

Ethics in Foreclosure

By Louis S. Pettey

Louis S. Pettey is a president of the Gaithersburg, Maryland, firm of Heise Jorgensen and Stefanelli PA and vice-chair of the Ethics and Professionalism Committee.

The mortgage foreclosure boom has spawned many new legal issues; however, one of the more unanticipated results of the flood of foreclosures has been the number of claims of unethical conduct on the part of lawyers on both the plaintiff and defense sides of the foreclosure practice.

On the plaintiff's side, although the influx of new filings has undoubtedly brought some new players into the game, historically in most states foreclosure has been a facet of law practiced by a few firms that specialize in that area. Traditionally (or at least previously), the paperwork for foreclosure filings has been fairly standard and routine, and paralegals and other staff can handle a lot of the work.

The defense bar, on the other hand, is a fairly new phenomenon since the advent of increased numbers of filings. Consider the recent "Lincoln Lawyer" novel by Michael Connolly, *The Fifth Witness*, in which the main character, criminal defense lawyer Mickey Haller, jumps into the foreclosure defense fray, seeking new avenues of relief for his foreclosure clients to keep them in their underwater homes. Fiction it is, but for those of us in the foreclosure field, the truth is not so far removed, because we often see lawyers finding a new niche defending the defaulting borrowers.

Robo-Signing

Each side of the aisle has seen ethical issues arise, but from different angles. For those representing lenders, one of the first ethical hurdles is the possibility that the client has engaged in “robo-signing.” The term “robo-signing” has come to describe many different practices that can cause ethical problems. Robo-signing is a term originally coined by consumer advocates and defense counsel when confronted with evidence of a seemingly robotic process in which affidavits and other legal documents related to foreclosures were processed and executed by employees of mortgage lenders and servicers who lacked direct personal knowledge of the facts. The term has now expanded to include similar actions by foreclosure lawyers and their staffs in the execution of documents required to be filed in court in judicial or quasi-judicial foreclosure states and with commissioners or other officials in nonjudicial foreclosure venues.

Robo-signing raises ethical issues for lender’s counsel under Model Rule 3.4(d) of the ABA Model Rules of Professional Conduct (2011), which provides that a lawyer shall not “falsify evidence, [or] counsel or assist a witness to testify falsely.” Arguably, a robo-signing allegation puts the lawyer on notice that his or her lender clients may not be conducting an appropriate level of due diligence in processing the materials sent to the lawyer in support of the foreclosure. The problem is exacerbated in judicial or quasi-judicial foreclosure states where the lawyer could be accused of a violation of Model Rule 3.3(a), which prohibits a lawyer from presenting false evidence to a tribunal. Although the lawyer may not have actual knowledge of the falsity of the documents being relied on, the Comments to the Model Rules remind the lawyer that falsity can be “inferred from the circumstances,” possibly imposing some degree of due diligence on the lawyer in such situations.

Then there is the additional challenge of verifying that the lawyer’s client is actually the holder of the note. Situations have arisen in which the chain of ownership contains gaps, raising the question of whether the initiation of foreclosure itself is false, creating another level of due diligence for the lender’s lawyer.

The larger robo-signing problem for the plaintiffs' bar may occur right in the lawyer's own office. The defense bar, and in some cases bar disciplinary authorities, have accused foreclosure lawyers of (1) signing or permitting staff to sign the client's or the trustee's name to affidavits and legal documents, (2) instructing staff to sign the lawyer's name to affidavits and pleadings, (3) signing the names of other lawyers or trustees on deeds and other instruments recorded in land records, and (4) permitting or instructing staff to notarize the foregoing described affidavits and documents. If true, these allegations would subject the lawyer to possible attorney discipline and sanctions under Model Rules 3.3 and 3.4 referenced above and also Model Rule 5.3, which requires the lawyer to make reasonable efforts to ensure that the lawyer's staff's conduct is compatible with the professional obligations of the lawyer and renders the lawyer responsible if the lawyer orders or ratifies conduct by staff in violation of the Model Rule.

In most cases, lawyers who have been accused of this conduct do not fit into any traditional category of legal miscreants. On the contrary, they often manage well-run firms that do a good job for their clients, handle client funds appropriately, and have never previously been accused of unethical conduct. Also, in most cases, the content of the information contained in these affidavits and pleadings has been truthful, other than the signing and notarization of the documents. With that in mind the obvious question is—why would they do such a thing?

The focus of the lender's lawyer has sometimes been more on whether the conduct, if discovered and challenged by a borrower, would result in a successful challenge to the foreclosure sale. The case of *Habib v. Mitchell*, 261 A.2d 744 (Md. 1970), for example, provides some level of comfort to lawyers who permit staff to sign the names of others to the affidavits and pleadings in foreclosures because the foreclosure was upheld. In *Habib*, a trustee on a deed of trust that was conducting a foreclosure sale was ill and asked a long-standing business associate to sign the foreclosure bond on his behalf. Because the party signing for the trustee was not exercising any discretion in the performance of the act he was given authority to perform—in other words, he was merely doing the perfunctory act of signing the name of the trustee to a document at the

trustee's express direction—the court concluded that the foreclosure bond was valid. No specific power of attorney or other written authorization was deemed to be required.

Nevertheless, reliance on *Habib* is problematic for the lawyer in two respects. First, it does not under any interpretation authorize a notary public to make a false jurat. In such a case, the notary must accurately identify the person who actually signed the document before the notary and state that the signer acknowledged acting as agent for another. In the cases in which this issue has been raised, the notaries have not acted legally; instead, the jurat simply has stated that the person whose name is signed did, in fact, sign and has not reflected what truly occurred. In some cases in which this practice has been brought to light, the notary's commission has been revoked as a result of such actions. The problem with reliance on a case like *Habib* is that once the lawyer and the lawyer's staff begin to cross the ethical line in the sand and sign the names of others without attribution, the line blurs and eventually disappears. Soon, signing the name of a trustee who is ill becomes the signing of a trustee's name because the trustee's office is too far down the hall or because the trustee's box is too full of other work and he or she won't get to it soon enough. Eventually, this mind-set can result in hundreds of documents with unattributed signatures and false notary jurats if a firm is handling a large volume in today's foreclosure environment.

