

6-1-2012

## Avoiding a Lawyers' Race to the Foreclosure Bottom: Some Advice to Lawyers for Lenders and Borrowers on Their Roles in Foreclosure Litigation

James Geoffrey Durham

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### Suggested Citation

James Geoffrey Durham, *Avoiding a Lawyers' Race to the Foreclosure Bottom: Some Advice to Lawyers for Lenders and Borrowers on Their Roles in Foreclosure Litigation*, 32 N. Ill. U. L. Rev. 419 (2012).

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# Avoiding a Lawyers' Race to the Foreclosure Bottom: Some Advice to Lawyers for Lenders and Borrowers on Their Roles in Foreclosure Litigation

JAMES GEOFFREY DURHAM\*

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## I. INTRODUCTION

The current mortgage foreclosure crisis presents many issues that are entwined with how we got where we are and how we might extricate ourselves—for example, issues involving the business side of mortgage lend-

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\* Professor of Law, University of Dayton School of Law. I would like to express my thanks for their excellent research assistance to Professor Paul Venard, Reference Librarian at the University of Dayton School of Law Zimmerman Law Library, and Christopher L. Bagi, University of Dayton School of Law Class of 2012.

ing, the near financial meltdown in 2008, and legal issues in foreclosures. The mortgage foreclosure crisis, however, also raises issues of lawyers' ethics, and invites us to consider the current actions of lawyers in the foreclosure process. Before you accuse me of "shooting fish in a barrel," please let me explain why we should consider the actions of the lawyers for foreclosing lenders and defaulting borrowers.

In a sense, the issues raised by the current actions of foreclosure lawyers that I will describe can be resolved by "all I really need to know I learned in kindergarten," that is "[p]lay fair" and "[d]on't take things that aren't yours."<sup>1</sup> But we could say the same things about all lawyers, therefore all litigators, and, further narrowing our focus, all foreclosure lawyers. It is not that what is being done by foreclosure lawyers is unique or unheard of, but rather, what foreclosure lawyers are doing gives us the opportunity to step back, reconsider, and relearn just what it is that lawyers, litigators, and foreclosure lawyers should do to represent their clients well as they comply with the rules of legal ethics. With any luck, we then can consider how, in the context of the mortgage foreclosure crisis, lawyers can aspire to a higher level of practice that ensures that all parties in the foreclosure process receive their due in an honest and just manner.

And it is appropriate that we do so; the problems are not going away because the mortgage foreclosure crisis is going to continue. In February 2012, the Mortgage Bankers Association ("MBA") stated that, during the fourth quarter of 2011, 7.58% of homeowners had missed at least one monthly payment. The MBA survey was based on 44 million homes (88% of the total market), for a total number of 3,335,000 homes at risk of foreclosure.<sup>2</sup> While the percentage of homeowners at risk of foreclosure was down from more than 10% in 2010, the MBA noted that the "down" number was skewed by the foreclosure backlog in state courts in Florida, New Jersey, Illinois, and New York, and that the MBA expected the number of foreclosures to rise after the early 2012 settlement between 49 state attorneys general and five major lenders.<sup>3</sup>

There have been real abuses by lenders and their lawyers, and issues have been raised concerning abuses by borrowers and their lawyers. I first will set out some statistical support for claims that lenders have acted sloppily (at best) or fraudulently (at worst),<sup>4</sup> extensively review actions by one

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1. See ROBERT L. FULGHUM, *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN* 2 (2003).

2. Derek Kravitz, *Number of U.S. Homeowners at Risk of Foreclosure Fell in October-December Period of 2011*, YAHOO! FIN. (Feb. 16, 2012), <http://finance.yahoo.com/news/fewer-americans-risk-foreclosure-q4-152749473.html>.

3. *Id.*

4. See *infra* Part II.

law firm in one case as an example of abuse by lenders' lawyers,<sup>5</sup> and then undertake to focus on the debate over the conduct of lenders' lawyers.<sup>6</sup> Secondly, I will raise the issue of the ethics of defending a foreclosure against a borrower who admittedly owes the money,<sup>7</sup> and then consider how, in most cases, a lawyer can ethically defend a borrower against foreclosure.<sup>8</sup> My differing focuses are not because lenders and their lawyers are bad and borrowers and their lawyers are good; rather, it is predicated on the difficult position that lenders have placed themselves in, a position that has been exacerbated by the financial meltdown.

## II. STATISTICAL EVIDENCE OF ABUSES BY FORECLOSING LENDERS

In February 2012, the San Francisco Assessor-Recorder made public an "audit" report of residential foreclosures in San Francisco submitted by an outside consultant ("SF Report").<sup>9</sup> The SF Report includes a series of eye-opening statistics and conclusions relating to non-judicial foreclosures<sup>10</sup> carried out in San Francisco, beginning in January 2009 and running

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5. See *infra* Part III.

6. See *infra* Part IV.

7. See *infra* Part V.

8. See *infra* Part V.

9. See PHIL TING, OFFICE OF THE ASSESSOR-RECORDER OF SAN FRANCISCO, FORECLOSURE IN CALIFORNIA: A CRISIS OF COMPLIANCE (2012), [http://aequitasaudit.com/images/aequitas\\_sf\\_report.pdf](http://aequitasaudit.com/images/aequitas_sf_report.pdf) [hereinafter SF REPORT]. The "audit" report was prepared by Aequitas Compliance Solutions, Inc., and submitted to Phil Ting, the Assessor-Recorder of the City and County of San Francisco. Aequitas Compliance Solutions, Inc. is based in Newport Beach, California, and its website describes the company's business on its front page:

Aequitas Compliance Solutions, Inc. ("Aequitas") is a mortgage regulatory compliance consulting firm specializing in complex litigation, investigation and internal audit issues. We work with the mortgage industry, regulators and enforcement agencies, and attorneys for securities-holders, attorneys for distressed homeowners and other industry stakeholders. We provide our clients accurate, thoughtful and customized analysis, which we present in a clear and persuasive manner. Our experts possess a broad range mortgage and regulatory expertise, which enable us to serve large and small companies, law firms and government agencies.

AEQUITAS, <http://aequitasaudit.com/> (last visited Feb. 28, 2012).

