Welcome to the first issue of the Real Property Section Newsletter! We hope to publish three or four times a year, with three articles of 300-500 words, five to seven practical tips of 50 to 100 words, and an editor’s column offering news about section activities. This is your newsletter. We hope many of you will find the time to contribute!

The section held its first executive committee meeting in January 2008. Our past ten years have been productive, especially in the areas of legislation and CLE. We are especially proud of bringing two of the giants in real property law, Pat Randolph and Roger Bernhardt, to Nevada. Mike Rubin’s entertaining ethics program in 2013 sold out the Smith Center. Many of our articles and programs, in addition to the minutes of our meetings and bylaws extending back to the beginning, are available on the state bar website. (It would be a great service for a section member to prepare an index of materials on the website!)

Inaugural Real Property Section Newsletter

By Michael Buckley

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What’s going on now and what’s on the horizon?

First and foremost, the 2019 Legislature is within sight. As usual, we will propose technical corrections and clarifications, posting our proposals on the Listserve and soliciting your input. In July, at the state bar’s Annual Meeting, the section will present a breakout session on associations and vacation rentals by Judge Barry Breslow, Gayle Kern, and Cheri Hauer. (Gayle’s article on page 6 in this newsletter highlights how the bar can be a resource. Section members may not be aware, but the section is able to file amicus briefs in appropriate cases.)

The executive committee hopes to repeat in Reno the success of our CLE extravaganza this past November in Las Vegas. Please give us your suggestions. A major endeavor will be a Real Property Practice Manual, which is planned as an outline of basic Nevada practice, not a treatise. We have a few volunteers, but we need more. Unlike this newsletter, which can come together pretty quickly, the practice manual will be a long-term project, requiring many months. We will keep you posted. Until then, please remember your section colleagues and plan to contribute if you have lessons learned or have something that would be helpful to share.

Senate Bill 451 Adds Formatting Requirements to Recorded Documents

By Matt Watson

In 2003, the Nevada Legislature in SB 451 added additional formatting requirements for documents to be recorded with a county recorder’s office. Those requirements are codified at NRS 247.110(3) and include, among other things: margin requirements, paper size, font size, prohibitions on two-sided documents, pages that are bound together, and colored markings. The same bill added NRS 247.305(4), which permitted a county recorder to charge a fee of $25.00 for recording a document not meeting the standards set forth in NRS 247.110(3).

In practice, recorders have routinely recorded documents that failed to meet the formatting requirements. For example: footers encroach on the bottom one-inch margin; font sizes on footers and exhibits, especially maps, are smaller than Times New Roman 10 pt.; notaries place their stamps over text; and people sign with ink other than black. Some of the fouls are unknown by the preparer of the document, as the document looked fine when printed, before being signed, notarized, and presented to the recorder. Recorders nearly always ignored the deficiencies and happily collected an additional $25.00.

The status quo changed in 2017 with the passage of Assembly Bill 169. In addition to revising recording fees, AB 169 rescinded NRS 247.305(4), which permitted a county recorder to charge a fee of $25.00 for recording a document not meeting the standards set forth in NRS 247.110(3).

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The annual meeting of the Real Property Section of the Nevada State Bar is scheduled for April 24, 2018 in both locations in Las Vegas and Reno. Section members may participate in person at either of the two locations or by teleconference. (Dial-in information: 1-877-594-8353 Passcode: 15858942). Videoconferencing between the two locations will be available.

As an enticement to participate in person, we have invited sommelier Paul Ellis to attend our Las Vegas location and help us enjoy a glass or two of different wines (same at both locations) after the meeting.

Paul formerly served as wine director for MGM Grand Resort, Charlie Palmer Steak and Aquaknox, and as the Southwest regional manager for Champagne Roederer/Cristal. He has instructed at Le Cordon Bleu, The Art Institute and CSN, Las Vegas. Paul spent a dozen years as wine instructor at UCLA, while serving as consultant to Christie’s Auction House, Beverly Hills. During this time he topped three separate sommelier competitions. Paul’s personal familiarity with the wine making regions in France, Italy, Germany, Austria, Switzerland, Spain, Portugal and South Africa brings even more to his professional background.

Plan to join us for an informative evening of business and social events! Kindly RSVP to Lucy Trotter at ltrotter@fclaw.com with subject line “RSVP - RP Section Meeting” or call 702.692.8031.
allowing payment of a nominal tribute. In its place is new NRS 247.110(5), which states:

A county recorder has the discretion to accept and record a document that does not meet the formatting requirements set forth in paragraphs (a) to (g), inclusive, of subsection 3 [of NRS 247.110].

One could conclude that the revisions mean recorders will now record defective documents without imposing the fee. That is not, however, what recorders have done. Attorneys and title companies have observed that recorder’s offices are now rejecting documents with formatting deficiencies, with the requesting party being sent away to revise the offending document. This is obviously not helpful at the closing of a transaction, especially when, for fourteen years, many deficiencies were overlooked by paying $25.00.

