team.

An active trial attorney with extensive courtroom experience, Conrad has tried well in excess of 1,000 criminal or civil cases and has argued countless motions in his over thirty years of experience in criminal and civil courtrooms. In the area of criminal law, he has acted as both a prosecutor and a defense attorney, giving him a unique perspective. As a defense attorney, he has successfully tried criminal cases ranging from disorderly person to aggravated rape, and is also active in civil litigation. Conrad's experience has been on both sides of disputes, as he has successfully represented plaintiffs and defendants in civil litigation. He is also corporate counsel for several companies, and provides litigation and litigation assessment services to several others. His background in litigation, finance and real estate allows him to give a broad perspective in providing corporate services. Conrad has extensive experience in forming corporations, LLC's, LLP's, partnerships and trusts, and advises them with respect to their needs. He has significant experience in negotiating contracts, handling employment matters, representing companies before the Massachusetts Commission Against Discrimination, and assessing litigation for companies. Conrad has represented lenders, sellers and buyers in thousands of real estate transactions, and has substantial experience in both residential and commercial real estate closings.

Born and raised in Brighton, Conrad received his J.D. from Boston College Law School and graduated from Boston Latin School. He is a member of REBA's Board of Directors.



## **Timothy J. van der Veen, Esq.**

Vanderveen Law  
1020 Plain Street, Suite 390  
Marshfield, MA 02050  
(781) 829-2003  
[tim@timvanderveenlaw.com](mailto:tim@timvanderveenlaw.com)

Tim van der Veen is the founder/owner of the Law Office of Timothy J. van der Veen, PC. Since 2003, he has handled thousands of real estate transactions throughout Massachusetts ranging from one-bedroom condo sales to commercial transactions in the tens of millions.

After law school, Tim practiced as a litigator for two separate Boston firms with a focus on complex commercial disputes and insurance defense work. In 2003, Tim left the litigation world and formed his own firm dedicated exclusively to real estate. Complimenting his law practice, Tim has become a real estate instructor, hosting or participating in dozens of homebuyer and home seller seminars. As a licensed real estate instructor, Tim also teaches realtor certification and continuing education classes through his chartered school, The Real Estate Academy.

Tim graduated from University of Massachusetts-Amherst with a B.S. in Mechanical Engineering. After working as an engineer for several years with a gas utility company, Tim transitioned to a law career by enrolling in Suffolk University Law School. He received his J.D., *magna cum laude*, from Suffolk Law. While at Suffolk, Tim was a member of the school's *Law Review* journal, publishing two articles on union labor issues.

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## ***REBA v. NREIS* Codified? How House Bill 4716 Could End Witness Closings for Good**

### **I. Pre-NREIS (before 2011)**

#### **Is Conveyancing the Practice of Law?**

- Black's Law Dictionary: "act and business" of transferring title in real estate
- Massachusetts: traditionally, residential connotation

#### ***MCA v. Closings, Ltd. (Super. Ct. 1993)***

- Default judgment against national foreign corporation
- Hire MA attys to conduct conveyancing
- Violation M.G.L. c. 221 § 46 (prohibits corporations from practicing law)
- Practice of law includes residential real estate conveyancing
- Prep. of instruments affecting title to real estate
- Advising others regarding legal rights in conveyancing

#### ***MCA v. Colonial Title (Super. Ct. 2001)***

- Court issued declaratory judgment/permanent injunction against Colonial
- Colonial Massachusetts and Rhode Island corp. owned by two non-lawyers
- Conducted all conveyancing duties / title agent
- Court: dual roles as title insurance agent and closing agent = UPL
- Issuing policies based on Colonial's title evaluation enjoined

#### **Bottom Line**

- No appellate decisions → green light for witness closings

### **II. *REBA v. NREIS* 459 Mass. 512 (2011)**

#### **Procedural History**

- 2006: REBA files UPL suit in Superior Court (DJ & Injunction relief)
- *NREIS* removes to U.S. District Court (Massachusetts)  
\**NREIS* obtains summary judgment; activities not UPL; \$900k legal fees
- REBA appeals; First Circuit vacates; certifies two questions to SJC

**Question #1:** Whether *NREIS's* activities, 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 M.G.L. ch. 221, §§ 46 et seq.

- “Conveyancing” = series of interconnected but discrete activities
- Title exams/preparation of abstracts – not UPL
- Preparation of HUD / closing documents – not UPL (except deeds, other title xfer docs)
- Post-closing delivery of documents to lender and Registry – not UPL
- Issuance of title insurance policies – not UPL
- Possible violations regarding deed preparation, Good Funds Statute, title opinions
- Record insufficient

**Question #2:** Whether *NREIS's* activities, in contracting with Massachusetts attorneys to attend [real estate] closings, violate Mass. Gen. Laws ch. 221, §§ 46 et seq.