10. There admittedly is a substantial difference between the processes for non-judicial foreclosure and judicial foreclosure, with the obvious difference being that the latter necessarily involves at least one court hearing. To the degree that lawyers are involved, the legal ethics issues differ little. Since most of the foreclosure abuses that have been chronicled in the few published cases and in the popular press have involved judicial foreclosure, I have chosen to emphasize statistics and conclusions from the SF Report that are directly analogous to the judicial foreclosure process.

through October 2011.<sup>11</sup> The SF Report asserts its own relevance in the area of judicial foreclosure by pointing out that in California any person who “knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony.”<sup>12</sup> Almost every example of lawyer misconduct in judicial foreclosure proceedings by lawyers representing foreclosing lenders involves at least one instrument that might be “filed, registered, or recorded.”<sup>13</sup>

There were 2,405 foreclosure sales during the thirty-four month period covered by the SF Report, and the SF Report audited 382 (almost 16%) of them.<sup>14</sup> The SF Report focused on six areas: Assignments, Notice of Default, Substitution of Trustee, Notice of Trustee Sale, Suspicious Activities Indicative of Potential Fraud, and Conflicts Relating to Mortgage Electronic Registration Systems (MERS).<sup>15</sup> I will focus on three of these: Assignments, Suspicious Activities Indicative of Potential Fraud, and Conflicts Relating to MERS; but make note of the other three because, in my mind, they are indicative of actions by lenders, and those acting on their behalf, which are sloppy (at best) or fraudulent (at worst).

A stunning statement begins the analysis in the SF Report: “Overall, we identified one or more irregularities in 99% of the subject loans. In 84% of the loans, we identified what appear to be one or more clear violations of law.”<sup>16</sup> The SF Report identified the following issues as the six focus areas.

#### A. ASSIGNMENTS<sup>17</sup>

Seventy-five percent of the loans involved issues with assignment from the originating lender to the party seeking foreclosure, including: two or more conflicting assignments (6%); conflicts with federal filings, usually with the Securities Exchange Commission, for mortgages which had been securitized (23%); evidence that the assignment was not signed by the assignor, but by an employee of the servicer or trustee (27%);<sup>18</sup> evidence that

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11. SF REPORT, *supra* note 9.

12. *Id.* at 5 (quoting CAL. PENAL CODE § 115 (West 1999)).

13. *Id.* (quoting CAL. PENAL CODE § 115 (West 1999)).

14. *Id.* at 1.

15. *Id.*

16. SF REPORT, *supra* note 9, at 1.

17. *Id.* at 6-8.

18. These are both third parties who would not necessarily have the legal authority to sign the assignment on behalf of the originating lender.

the assignee signed on behalf of the assignor (11%); and filing of the assignment after giving the defaulting borrower a Notice of Default (59%).<sup>19</sup>

B. NOTICE OF DEFAULT<sup>20</sup>

California law requires a lender, prior to recording a Notice of Default, to contact the borrower “to ‘assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure.’”<sup>21</sup> In 6% of the foreclosures, the required affidavit was not filed. While this is not a requirement under most states’ laws, it is evidence of lenders’ failure to comply with a clear statutorily mandated procedure, with the failure being evident in documents filed by the lenders as part of the foreclosure process.

C. SUBSTITUTION OF TRUSTEE<sup>22</sup>

“In most instances, the original Beneficiary will substitute another trustee to handle the foreclosure under a *Substitution of Trustee*. Substitute trustees typically are firms that specialize in default servicing needs and foreclosure processing.”<sup>23</sup> The SF Report noted several issues,<sup>24</sup> but two involve potential fraud that are analogous to problems in judicial foreclosures nationwide: (1) the inability to determine who holds the note and has the right to foreclose and (2) robo-signing. The SF Report found that in 85% of the foreclosures (just think about that incredible percentage) the substitution of the trustee was executed by an entity other than the beneficiary under the deed of trust.<sup>25</sup> In addition, in 28% of the foreclosures the substitutions of trustees were signed by persons who were not employees or agents of the beneficiaries who had the legal right to make the substitutions.<sup>26</sup> These stunning percentages provide a sound basis for questioning whether the necessary documents in judicial foreclosures are subject to the

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19. Under California law, the Notice of Default should come from the current holder of the rights under the Deed of Trust, which means the current holder of the Note, in order to meet the requirements to proceed to a non-judicial foreclosure sale under the terms of the Deed of Trust. See SF REPORT, *supra* note 9, at 7-8 (citing CAL. CIV. CODE §§ 2923.5, 2924(a)(1)(C) (West 2011)).

20. See SF REPORT, *supra* note 9, at 8.

21. *Id.* (quoting CAL. CIV. CODE § 2923.5) (West 2011).

22. See *id.* at 8-10.

23. *Id.* at 8 (emphasis in original).

24. Among the issues included in the report were invalid substitutions after Notice of Default (18%) and the substitution being recorded after the filing of the notice of the foreclosure sale (3%). SF REPORT, *supra* note 9, at 9.

25. *Id.* at 9-10.

26. *Id.* at 10.

same issues—inability to identify the party entitled to foreclose and signing of documents by persons not entitled to sign.

D. NOTICE OF TRUSTEE SALE<sup>27</sup>

In 34% of the foreclosures the Notice of Trustee's Sale was not executed by the current Trustee, which renders the notice invalid and, as a result, "the Trustee's sale may be void."<sup>28</sup> Again, this is not an issue in judicial foreclosure, but it shows lenders' sloppiness as to a critical detail (at best) or fraud in a significant number of the reviewed foreclosures (at worst).

E. SUSPICIOUS ACTIVITY AND OTHER ISSUES<sup>29</sup>

This generically titled subsection contains the SF Report's most damning conclusions:

Charges that some of the largest mortgage servicers are engaged in fraudulent practices continue to be made. These practices include: fabricating documents that should have been signed years ago and submitting them as evidence to foreclose on homeowners, back-dating documents and robo-signing (using fake signatures to power through foreclosure documents).

It is sometimes difficult to prove fraudulent practices with certainty. However, by reviewing documents and signatures against public and proprietary databases, we were able to identify numerous specific instances [of] potential abusive practices. We refer to these instances as "Suspicious Activity."<sup>30</sup>

There was evidence of Suspicious Activity in 82% of the reviewed foreclosures.<sup>31</sup> In 45% of the foreclosures the winning bidder at the trustee's sale did so by making a credit bid as the current holder of the beneficiary's interest, but "(1) no Assignment of the Deed of Trust was ever recorded granting a beneficial interest to that entity or (2) such assignment was recorded *after* such sale."<sup>32</sup> In 59% of the foreclosures there was evidence

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27. *Id.* at 10-11.

28. *Id.* at 11.

29. SF REPORT, *supra* note 9, at 11-12.

30. *Id.* at 11.

31. *Id.*

32. *Id.* at 12 (emphasis in original).