This practice will have a significant negative effect on closing transactions. Original documents, often signed in advance by people no longer immediately available, may require new signatures and notaries. Critical closing deadlines may be jeopardized. Attorneys, asked to give an opinion that documents are in recordable form, will have difficulty giving the opinion without qualifications that render the opinion meaningless.

Taking additional time to ensure recordability will save time and frustration later. **The following are strategies for improving recordability:**

- **Beware** of the statutory changes when preparing or giving opinions on recordable documents.
- **Don’t forget** the exhibits, especially site plans and maps.
- **Be careful** with margins (recording clerks have rulers at the ready), notary stamps, font sizes (including footers), and ink color.
- **Format** your notary blocks to give plenty of room for the notary’s stamp.
- **Train** notaries on proper stamp placement.
- **Advise** clients and notaries to sign only in black ink.
- **Leave** plenty of room in a signature block for a large signature, so the signature does not cover text.
- **Always include** the signer’s capacity in the signature block.
- **Consider** using separate signature and notary pages so deficient pages can be quickly replaced (with the signer’s consent, of course).
- **When possible**, review the signed and fully assembled document before sending it for recordation, with enough time to correct any issues.

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**LEGISLATIVE SESSION UPDATE: AB 169, SB 305, SB 433 and TRANSFER TAX AUDITS**

**By Chris Childs**

During the 2017 Legislative session, several bills (AB 169, SB 305, SB 433) were approved that changed recording fees effective October 1, 2017. One major change included eliminating the $25.00 noncompliance fee for documents that do not meet statutory standards. As a result, the Clark County Recorder now rejects outright recordings that fail to comply. To avoid having your transaction or closing derailed, delayed, or detoured, consider having your recording pre-cleared by the recorder’s office audit division by visiting the recorder’s office with your recording for an over-the-counter audit or by emailing a copy of the recording to the audit division at CCORAuditTeam@ClarkCountyNV.gov.

The audit division also reviews and pre-approves conveyance documents for transfer tax purposes both over-the-counter and by email, including reviewing the Declaration of Value form and claimed transfer tax exemptions (along with exemption supporting documentation). More information regarding transfer tax audits and suggested supporting documentation can be found here: [http://www.clarkcountynv.gov/recorder/Documents/RPTT_Supporting_Documentation_Brochure.pdf](http://www.clarkcountynv.gov/recorder/Documents/RPTT_Supporting_Documentation_Brochure.pdf).
Washington and Nevada are both “lien theory states.” A century-old Nevada statute, NRS 40.050, states, “A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to take possession of the real property without a foreclosure and sale.” An equally ancient Washington statute, RCW 7.28.230(1), provides in pertinent part: “A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law.”

NEVADA IS A “LIEN THEORY” STATE
WHAT DOES THAT MEAN FOR LENDERS AND SERVICERS?

By Stephanie Sharp

One of the questions was, “can a borrower and lender enter into a contractual agreement prior to default that allows the lender to enter, maintain, and secure the encumbered property prior to foreclosure?”

In Jordan v. Nationstar Mortg., LLC, 374 P.3d 1195, 1199 (Wash. 2016) (en banc), the Washington Supreme Court provided an uncomfortable answer to the lending community:

The District Court asks us to determine whether a predefault clause in a deed of trust that allows a lender to enter, maintain, and secure the property before foreclosure is enforceable. We must determine whether these provisions contravene Washington law, [sic] As described below, the deed of trust provisions authorize a lender to enter the borrower’s property after default. The parties agree that a Washington statute prohibits a lender from taking possession of a borrower’s property prior to foreclosure. The controversial issue here is whether the deed of trust provisions allowing the lender to enter constitute taking possession prior to foreclosure, such that they conflict with state law. Based on Nationstar’s practices, we find that the provisions do allow the lender to take possession and thus they are in conflict with state law. As such, we answer the first certified question in the negative.

In view of the similarity between the two statutes in the two “lien theory” states, it is likely a Nevada court would reach the same conclusion.¹ Lenders and servicers beware!

¹ For additional analysis of this topic the reader should refer to the article at 52 Real Property, Trust and Estate Law Journal 195 (2017), which discusses the case at length.

THE DEED UPON DEATH SURPRISE

By Charles Cook

Nevada adopted the Uniform Real Property Transfer on Death Act in 2011 (NRS 111.655 to 111.699). Generally, the owner of an interest in property may create a deed which becomes effective upon the death of the owner. Such a deed is known as a “Deed Upon Death.”

While a Deed Upon Death can avoid the need for probate, if the property must be sold or encumbered soon after the death of the grantor, a probate proceeding may still be necessary.

NRS 111.689 provides that, to the extent the grantor’s probate estate is insufficient to satisfy allowed claims against the estate, the estate may enforce the liability against property transferred pursuant to a Deed Upon Death. A proceeding to enforce the liability under this section must be commenced not later than 18 months after the grantor’s death. Thus, a title insurer may not be willing to insure such a deed unless a probate is filed or you wait 18 months after the grantor’s death.
As seen in an email:
“The rent was payable “in the rears.”

