ETHICS IN FORECLOSURE

The 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 side of the plantiff's bar, while there are undoubtedly some "new players" with the influx of new filings, foreclosure in most states has historically been a facet of law practiced by a few firms which specialize in that area. The paperwork for foreclosure filings has traditionally (or at least previously) been fairly standard and routine and a lot of the work can be handled by paralegals and other staff.

The defense bar, on the other hand is a fairly new phenomenon since the advent of the increase in number of filings. Consider the recent "Lincoln Lawyer" novel by Michael Connolly, *The Fifth Witness*, in which his 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, since we often now see lawyers finding a new niche defending the defaulted borrowers.

Each side of the aisle has seen ethical issues arise, but from different angles. For those representing lenders, the term "robo-signing" has come to describe many different practices which 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 by mortgage lenders and servicers in which affidavits and other legal documents related to foreclosures were processed and executed by persons who lacked direct personal knowledge of

the facts. The term has now spread to include actions by the foreclosure lawyers and their staff 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 non-judicial foreclosure venues.

The foreclosure practitioner meets his first ethical hurdle in dealing with the robo-signing by the lawyer's lender clients. Model Rule 3.4 (d) of the ABA Model Rules of Professional Conduct (2011 Edition) provides that a lawyer shall not "falsify evidence, [or] counsel or assist a witness to testify falsely." Arguably, the influx of robo-signing allegations puts the lawyer on notice that his 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 in which the lawyer under the same facts could be accused of a violation of Model Rule 3.3 (a) prohibiting a lawyer from presenting false evidence to a tribunal. While the lawyer may not have actual knowledge of the falsity of the documents being relied upon, 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 where 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 foreclosure lawyer.

The larger robo-signing problem for the foreclosure bar has occurred right in the lawyer's own office. The defense bar, and consequentially, in some cases, bar disciplinary authorities, have accused foreclosure lawyers of (i) signing or permitting staff sign the client's or the trustee's name to affidavits and legal documents (ii) instructing staff sign the lawyer's name to affidavits and pleadings (iii) signing the names of other lawyers or trustees on deeds and other instruments

recorded in land records, and (iv) 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 *Responsibility Regarding Non-Lawyer Assistants*. Model Rule 5.3 requires the lawyer to make reasonable efforts to ensure that his 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 Rule.

In most cases, the 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 which 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 foreclosure 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 (1970) provided some level of comfort to Maryland lawyers who permitted staff to sign the names of others to the affidavits and pleadings in foreclosures. In *Habib*, a trustee on a deed of trust who 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.

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 would properly have to 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, no such nuance has been observed; instead the notary simply has stated that the person whose name is signed did, in fact, sign without stating what truly occurred. In some such 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 upon a case like *Habib* is that once the lawyer and/or 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, the signing the name of a trustee who is ill becomes the signing of a trustee's name because his office is too far down the hall or because her box is too full of other work and 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 where there is a notary jurat which 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. While these actions have subjected

some lawyers to attorney discipline, it is noteworthy that the author is aware of one federal class action suit by a class of aggreived borrowers against a foreclosure firm and its lawyers seeking many millions of dollars in damages due, in part, to conduct alleged to be in violations of the applicable Rules of Professional Conduct..

The foreclosure defense bar has its ethical challenges also. 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 incentive to deceive or mislead the lawyer about the facts surrounding the loan's origination, closing and/or default. Just as the foreclosure 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 foreclosure defense bar to look for new avenues of defenses which 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 represent 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 by the fact that it is the usually the borrower client's most important goal to remain in possession of the property. Model Rule 3.2 *Expediting Litigation* 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, since 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." Comment, Model Rule 3.2

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 the foreclosure. The lender will often require the borrower to provide details of 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. On the other hand, the lender will likely have information, such as a current appraisal, which would impact the negotiating process.

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 Rule 1.6. Two of those exceptions are arguably relevant to the hypothetical above, i.e. Rule 1.6(b)(1) "to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in…substantial injury to the financial interests or property of another," and Rule 1.6(b)(4) "to comply with these Rules…" It is important to note that the exceptions in Rule 1.6(b) are *permissive* such that the lawyer may make certain disclosures, but is not required to do so.

Whether or not any particular representation or misrepresentation by foreclosure counsel to the other side would rise to the level of "a criminal or fraudulent act likely to result in substantial injury to the financial interests of another," as permitted under the Rule 1.6(b)(1) exception, is a point which could be fairly debated. The more obviously applicable exception is Model Rule 1.6(b)(4) pertaining to compliance with the other Rules, in particular, Model Rule

4.1 *Truthfulness in Statements to Others*. 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 the negotiations between foreclosure counsel, the lawyer could even be violating the 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. [1] 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 as to an acceptable settlement of a claim would also not be commonly considered a statement of fact.

It is easy to see where 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 cross-hairs 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

[1] It is noteworthy that the Comment to Rule 4.1 for the District of Columbia Bar contains this additional language: "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."

take a hard look at their practice and procedures to be certain that their actions, policies and procedures comply.

Louis S. Pettey
Heise Jorgensen and Stefanelli P.A.
18310 Montgomery Village Avenue, Suite 400
Gaithersburg, Maryland 20879