“that one or more of the foreclosure documents recorded against the subject property were back-dated (i.e. there is a time discrepancy between the document date and the notary's date or the recording date).”<sup>33</sup> The analogy to judicial foreclosure is clear: lenders are ignoring necessary formalities, such as making sure that the foreclosing party is legally entitled to do so, or covering their missteps with non-chronological or back-dated documents.

F. MERS CONFLICTS AND RESULTS<sup>34</sup>

The SF Report begins this section by describing what MERS is:

The Mortgage Electronic Registration System (MERS) is a private corporation that tracks the ownership interests and servicing rights in mortgage loans . . . .

Mortgage Electronic Registration Systems, Inc. and MERSCORP, Inc. were created by Fannie Mae, Freddie Mac, Ginnie Mae, the Mortgage Bankers Association of America and large mortgage banks to provide an electronic registry for tracking ownership interests and servicing of mortgage loans . . . .

MERS members can sell mortgage loans without having to record each transfer in county offices thus eliminating the need for frequent recorded assignments of mortgages and deeds of trust. MERS asserts to be the owner (and the owners agent) of the security interest indicated by trust deed and registers assignments of beneficial interests through its system.

MERS maintains that by eliminating the need to file assignments in the County Records it lowers costs for lenders and consumers by reducing county recording fee expenses resulting from real estate transfers. MERS further maintains that it provides a central source of information and tracking for mortgage loans, although a transfer between two MERS members is effectively unknown to those outside the MERS system.<sup>35</sup>

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33. *Id.*

34. SF REPORT, *supra* note 9, at 12-14.

35. *Id.* at 12-13.



There was data in the MERS database for 192 of the 382 reviewed foreclosures.<sup>36</sup> “The investigation resulted in 112 loans whereby the beneficiary as entered on the Trustee’s Deed upon Sale conflicted with the investor information present on the MERS database. This is a 58% failure rate.”<sup>37</sup> Throughout the country, in both judicial and non-judicial foreclosures, millions of mortgages involve MERS registration. The SF Report provides grounds for concluding that MERS registration is a completely invalid basis on which to base a foreclosure action.

### III. A TELLING ANECDOTE: THE UDREN LAW OFFICES, P.C., HSBC, THE THIRD CIRCUIT, AND *IN RE TAYLOR*

Every story is at risk of being marginalized as a mere anecdote that is not an accurate example of the overall picture. *In re Taylor* is one story of the actions of one lender, HSBC, and one law firm, Udren Law Offices, P.C., in a bankruptcy action filed by HSBC’s borrowers, the Taylors, and the responses by three courts, all as seen through the lens of an opinion from the Third Circuit.<sup>38</sup> While it is just one story, it is emblematic of what has gone on around the country, and how lenders and their lawyers have engaged in the race to the bottom. There are more, to cite a few: the Florida Attorney General asking the Florida Supreme Court to allow her to pursue “foreclosure mill” law firms under the Florida Deceptive and Unfair Trade Practices Act, responding to conduct by Florida “foreclosure mill” law firms;<sup>39</sup> a Nevada lawyer’s failure to show that the loan had been properly assigned from the now defunct originating lender to the foreclosing

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36. *Id.* at 13.

37. *Id.*

38. *In re Taylor*, 655 F.3d 274 (3d Cir. 2011).

39. Kimberly Miller, *Florida’s AG Files Motion Requesting Supreme Court Decision on Foreclosure Cases*, PALM BEACH POST (Jan. 3, 2012, 9:04 PM), <http://www.palmbeachpost.com/money/foreclosures/floridas-ag-files-motion-requesting-supreme-court-decision-2069093.html>. See David Callahan, *A “Foreclosure Mill” Law Firm Faces Scrutiny*, CHEATINGCULTURE (Oct. 27, 2010, 8:01 PM), <http://www.cheatingculture.com/lying-lawyers/2010/10/27/a-foreclosure-mill-law-firm-faces-scrutiny.html>; see also *Florida Bar Wises Up to Ethical Violations*, FLA. FORECLOSURE DEF. LAW. BLOG (Aug. 7, 2011, 8:30 AM), <http://www.floridaforeclosuredefenselawyersblog.com/2011/08/florida-bar-wises-up-to-ethical-violations.html>; John Schwartz, *Judges Berate Bank Lawyers in Foreclosures*, N.Y. TIMES (Jan. 10, 2011), [http://www.nytimes.com/2011/01/11/business/11lawyers.html?\\_r=2&pagewanted=1&src=b-usln](http://www.nytimes.com/2011/01/11/business/11lawyers.html?_r=2&pagewanted=1&src=b-usln); Kimberly Miller & Christine Stapleton, *Lawyer Held in Contempt Over ‘Fraud’ in Foreclosure Filing*, PALM BEACH POST (Feb. 12, 2011, 4:36 PM), <http://www.palmbeachpost.com/money/foreclosures/lawyer-held-in-contempt-over-fraud-in-foreclosure-1248825.html>.

lender;<sup>40</sup> and New York requiring foreclosing lenders' lawyers to affirm (1) that the lawyer has communicated with the lender's representative who has personally reviewed the documents and who could confirm their factual accuracy and (2) that the court filings in foreclosure actions "contain no false statements of fact or law."<sup>41</sup>

The Third Circuit began its opinion in *In re Taylor* with this pithy statement:

This case is an unfortunate example of the ways in which overreliance on computerized processes in a high-volume practice, as well as a failure on the part of clients and lawyers alike to take responsibility for accurate knowledge of a case, can lead to attorney misconduct before a court.<sup>42</sup>

And it is that, if not more. The lawyer conduct considered by the court included the Udren firm's request to lift the automatic stay on HSBC's foreclosure action on the Taylors' house, the Udren firm's response to the Taylors' objection to HSBC's proof of claim, and Udren firm "attorneys' conduct in court in connection with those pleadings."<sup>43</sup>

Niles and Angela Taylor filed for a Chapter 13 bankruptcy in September, 2007; they listed HSBC as a creditor, the holder of the mortgage on their home, and HSBC filed a proof of claim in October, 2007.<sup>44</sup> HSBC'S proof of claim, which was not reviewed by any HSBC employee and contained information its then lawyers drew "from HSBC's computerized mortgage servicing database," included several errors: the monthly payment was misstated, the wrong note was attached, and the value of the Taylors' home was understated by about \$100,000.<sup>45</sup> While the filing of a bankruptcy petition imposes an automatic stay on any debt collection activities, including foreclosure, the bankruptcy code allows the lender, as a secured creditor, to request the bankruptcy court's approval to proceed with a foreclosure action under state law by the court giving the lender relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property."<sup>46</sup> Because the Taylors were not making the full pay-

40. *Nevada Supreme Court Takes Up Foreclosure Case*, CBSNEWS.COM, [http://www.cbsnews.com/8301-505245\\_162-57352849/nevada-supreme-court-takes-up-foreclosure-case/](http://www.cbsnews.com/8301-505245_162-57352849/nevada-supreme-court-takes-up-foreclosure-case/) (last visited March 26, 2012).