Legal Opinions and Title Insurance: Safer Passage

By Michael Buckley and DeArmond Sharp

Over the past several years, the ABA Real Property, Trust and Estate Law Section, the American College of Real Estate Lawyers (ACREL), and the American College of Mortgage Attorneys have undertaken major efforts to make furnishing of a borrower’s closing opinion an easier process. Nevada practitioners are likely to find “Local Counsel Opinion Letters in Real Estate Transactions, A Supplement to the Real Estate Finance Opinion Report of 2012,” 51 Real Property, Trust and Estate Law Journal 167 (2016) a great help in understanding what is and what is not appropriately included in a closing opinion. The Legal Opinions Committee of the ABA’s Business Law Section also continues to work on an update to customary opinion practices, the most well-known of which is the “golden rule:” an opinion-giver should not be expected to give an opinion the opinion recipient would not give. Many of these resources are available through the ABA Business Law Section.

In the past, navigating through the world of title insurance has sometimes proved difficult, as clients ask their attorneys to advise them on the types of title insurance policy and endorsements to be obtained when purchasing or securing a loan with real property. This area too is changing. After the significant revision to the ALTA forms in 2006, many title insurance companies now provide publications or online manuals containing the title insurance policy forms and explanations of the available endorsements. More recently, the ACREL Title Insurance Committee surveyed its members to determine the title insurance endorsements most frequently requested by counsel for owners and lenders. See, “A Uniform List of Title Endorsements,” Spring 2018 ACREL Papers (ALI/CLE).

If either of these topics are of interest to section members, please let the section know. If there is enough interest in these or any other topics, the section can plan CLE programs.
Attorney-Client Relationship Upheld
By Nevada Supreme Court

By Gayle Kern

In a resounding victory for preserving the attorney-client relationship, the Nevada Supreme Court, sitting en banc, held in a 6-1 decision that an attorney who provides legal services to and acts on behalf of a common-interest community homeowners’ association client does not owe a duty to a unit owner. In the case of David Dezzani and Rochelle Dezzani vs. Kern & Associates, Ltd and Gayle A Kern, 134 Nev. Adv. Op 9, the Court rejected the assertion when a dispute arose between the Dezzanis and the Association represented by Kern & Associates, that the Dezzanis could sue the attorney directly. The Court noted that “whether the attorney, as opposed to the client, can be personally liable as an agent for actions the attorney took in representing his or her client is distinguishable from cases involving client liability for attorney actions.” The Court affirmed the important principle that “an attorney providing legal services to a client generally owes no duty to adverse or third parties.”

Emphasizing “the attorney-client relationship is different from other agent-principal relationships based on the unique characteristics of the attorney-client relationship,” the Court provided support for the “attorney’s ethical obligations to be candid with a client and zealously represent his or her client.”

THE COURT AFFIRMED THE IMPORTANT PRINCIPLE THAT “AN ATTORNEY PROVIDING LEGAL SERVICES TO A CLIENT GENERALLY OWES NO DUTY TO ADVERSE OR THIRD PARTIES.”

Moreover, as demonstrated by the State Bar of Nevada’s filing of an amicus brief, this decision provides important guidance and protection to those attorneys representing corporations or other entities. The Court noted that Kern owed “fiduciary duties only to the HOA, not to the individual members of the HOA.”

The Court declined to allow an award of attorney fees to Ms. Kern for the services she performed on behalf of herself and her firm. In an issue of first impression for the Nevada Supreme Court, the Court determined that when attorneys represent themselves or their law firms, no fees are actually incurred.

Ms. Kern was represented in the appeal by Debbie A. Leonard, McDonald Carano LLP and appearing for the Amicus Curiae State Bar of Nevada was Micah S. Echols and Adele V. Karoum, Marquis Aurbach Coffing. Ms. Kern is appreciative of the many attorneys who reached out to her in support and is especially grateful to Debbie, Micah and Adele.

ARBITRATION CLAUSES

By Colleen Dolan

Tucked away in NRS Chapter 597, Miscellaneous Trade Regulations and Prohibited Acts, lies a potential trap for the unwary lawyer drafting an arbitration clause in an agreement. NRS 597.995 provides that, with the exception of collective bargaining agreements, an agreement that includes a provision requiring a person to submit to arbitration on disputes arising from the agreement must include a specific authorization that indicates that the person has affirmatively agreed to the arbitration provision. Failure to include the specific authorization voids the arbitration provision. NRS 597 (2).

While the statute does not require a specific form of authorization, something to the effect of the following, placed in the same section of the agreement requiring arbitration, should be sufficient:

SPECIFIC AGREEMENT TO ARBITRATION PROVISIONS. By initialing below, Party 1 and Party 2 each specifically affirmatively agree to, and hereby authorize, the arbitration provisions of this Section __ in satisfaction of the requirements of NRS 597.995(1).

Party 1’s Acknowledgement: ____________________________ Party 2’s Acknowledgement: ____________________________