The second problem with reliance on *Habib* is that, when filing these pleadings and affidavits signed by persons other than those identified as signers and, especially when a notary jurat does not reflect what actually occurred, the lawyer is misrepresenting these documents to the court and the public in violation of Model Rules 3.3 and 3.4, as discussed above. Further, and especially in the case of the improper notarizations, the lawyer has violated Model Rule 5.3 by failing to properly supervise associates. These actions have not only subjected some lawyers to attorney discipline but also exposed them to civil damages. The author is aware of one federal class action suit that was brought by a class of aggrieved borrowers against a foreclosure firm and its lawyers. The suit sought many millions of dollars in damages due, in part, to conduct alleged to be in violation of the applicable Rules of Professional Conduct.

Ethical Challenges for the Defense Bar

The foreclosure defense bar also has its ethical challenges. The defenses to be raised are frequently a result of input from the client borrower who desires to remain in the property and therefore may have an incentive to deceive or mislead the lawyer about the facts surrounding the loan's origination, closing, or default. Just as the lender's lawyer has a responsibility to ensure that the affidavits and other documents from the lender client are truthful, the defense bar has the same responsibility under Model Rules 3.3 and 3.4.

Also, there is a substantial temptation on the part of the defense bar to look for new avenues of defense that may not have any previously defined legal precedent or statutory basis. By way of example, the federal class action case mentioned above includes a cause of action for "wrongful foreclosure," which appears to be a new tort. Model Rule 3.1 cautions the lawyer not to make assertions for which there is no legal basis unless the lawyer has a good faith argument for a modification of the law.

This situation is often exacerbated because usually the borrower client's most important goal is to remain in possession of the property. Model Rule 3.2 requires that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." On the surface, that language would seem to permit the lawyer to file pleadings designed, at least in part, to delay the foreclosure, because that is the client's desire. The Comments to Model Rule 3.2 make it clear, however, that there is a distinction between the client's desires and the client's "best interests," saying: "The question is whether a competent lawyer, acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." Model Rule 3.2 cmt.

The increased emphasis on mediation and the modification of loan documents has created an environment fertile with the ingredients of yet another potential ethical pitfall for lawyers on each side of a foreclosure. The lender often requires the borrower to pro-

vide details of the borrower's financial situation in order to assess its negotiating position. Borrower's counsel must, once again, be careful to ensure that the client provides truthful information. The lender, however, will likely have information, such as a current appraisal, that will affect the negotiating process.

Confidentiality

Under Model Rule 1.6, a lawyer may not reveal information relating to the representation of a client unless the client consents to the disclosure or unless the situation falls within one of the exceptions set forth in subsection (b) of Model Rule 1.6. Two of those exceptions are arguably relevant in the foreclosure context—Model Rule 1.6(b)(2), “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another,” and Model Rule 1.6(b)(4), “to secure legal advice about the lawyer's compliance with these Rules.” It is important to note that the exceptions in Model Rule 1.6(b) are *permissive*, meaning that the lawyer *may* make certain disclosures but is not required to do so.

Whether any particular representation or misrepresentation by foreclosure counsel to the other side rises to the level of “a crime or fraud that is reasonably certain to result in substantial injury to the financial interest or property of another,” the revelation of which is permitted under the Model Rule 1.6(b)(2) exception, is a point that could be fairly debated. The more obviously applicable exception is Model Rule 1.6(b)(6), which pertains to compliance with the other laws. In particular, Model Rule 4.1 requires that a lawyer not knowingly make a false statement of a material fact or law to a third person, or fail to disclose a material fact when the disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Applying this last requirement to negotiations between foreclosure counsel, a lawyer could conceivably violate the Model Rules by remaining silent in a meeting in which the client personally conducts the negotiation, which is often the case during mediation. Model Rule 4.1 further provides that the duties stated in Model Rule 4.1 apply even if compliance requires disclosure of information otherwise protected by Model Rule 1.6. As highlighted in the Comment to Rule 4.1 for the District of Columbia Bar: “If, in the particular circumstances in which the lawyer

finds himself or herself, the lawyer has discretion to disclose a client confidence or secret under Rule 1.6(c), (d), or (e), disclosure is not prohibited by Rule 1.6, and the lawyer must disclose the information if otherwise required by this rule.” Significantly, disclosures under Model Rule 4.1 are *required*, not permissive as under Model Rule 1.6(b).

The Comment to Model Rule 4.1 provides some clarification to the conflict between the two rules. Model Rule 4.1 pertains only to statements of “fact.” The Comment concedes that in negotiation, certain types of statements are ordinarily not taken as statements of material fact, such as estimates of the price or value of the subject of a transaction. The Comment to Model Rule 4.1 also recognizes that, in negotiation, the statement of a party’s intentions on an acceptable settlement of a claim would also not be commonly considered a statement of fact.

Conclusion

With the abundance of new foreclosure filings, the need for the lender to liquidate the property and the conflicting desire of the defaulting borrower to remain in the property have placed lawyers who might rarely have concerned themselves with issues of legal ethics right in the crosshairs of disciplinary authorities. Lawyers practicing on either side of the controversy should first study the rules of professional conduct applicable in their state and then scrutinize their practice and procedures to be certain that their actions, policies, and procedures comply. n