41. *Attorney Affirmation*, SUP. CT. OF THE STATE OF N.Y., <http://www.courts.state.ny.us/attorneys/foreclosures/Affirmation-Foreclosure.pdf> (last visited May 2, 2012).

42. *In re Taylor*, 655 F.3d at 277.

43. *Id.* at 278.

44. *Id.* at 277.

45. *Id.* at 278.

46. *Id.* (citing 11 U.S.C. § 362(d)(1) (2010)).

ments demanded by HSBC (HSBC claimed that the Taylors' house was in a flood zone and had obtained "forced insurance" which the Taylors refused to pay, although they did make their scheduled monthly payments),<sup>47</sup> and HSBC therefore deemed the Taylors delinquent, HSBC retained the Udren firm to seek relief from the automatic stay in January 2008.<sup>48</sup>

Lorraine Doyle was the attorney of record for the Udren firm. Doyle is the Managing Attorney of the firm "with twenty-seven years of experience."<sup>49</sup> The Third Circuit described the information that Doyle had from HSBC as follows:

HSBC does not deign to communicate directly with the firms it employs in its high-volume foreclosure work; rather, it uses a computerized system called NewTrak (provided by a third party, LPS) to assign individual firms discrete assignments and provide the limited data the system deems relevant to each assignment . . . . Although it is technically possible for a firm hired through NewTrak to contact HSBC to discuss the matter on which it has been retained, it is clear from the record that this was discouraged and that some attorneys, including at least one Udren Firm attorney, did not believe it to be permitted.<sup>50</sup>

NewTrak provided Doyle with the Taylors' name, address, payment amounts, late fees, and amounts past due, but nothing about the Taylors' equity in their home nor the dispute over "forced insurance."<sup>51</sup> Doyle then filed the January 2008 motion for relief from the automatic stay; the motion was prepared by non-lawyer employees of the firm who relied exclusively on the NewTrak information.<sup>52</sup> The motion stated: (1) the Taylors had failed to make monthly payments since the action was filed (they had made scheduled payments, but not including the amount of forced insurance); (2) that their payments were higher than the amount previously asserted in HSBC's proof of claim filed by HSBC's prior lawyers, thereby creating a conflict between two filings on behalf of HSBC; and (3) that the Taylors

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47. HSBC asserted, and the Taylors denied, that their home was in a flood zone and HSBC had obtained "forced insurance" at a cost of about \$180 per month. *In re Taylor*, 655 F.3d at 278. The Taylors made the regularly scheduled payments, but not the additional \$180 per month for the forced insurance, and HSBC treated each payment as a partial one, so that, according to HSBC, each month the Taylors were more and more delinquent. *Id.*

48. *Id.*

49. *Id.*; see also UDREN LAW OFFICES, P.C., <http://www.udren.com/profiles.htm> (last visited Mar. 1, 2012).

50. *In re Taylor*, 655 F.3d at 278-79.

51. *Id.* at 279.

52. *Id.*

had “inconsequential or no equity” (the NewTrak information, on which Doyle and the Udren firm relied, did not include data about the Taylors’ equity); but the motion did not address the dispute over the “forced insurance.”<sup>53</sup>

Along with the motion for relief from the automatic stay, the Udren firm also served the Taylors with requests for admission (RFA) which sought binding admissions that the Taylors had not made payments from November 2007 to January 2008, and that they had no equity in their home.<sup>54</sup> In February 2008, the Taylors responded to the motion for relief from the automatic stay, denying that they had failed to make payments and attaching copies of six checks tendered to HSBC, four of which had already been cashed by HSBC.<sup>55</sup> In March 2008, the Taylors filed an objection to HSBC’s proof of claim stating that HSBC had misstated the payment due on the mortgage and pointing out the dispute over the forced insurance.<sup>56</sup> Despite these two filings, the Taylors did not respond to the RFAs served on them by the Udren firm on behalf of HSBC, and, by not responding within thirty days, the facts asserted in the RFAs were deemed admitted.<sup>57</sup> Also in March 2008, Doyle filed a response to the Taylors’ objection to HSBC’s proof of claim that did not discuss the forced insurance issue and stated that all figures in the proof of claim “accurately reflect . . . charges to which Mortgagee is contractually entitled,” the latter conflicting with Doyle’s own motion for relief from the automatic stay, which included a higher monthly payment amount than did the proof of claim.<sup>58</sup>

In May 2008, the bankruptcy court held a hearing on HSBC’s motion for relief from the automatic stay and on the Taylors’ objection to HSBC’s proof of claim: “HSBC was represented at the hearing by a junior associate at the Udren Firm, Mr. Fitzgibbon.”<sup>59</sup> Fitzgibbon “ultimately admitted” that HSBC had received the November 2007 payment, which conflicted with his firm’s motion for relief from the automatic stay and its response to the Taylors’ objection to the proof of claim, but still urged the court grant relief from the automatic stay based on the Taylors’ failure to respond to the RFAs: “It appears from the record that Fitzgibbon initially sought to have the RFAs admitted as evidence even though he knew they contained falsehoods.”<sup>60</sup> At a second hearing in June 2008, Fitzgibbon stated that he literally was unable to contact his firm’s client, HSBC, in order to verify infor-

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53. *Id.*

54. *Id.* at 279-80.

55. *In re Taylor*, 655 F.3d at 280.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *In re Taylor*, 655 F.3d at 280.

mation.<sup>61</sup> The bankruptcy judge expressed her concern about the Udren firm's submissions<sup>62</sup> and Fitzgibbon's statements at the two hearings, and ordered Fitzgibbon, Doyle, and Mark Udren, the Udren firm's owner, to appear and give testimony in order to assist the court in determining whether to impose sanctions.<sup>63</sup>

The bankruptcy judge stated that she was concerned about the Udren firm's practices of "pressing a relief motion on admissions that were known to be untrue, and signing and filing pleadings without knowledge or inquiry regarding the matters pled therein."<sup>64</sup> After conducting four hearings over several days,<sup>65</sup> the bankruptcy judge found the Udren firm and its lawyers had committed several violations of Rule 9011 of the Federal Rules of Bankruptcy Procedure<sup>66</sup> ("the equivalent of Rule 11 of the Federal Rules of Civil Procedure"):<sup>67</sup>

Fitzgibbon, for pressing the motion for relief based on claims he knew to be untrue; Doyle, for failing to make reasonable inquiry concerning the representations she made in the motion for relief from stay and the response to the

61. *Id.* at 281.