- Record insufficient for definitive answer, BUT...
- First Circuit also requests advice to “aid in the proper resolution of the issues”
- ... and what great advice it was for Massachusetts consumers and practitioners

### ***REBA v. NREIS (cont'd)***

“[A] lawyer is a necessary participant at the closing to direct the proper transfer of title and consideration and to document the transaction, thereby protecting the private legal interests at stake as well as the public interest in the continued integrity and reliability of the real property recording and registration systems.”

...

“[M]any of the activities that necessarily are included in conducting a closing constitute the practice of law and the person performing them must be an attorney.”

...

“Implicit in what we have just stated is our belief that the closing attorney must play a meaningful role in connection with the conveyancing transaction that the closing is intended to finalize.”

...

“[This] case is closer to one where a party places itself as an intermediary between an attorney and a client. When a third party interposes itself between an attorney and a client, the key question is who exercises and retains control over the attorney ... there must be a genuine attorney-client relationship, and direction and control over the attorney's actions cannot rest with that third party.”

### **III. Post-*NREIS* (2011 – Present)**

#### **Fake Compliance - Model #1**

- Title and settlement arm of national title insurers
- Assembly line model
- 1 funding attorney; disburses proceeds and records mortgage/conveyance documents
- Title and settlement company contracts attorney to conduct closing

### **Fake Compliance - Model #1 (cont'd)**

- Title company is primary or sole contact with lender-client
- REBA position: violation of *NREIS*, no atty-client relationship established
- State offices of national carriers support REBA position to no avail
- Three cheers for CATIC: exception to the rule

### **Fake Compliance - Model #2**

- Out of state law firm or independent title/escrow company
- Same as model #1 but in-house attorney gets licensed in Massachusetts
- Typically, has never practiced in Massachusetts; not involved in transactions
- Transactions managed by out of state non-attorneys

### **Recent Complaints Received by UPL Committee**

1. Refinance closing conducted by non-attorney
  - Borrower was a REBA board member!
  - REBA members have reported cold call advertising from non-atty notaries
2. Rhode Island law firm
  - One attorney; one non-attorney who handles transactions; hire Massachusetts attorneys to close
  - Rhode Island / Bristol County border fertile ground for UPL
3. Massachusetts title/escrow LLC (Bristol County)
  - owned, managed by non-attorney (even named after him)
  - tacitly holding himself out as an attorney
  - Employs two Massachusetts attorneys
  - Violation of M.G.L. c. 221 §§ 46, 46A
  - Violation of MRPC Rule 5.4 (fee sharing w/non-lawyer)

## **IV. House Bill No. 4716 – Remote Online Notarization**

Amends M.G.L. Chapter 222 (governing notaries public)

- Proposed adoption of Remote Online Notarization
- Would pre-empt pending Federal RON bill (with no witness closing safeguards)
- AG rule-making authority, communication technology and ID verification

Amends M.G.L. Chapter 221

- Adds § 46E *Practice of law in real estate closings involving the use of communication technology.*

*[N]o person shall direct or manage a real property closing unless that person has been admitted as an attorney in the Commonwealth of Massachusetts.*

*No person shall take the following actions in preparation for, or furtherance of closing unless that person has been admitted as an attorney in the Commonwealth of Massachusetts:*

- (1) giving or furnishing legal advice as to the legal status of title;*
- (2) ensuring that the seller, or the borrower-mortgagor in a mortgage refinancing transaction, is in a position to convey marketable title to the residential property at issue;*
- (3) issuing a certification of title pursuant to section 70 of chapter 93;*
- (4) drafting a deed to real property on behalf of another;*
- (5) ensuring that the documents necessary for the transfer of title are executed in accordance with the laws of the Commonwealth of Massachusetts;*
- (6) disbursing, or managing the disbursement, of consideration for the conveyance.*

*The attorney general may initiate an action, including a petition for injunctive relief against any person or creditor whose violation of this section is part of a pattern, or consistent with a practice, of noncompliance. The supreme judicial court and the superior court shall have concurrent jurisdiction in equity. A person having an interest or right that is or may be adversely affected by a violation of this section may initiate an action against the person or creditor for private monetary remedies.*

## **V. What Can Do You?**

- Join REBA's UPL Committee (Committee Co-Chair Vacancy)
- Report UPL to REBA promptly
- Contact your local state representative and say: Pass House Bill No. 4716 *now* (please)!