

# Ethics in Foreclosure Litigation

December 18, 2013

## Issues to Discuss:

- ▶ 1. “No Contact” Rule.
- ▶ 2. Communication Regarding the Consequences of Settlement.
- ▶ 3. Advocate–Witness Rule.
- ▶ 4. Duty to Continue Representation to Conclusion of the Matter.

## Issue: 1: Communication with Represented Parties

- ▶ Rule 4.2: the “No Contact” Rule.
- ▶ (a) In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

## No Contact Rule, Con't.

- ▶ (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person..., and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

## No Contact, Con't: Key Questions

- ▶ Is the individual represented, in this matter?
- ▶ With a corporate party, what role does the individual with whom you are attempting to speak play in that organization? Can the individual *bind* the corporation with his or her admissions? (*Niesig v. Team 1*, 76 N.Y. 2d 363 (1990))
- ▶ Can you get permission?
- ▶ Is the individual a former employee?
- ▶ Can the client speak with him or her?
- ▶ Should you seek a court order? (*Niesig*)

## Issue 2: Communication Regarding Consequences of Settlement

- ▶ **Rule 1.4 Communication**
- ▶ (a) A lawyer shall:
  - ▶ (1) promptly inform the client of:
    - ii) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;
    - (ii) any information required by court rule or other law to be communicated to a client; and
    - (iii) material developments in the matter including settlement or plea offers.
  - ▶ (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished.
  - ▶ (3) keep the client reasonably informed about the status of the matter;
  - ▶ ...
  - ▶ (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- ▶ (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

## Issue 3: Advocate Witness Rule

- ▶ Rule 3.7:
  - ▶ (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
    - ▶ (1) the testimony relates solely to an uncontested issue;
    - ▶ (2) the testimony relates solely to the nature and value of legal services rendered in the matter;
    - ▶ (3) disqualification of the lawyer would work substantial hardship on the client;
    - ▶ (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
    - ▶ (5) the testimony is authorized by the tribunal.
  - ▶ (b) A lawyer may not act as advocate before a tribunal in a matter if:
    - ▶ (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
    - ▶ (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

## Case Law

- ▶ The advocate-witness rules contained in the Code of Professional Responsibility, which have been superseded by the Rules of Professional Conduct, provide guidance, but are not binding authority, for the courts in determining whether a party's attorney should be disqualified during litigation...Here, since the plaintiffs' attorney was the only person, other than the parties, who had knowledge of any discussions regarding the terms of the oral agreement underlying this litigation, he is "likely to be a witness on a significant issue of fact"...Accordingly, the Supreme Court properly granted the defendants' motion to disqualify the plaintiffs' attorney.
- ▶ *Falk v. Gallo*, 73 A.D.3d 685 (2<sup>nd</sup> Dep't 2010)(citations omitted).

## Some Case Law that Rule More Important in Context of a Jury Trial

- ▶ ***Ramey v. District 141, Intern. Ass'n of Machinists and Aerospace Workers***  
378 F.3d 269 (2<sup>nd</sup> Cir. 2004)(construing old Rule 3.7), and progeny.

## Can the Firm Still Appear?

- ▶ The Plaintiffs assert that Mr. Axelrod is not appearing as a litigator in this case, but rather, the advocacy role is being performed by his partner, Wayne Schaefer, Esq., and an associate. Under DR 5-102(a), “[A] law firm is permitted to continue representation of a client even though one of the firm's attorneys will be called as a witness on behalf of the client before a tribunal.” *In re Owen & Mandolfo, Inc. v. Davidoff of Geneva*, 197 A.D.2d 370, 370, 602 N.Y.S.2d 369, 369 (1st Dep't 1993).
- ▶ *Adams v. Suozzi*, 340 F. Supp. 2d 270 (2004) aff'd on different grounds, 433 F.3d 220 (2<sup>d</sup> Cir. 2005).
- ▶ See also, *People v. Papa*, 119 Misc. 2d 595 (Suffolk Cty 1983).
- ▶ But see, *Colacino v. Andrews*, 32 Misc. 2d 1220 (NY Sup. Ct 2010).

## Issue 4: Duty to Continue Representation

- ▶ “When an attorney is retained to conduct a legal proceeding, he enters into an entire contract to conduct the proceeding to a conclusion and he may not abandon his relation without reasonable or justifiable cause.”
- ▶ *Rindner v. Cannon Mills*, 127 Misc. 2d 604 (N.Y. Sup. Ct 1985).

## Rule 1.16: Withdrawal

- ▶ (b) Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when:
- ▶ (1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law;
- ▶ (2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client;
- ▶ (3) the lawyer is discharged; or
- ▶ (4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person.

## Withdrawal, Con't

- ▶ (c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:
  - ▶ (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
  - ▶ (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
  - ▶ (3) the client has used the lawyer's services to perpetrate a crime or fraud;
  - ▶ (4) the client insists upon taking action with which the lawyer has a fundamental disagreement;
  - ▶ (5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;
  - ▶ (6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
  - ▶ (7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively;
  - ▶ ...
  - ▶ (9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;
  - ▶ (10) the client knowingly and freely assents to termination of the employment;
  - ▶ ...
  - ▶ (12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or
  - ▶ (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.

## Withdrawal, Con't

- ▶ **(d) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.**

## Limited Representation: Rule 1.2

- ▶ (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

## Contact Info/Additional Reading:

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