62. "I really find this motion to be in questionable good faith," and "I'm issuing an order to show cause on your firm, too, for filing these things . . . without having any knowledge." *Id.*

63. *Id.*

64. *Id.* (quoting Brief for Appellant at 18-19, *In re Taylor*, 655 F.3d 274 (3d Cir. 2011) (No. 10-2154), 2010 WL 5776986 at \*35).

65. *In re Taylor*, 655 F.3d at 281.

66. The relevant section of the Rule states as follows:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

FED. R. BANKR. P. 9011(b).

67. *In re Taylor*, 655 F.3d at 282.

claim objection; Udren and the Udren Firm itself, for the conduct of its attorneys; and HSBC, for practices which caused the failure to adhere to Rule 9011.<sup>68</sup>

The bankruptcy judge did not sanction Fitzgibbon “[b]ecause of his inexperience,” but she required Doyle to take three Continuing Legal Education (CLE) credits in professional responsibility, Udren to be trained in the use of NewTrak and to spend a day watching his employees using NewTrak, and both Doyle and Udren to conduct training sessions for the firm’s lawyers in what Rule 9011 requires “for escalating inquiries on NewTrak.”<sup>69</sup> The bankruptcy judge also required HSBC to send a copy of the court’s decision to all its bankruptcy counsel along with a letter stating that it was permissible for bankruptcy counsel to contact HSBC directly.<sup>70</sup>

#### IV. WHAT IS A LENDER’S LAWYER SUPPOSED TO DO?

As stated at the beginning of this article, it is easy in a sense: “Play fair” and “[d]on’t take things that aren’t yours.”<sup>71</sup> But, as Fitzgibbon discovered, it is harder than that. There is tremendous pressure by lenders on their lawyers to do their work as quickly and inexpensively as possible, especially with the huge number of residential mortgage defaults and resulting foreclosures arising since the beginning of the financial meltdown in 2008.<sup>72</sup> The American Bar Association Model Rules of Professional Conduct, with some insights from the American Law Institute’s Restatement of the Law Governing Lawyers, provide some guidance as to what lenders’ lawyers must and should do. Recent experiences of lenders’ lawyers, along with judicial reactions, can add some practical insight into just what a lender’s lawyer is supposed to do. This section is organized by what I view as the applicable ABA Model Rules.

##### A. COMPETENCE

###### ABA Model Rule 1.1: Competence

A lawyer shall provide competent representation to a client.  
Competent representation requires the legal knowledge,

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68. *Id.* at 281.

69. *Id.* at 281-82.

70. *Id.* at 282.

71. FULGHUM, *supra* note 1, at 2.

72. See, e.g., Kris Hundley, *Foreclosure: Defending the Lenders*, TAMPA BAY TIMES (Mar. 20, 2011), available at <http://www.tampabay.com/news/business/foreclosure-defending-the-lenders/1156201>.

skill, thoroughness and preparation reasonably necessary for the representation.<sup>73</sup>

“A lawyer must know at least the basic elements of the law involved in representing a client.”<sup>74</sup> That is one of the issues that is most striking about the SF Report: many foreclosures are carried out while failing to comply with basic legal requirements.<sup>75</sup> One of the most disturbing acts of the Udren firm lawyers in *In re Taylor* is that the junior associate lawyer, Fitzgibbon, argued to the bankruptcy court that the RFAs his firm served on the Taylors, which stated that the Taylors had made no payments since the filing of the action and were deemed admitted because the Taylors failed to respond within thirty days, be the factual basis for relief from the automatic stay, even though he knew that the Taylors had made all scheduled payments, just not the amount required for the disputed forced insurance.<sup>76</sup> The former potentially reflects failure to know the substantive law, and the latter potentially reflects the failure to know the procedural law.

It is simple, then. A lawyer cannot prevail on every fact sought to be proved, win every motion brought or defended, or prevail in every judicial action. Sometimes you have a winner, and sometimes you have a loser. If a mortgage has not been properly assigned, or you do not have the promissory note, or both, you do not move forward. If you know facts that contradict your own pleadings, you must know enough procedural law to realize that you may not move forward to request action that cannot be granted once those facts are known by the court.

## B. MERITORIOUS CLAIMS AND CONTENTIONS

### ABA Model Rule 3.1: Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . .<sup>77</sup>

Comment 1 to ABA Model Rule 3.1 makes it clear that “[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.”<sup>78</sup> Comment 2 adds to this: “What is required of lawyers, however, is that they inform themselves

73. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

74. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 5.1, at 187 (1986).

75. “In 84% of the loans, we identified what appear to be one or more clear violations of law.” SF REPORT, *supra* note 9, at 1.

76. *In re Taylor*, 655 F.3d 274, 280 n.9 (3d Cir. 2011).

77. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2011).

78. *Id.* at cmt. 1.

about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions."<sup>79</sup> Finally, the Restatement provides further insight: "First, a lawyer may file a pleading, motion, or other paper only after making an inquiry about facts and law that is reasonable in the circumstances. Second, the lawyer's conclusions as to the facts and law must meet an objective, minimal standard of supportability."<sup>80</sup>

This is where the Udren firm's Managing Attorney, Doyle, comes to mind. She had her non-lawyer support staff prepare a motion for relief from the automatic stay based on their review of the NewTrak data that resulted in a motion that misstated facts: (1) wrongly stated in the NewTrak data, that the Taylors' complete failure to make payments and the amount of the payments due and (2) not in the NewTrak data, that the Taylors had little or no equity in their home. In addition, Doyle's motion omitted a critical fact, that the Taylors were making their scheduled payments but refusing to pay the premiums for the forced insurance.<sup>81</sup> While acknowledging that "lawyers constantly and appropriately rely on information provided by their clients, especially when the facts are contained in a client's computerized records,"<sup>82</sup> the Third Circuit stated that "Doyle's behavior was unreasonable, both as a matter of her general practice and in ways specific to this case."<sup>83</sup>

The Third Circuit emphasized two issues in its review of Doyle's actions, the first dealing with the lack of information available to Doyle as she prepared her court filings:

First, reasonable reliance on a client's representations assumes a reasonable attempt at eliciting them by the attorney . . . .

"[I]t appears," the bankruptcy court observed, "that Doyle, the manager of the Udren Firm bankruptcy department, had no relationship with the client, HSBC." That HSBC was not providing her with adequate information through NewTrak should have been evident to Doyle from the face of the NewTrak file.<sup>84</sup>

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79. *Id.* at cmt. 2.

80. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 110 cmt. c (2000).

81. *In re Taylor*, 655 F.3d 274, 279 (3d Cir. 2011).

82. *Id.* at 284.

83. *Id.*

84. *Id.* at 284-85.



The Third Circuit's second point deals with what Doyle did with the information she received, which was in conflict with that previously acquired through NewTrak, and also in light of the Taylors' assertions in their court filings:

Although Doyle certainly was not obliged to accept the Taylors' claims at face value, they indisputably put her on notice that the matter was not as simple as it might have appeared from the NewTrak file . . . . Instead, Doyle mechanically affirmed facts (the monthly mortgage payment) that *her own prior filing* with the court had already contradicted.<sup>85</sup>

Finally, the Third Circuit addressed Doyle's ability to make conclusions in light of the information available to her: "Although the initial data the Udren firm received was not, in itself, wildly implausible, it was facially inadequate. In short, then, we find that Doyle's inquiry before making her representations to the bankruptcy court was unreasonable."<sup>86</sup>

This is not so simple. Lenders' lawyers throughout the country must rely on data from their clients, just as all lawyers rely on information from their clients. Doyle, however, treated the NewTrak data as complete, even when the proof of claim, filed by HSBC's first law firm, and the NewTrak data conflicted, and even in light of persuasive contrary allegations of the forced insurance dispute and the evidence of the cancelled checks offered by the Taylors. Doyle engaged in no consideration of the factual basis for her filings.

What, then, should lenders' lawyers do? They should look at the information from their clients to determine if it is sufficient to establish the basis for the pleadings and arguments necessary to be advanced in order to proceed with foreclosure actions. Doyle should have reviewed the data, determined it was inconsistent and incomplete, and requested additional information from HSBC. As the Third Circuit concluded in upholding the bankruptcy judge's sanctions against Doyle:

Where a lawyer systematically fails to take any responsibility for seeking adequate information from her client, makes representations without any factual basis because they are included in a "form pleading" she has been trained to fill out, and ignores obvious indications that her information

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85. *Id.* at 285.

86. *In re Taylor*, 655 F.3d at 285.

may be incorrect, she cannot be said to have made reasonable inquiry.<sup>87</sup>

C. CANDOR TOWARD THE TRIBUNAL

ABA Model Rule 3.3: Candor toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . .

(3) offer evidence that the lawyer knows to be false.<sup>88</sup>

As to pleadings, Comment 3 to ABA Model Rule 3.3 seems to give an “out” to litigators: “An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer.”<sup>89</sup> A comment to the Restatement adds to this: “[A] lawyer may not ignore what is plainly apparent, for example, by refusing to read a document.”<sup>90</sup> Federal Rule of Bankruptcy Procedure 9011(b) gives more direction:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . .

(3) [T]he allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . .<sup>91</sup>

There is no question that lawyers should give their clients the benefit of the doubt and not become judges of their clients’ accuracy or truthfulness. As the Third Circuit found in evaluating the Udren firm’s Managing

87. *Id.* at 288.

88. MODEL RULES OF PROF’L CONDUCT R. 3.3(a) (2011).

89. *Id.* at cmt. 3.

90. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 120 cmt. c (2000).

91. FED. R. BANKR. P. 9011(b).

Attorney Doyle's action in *In re Taylor*, however, "Rule 9011 'does not recognize a "pure heart and empty head" defense' . . . [A]n attorney must, in her independent professional judgment, make a reasonable effort to determine what facts are likely to be relevant to a particular court filing and to seek those facts from the client."<sup>92</sup> Doyle failed to do that.

There is another example of lawyer misconduct in judicial foreclosures: the acceptance of documents from lenders produced by robo-signing. In January 2011, the Florida Attorney General—Economic Crimes Division displayed a ninety-eight-slide PowerPoint presentation in which slides twenty-seven through thirty-three showed signatures for "Linda Green" as an officer of several different entities, including MERS.<sup>93</sup> Not only did "Linda Green" sign for many different entities, but "her" signature varies so much that if you view the slides, you will have no doubt that many different people were signing for "Linda Green." There is no question that a law firm handling a large number of Florida residential foreclosures would have had before it many documents signed by "Linda Green" as an officer of many different parties. Pursuing a foreclosure based on a document signed by "Linda Green" is exactly the type of conduct for which the Third Circuit upheld the bankruptcy court's sanctions against Udren firm Managing Attorney Doyle.

This brings us back to another Udren firm lawyer, Fitzgibbon. Although the bankruptcy court did not sanction him because of his inexperience, the Third Circuit recognized, as it should have, that he made false statements to the bankruptcy court: "It appears from the record that Fitzgibbon initially sought to have the RFAs admitted as evidence even though he knew they contained falsehoods."<sup>94</sup> Comment 3 to ABA Model Rule 3.3 addresses this:

[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.<sup>95</sup>

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92. *In re Taylor*, 655 F.3d at 284 (citing *In re Cendant Corp. Derivative Action Litig.*, 96 F. Supp. 2d 403, 405 (D.N.J. 2000)).

93. FLA. OFFICE OF THE ATTORNEY GEN., ECON. CRIMES DIV., UNFAIR, DECEPTIVE & UNCONSCIONABLE ACTS IN FORECLOSURE CASES (2010), <http://www.scribd.com/fullscreen/46278738>; see also Abby Wendle, *Florida AG's Disturbing Foreclosure Fraud Presentation*, HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/2011/01/07/foreclosure-fraud-report-\\_n\\_805963.html](http://www.huffingtonpost.com/2011/01/07/foreclosure-fraud-report-_n_805963.html).

94. *In re Taylor*, 655 F.3d at 280.

95. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 3 (2011).

Comment 8 to ABA Model Rule 3.3 goes on to elaborate on the lawyer's obligations: "A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood."<sup>96</sup> Fitzgibbon failed miserably. He presented as a fact the unanswered, and therefore-deemed-admitted, RFAs when he knew they were false, or, at least, should have figured it out by taking a few minutes to review the evidence before the court. And Fitzgibbon also urged the court to take direct action based on the RFAs which he knew, or should have known, stated "facts" that were false.

Again, it is simple. There is no "pure heart and empty head" defense.<sup>97</sup> A lawyer must read what is before her and present it truthfully to a court. A lawyer may, and rightfully should, give her client the benefit of the doubt, but when the client's statements, or documents submitted by or on behalf of the client, raise issues as to their veracity, the lawyer must look deeper before submitting to a court as fact matters contained in those statements or documents.

D. RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

ABA Model Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.<sup>98</sup>

Mark Udren, the owner of the Udren firm, was sanctioned by the bankruptcy court. The district court reversed all the sanctions imposed by the bankruptcy court against the Udren firm, Udren personally, Doyle, and HSBC. The only action of the district court upheld by the Third Circuit was the reversal of the sanctions imposed on Udren personally: "Udren himself to be trained in the use of NewTrak and to spend a day observing his employees handling NewTrak; and both Doyle and Udren to conduct a training session for the firm's relevant lawyers in the requirements of Rule 9011 and

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96. *Id.* at cmt. 8 (citation omitted).

97. *In re Taylor*, 655 F.3d at 284 (citing *In re Cendant Corp. Derivative Action Litig.*, 96 F. Supp. 2d 403, 405 (D.N.J. 2000)).

98. MODEL RULES OF PROF'L CONDUCT R. 5.1 (2011).

procedures for escalating inquiries on NewTrak.”<sup>99</sup> While it seems obvious from the text of the rule that Doyle, as managing attorney of the Udren firm, is subject to ABA Model Rule 5.1, it seems just as obvious that Udren, as the owner of the firm, is as well. The rule refers to partners, and where Udren had no partners, the intended meaning must be to impose the obligations of the rule on the sole owner of a law firm employing subordinate lawyers.

What does this mean? Comment 2 to ABA Model Rule 5.1 states that “[p]aragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct.”<sup>100</sup> ABA Model Rule 5.3 extends the obligations of the partner or supervisor to support staff as well.<sup>101</sup> That is exactly what the bankruptcy judge’s sanction order did; it ordered Udren as the owner to engage in the supervision mandated by the ethics rules.<sup>102</sup> This is common sense. While Udren was not an attorney of record, nor did he prepare filings that were submitted to the court, nor did he appear before the court, his firm’s employees were attorneys of record, did prepare filings, and did appear;<sup>103</sup> it was the non-lawyer staff that prepared Doyle’s motion, and it was junior associate lawyer Fitzgibbon who argued the motion for relief from the automatic stay.<sup>104</sup> Udren has, and should have, responsibility for what goes on in his “shop.”

Lenders’ lawyers need to supervise their subordinate lawyers and their non-lawyer staffs. This problem is not a small one. In Florida, at the end of 2010, nearly half of the 260 lawyers working in the state’s four largest

99. *In re Taylor*, 655 F.3d at 281-82, 288.

100. MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. 2 (2011).

101. The relevant section of the Rule states as follows:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.

MODEL RULES OF PROF’L CONDUCT R. 5.3 (2011).

102. *In re Taylor*, 655 F.3d at 281-82. The bankruptcy judge required “Udren himself to be trained in the use of NewTrak and to spend a day observing his employees handling NewTrak; and both Doyle and Udren to conduct a training session for the firm’s relevant lawyers in the requirements of Rule 9011 and procedures for escalating inquiries on NewTrak.” *Id.*

103. *Id.* at 279.

104. *Id.* at 280-81.

firms specializing in representing foreclosing lenders had been in practice for less than three years.<sup>105</sup> To go back to the Udren firm as an example, as of February 2012, its website listed four lawyers (Udren, Doyle, and two others each listed as “Senior Attorney”), a Director of Operations, and an Office Manager. The website then goes on to state:

Our current staff of over 125 litigation, bankruptcy, foreclosure, ejection, workout, loss mitigation, title resolution and REO paralegals have an average of over of 8 years experience in the mortgage banking industry. Each paralegal was chosen based upon his or her background and understanding of the issues you as a servicer are faced with on a daily basis. Each staff member is truly dedicated to providing our clients with the best service possible.<sup>106</sup>

To a great degree, then, the issue of supervision of subordinate lawyers and non-lawyer staff appears to be a significant one.

#### V. CAN LAWYERS FOR BORROWERS DEFEND AGAINST COLLECTION OF DEBTS OWED BY THEIR CLIENTS TO SOMEONE?

In November 2010, retired Federal Judge H. Lee Sarokin<sup>107</sup> succinctly stated what he saw as the dilemma for lawyers defending against foreclosure of their clients’ homes:

Foreclosure proceedings are not criminal in nature, in which a defendant can sit back, do nothing, and require the government to prove its case. These are civil proceedings and the borrowers and hopefully their lawyers know whether or not the mortgage is in default. To oppose the foreclosure, when both the borrower and lawyer know the mortgage is in substantial default, to my mind borders on the unethical. If indeed there are valid defenses to foreclosure — mortgages not in default, wrong property desig-

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105. Christine Stapleton & Kimberly Miller, *Novice Florida Lawyers Draw Suspicion in Foreclosure Mess*, PALM BEACH POST (Jan. 13, 2011), <http://www.palmbeachpost.com/money/real-estate/novice-florida-lawyers-draw-suspicion-in-foreclosure-mess-1146402.html?printArticle=y>.

106. *Profiles*, UDREN LAW OFFICES, P.C., <http://www.udren.com/profiles.htm> (last visited Mar. 1, 2012).

107. “H. Lee Sarokin served on the United States District Court (N.J.) . . . and the United States Court of Appeals (3rd Cir.) . . . . He retired in 1996 after 17 years on the federal bench . . . .” THE HUFFINGTON POST, <http://www.huffingtonpost.com/judge-h-lee-sarokin> (last visited Mar. 1, 2012).

nated, etc. instances which I suspect are very rare, they should be pursued with diligence.

On the other hand, the holder of the mortgage must prove ownership, and that information is solely in the hands of the banks and their assignees. That is not information a borrower would have, and the borrower (defendant) has an absolute right to know that a suit for foreclosure is being conducted by the current holder of the mortgage. That is a defense made in good faith and worthy of pursuit. I have reservations about the good faith of challenging the existence of a default with full knowledge that it exists, but none about insisting on proof of current ownership and the right to foreclose.<sup>108</sup>

For Judge Sarokin, then, the lawyer defending a borrower may only defend by showing that the party bringing the foreclosure action is not entitled to do so; his examples are no default or the wrong property, but we can add to those the inability to show that the foreclosing party is the current holder of the right to do so (e.g. inability to produce the note, nonexistent or incomplete assignment of the mortgage, etc.).

On the other hand, the SF Report asserts that “[t]he fact that these homeowners borrowed something, on some terms, from someone should not be enough to rob them of their due process right.”<sup>109</sup> In addition, Judge Sarokin’s position was criticized by Thomas A. Cox, a retired Maine lawyer, who since 2008 has represented homeowners in foreclosure proceedings as a volunteer lawyer and who during the banking crisis of the late 1980s and early 1990s represented banks and the FDIC in the Federal Court system.<sup>110</sup> In taking affront to what he felt was Judge Sarokin’s criticism of foreclosure defense lawyers for engaging in conduct that “borders on unethical,” Mr. Cox asserted his concern that lenders’ lawyers were building their cases on documents that do not survive scrutiny, and used the example of affidavits from lenders’ representatives filed in support of lenders’ mo-

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108. Judge H. Lee Sarokin, *Does the Defense of Foreclosures by Lawyers Border on the Unethical?*, HUFFINGTON POST BLOG (Nov. 22, 2010, 3:18 PM), [http://www.huffingtonpost.com/judge-h-lee-sarokin/does-the-defense-of-forec\\_b\\_787027.html](http://www.huffingtonpost.com/judge-h-lee-sarokin/does-the-defense-of-forec_b_787027.html).

109. SF REPORT, *supra* note 9, at 4.

110. Thomas A. Cox, *Blame Dishonest Banks, Not Ethical Lawyers Exposing Foreclosure Frauds*, HUFFINGTON POST (Nov. 30, 2010, 12:58 PM), [http://www.huffingtonpost.com/thomas-a-cox/blame-dishonest-banks-not\\_b\\_789859.html](http://www.huffingtonpost.com/thomas-a-cox/blame-dishonest-banks-not_b_789859.html).

tions for summary judgment under Federal Rules of Civil Procedure Rule 56(c):<sup>111</sup>

Today, I have yet to see a single affidavit from a loan servicer witness that adequately meets this personal knowledge requirement. As a consequence, I estimate that I, and the lawyers with whom I consult, win about 75% of the time by opposing these summary judgment motions based upon false affidavits. Yet the lawyers presenting these dishonest affidavits show no sense of shame when they lose, because in the 90% of the cases where they are unopposed, they win by default, collect their fees and go home happy. This failure to present honest and competent evidence arises not out of an inability to meet the requirements, but out of their stubborn refusal to devote the necessary resources to honestly comply with the rule.<sup>112</sup>

Whether or not the affidavit was truthful, Mr. Cox implies that it can be attacked by the lawyer defending against the foreclosure.

First, let us rule out what we all would agree on (including Judge Sarokin): it is, of course, completely ethical, and likely mandated, that a lawyer defend against a foreclosure if the loan is not in default (which is what the Taylors were asserting in *In re Taylor* because the default asserted by HSBC was based on the Taylor's failure to pay the forced insurance, which they contended HSBC could not require), the lender is trying to foreclose on the wrong property, or the lender is not entitled to foreclose because it cannot prove that the debt is owed to it or that it is entitled to security interest represented by the mortgage. The question, then, is whether a lawyer may defend against a foreclosure action based on "technical defects"? I will choose the "technical defect" asserted by Mr. Cox: the foreclosure is based on an affidavit from an officer/agent of the lender that asserts facts known to the defense lawyer to be true but is not based on the personal knowledge of the affiant, a "robo-signer."

#### A. EXPEDITING LITIGATION AND RESPECT FOR RIGHTS OF THIRD PERSONS

##### ABA Model Rule 3.2: Expediting Litigation

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111. "(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." FED. R. CIV. P. 56(c).

112. Cox, *supra* note 110.



A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.<sup>113</sup>

ABA Model Rule 4.4: Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .<sup>114</sup>

Comment 1 to ABA Model Rule 3.2 gives some context for the black letter mandate of the rule: “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.”<sup>115</sup>

There is no question that a homeowner facing foreclosure can benefit from delay in a foreclosure action. The homeowner benefits in three distinct ways: (1) if not making payments to the lender, the homeowner is living rent free, and likely not paying the property taxes and with little incentive to maintain improvements on the property; (2) if unemployed or facing extraordinary expenses the homeowner will be better able to meet those other obligations; or (3) in a down real estate market that might hit bottom and start to rise, the homeowner may become less “under water” or actually realize some new equity in the property (which could reduce or avoid a deficiency judgment, create a surplus in a foreclosure sale, enable the homeowner to refinance, or enable the homeowner to sell the property in a market transaction). As pointed out by Mr. Cox, the foreclosure defense lawyer is, in effect, entitled to make the foreclosing lender lawyer “dot every i and cross every t.” Further, we have built the following into the education of lawyers: (1) the Udren firm junior associate lawyer Fitzgibbon argued that unresponded-to-RFAs could be used to establish facts the bankruptcy court found he knew or should have known were false; and (2) my long-time research assistant (who received “A+” grades in both Civil Procedure and Professional Responsibility) responded to Fitzgibbon’s actions, “I probably would have done the same thing; that’s what the rules of civil procedure are for!”

Unlike my examples of conduct by lenders’ lawyers, which even if not always “simple” revolved around agreed-upon rules and standards for lawyer conduct, here we confront an area where there is disagreement over

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113. MODEL RULES OF PROF’L CONDUCT R. 3.2 (2011).

114. MODEL RULES OF PROF’L CONDUCT R. 4.4 (2011).

115. MODEL RULES OF PROF’L CONDUCT R. 3.2 cmt. 1 (2011).

identifiable behavior that some call wrong and others call right. Can the lawyer defending against a foreclosure make the lawyer prosecuting the foreclosure do everything “right,” even when the defending lawyer knows his client owes the money and is in default, and even if he knows that the foreclosing lender has the right to foreclose? Or, is this just a procedural tactic by the borrower’s lawyers to buy some time for his client? I would love to give a categorical answer, but I am unable to do so. First, I have posited an issue that, I think, most of the time is hypothetical; rarely will the borrower’s lawyer “know”<sup>116</sup> that the foreclosing lender is entitled to the foreclosure. Second, we have inculcated an adversarial ethic into the bar that includes making one’s opponent “dot every i and cross every t,” and to not question whether that is ethical behavior but to praise it as zealous advocacy for the client.

## VI. CONCLUSION

I am afraid that I end where I knew I would as I undertook this article: a look at behavior that has historical precedents in other areas of the law followed by comments with little new insight. It indeed is unfortunate that the same issues come up again and again, especially since there are clear abuses being committed by lawyers representing foreclosing lenders. Perhaps placing the spotlight on such abuses again will help to limit them.

As for lawyers representing borrowers facing foreclosure, abuses revolve around the age-old dilemma of when does zealous advocacy transition into unjustified obstruction. Suffice it to say, I hope that lawyers representing borrowers facing foreclosure are doing more than making lenders get their foreclosure actions “right;” there may be much more that can, and should, be done for their clients than just keeping the wolf from the door.

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116. “‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (2011).