FLORIDA BAR STAFF OPINION 29977
January 7, 2011

[This opinion was affirmed by the Professional Ethics Committee at its June 24, 2011 meeting.]

Florida Bar ethics counsel are authorized by the Board of Governors of The Florida Bar to issue informal advisory ethics opinions to Florida Bar members who inquire regarding their own contemplated conduct. Advisory opinions necessarily are based on the facts as provided by the inquiring attorney. Opinions are not rendered regarding past conduct, questions of law, hypothetical questions or the conduct of an attorney other than the inquirer. Advisory opinions are intended to provide guidance to the inquiring attorney; the advisory opinion process is not designed to be a substitute for a judge's decision or the decision of a grievance committee. The Florida Bar Procedures for Ruling on Questions of Ethics can be found on the bar's website at www.floridabar.org.

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring attorney's letter are specifically as follows:

> Bank holds a large portfolio of mortgages and hires Lawyer to file foreclosure lawsuits on mortgages which fall into default. Lawyer files 1,000 foreclosure cases per year for 20 years. Only 2,000 cases are open and active. 3,000 cases were settled by voluntary payment of the mortgage debt or reinstatement of the mortgage loan. The remaining 15,000 cases had foreclosure judgments entered, and the mortgaged properties were sold at a judicial sale with a Certificate of Title issuing shortly thereafter to the judicial sale purchasers. These 15,000 sold properties are now almost all in the hands of subsequent third party purchasers.
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> Recently, Bank has instructed Lawyer to stop progress on all foreclosure actions due to potential defects with affidavits which Bank submitted to Lawyer and which Lawyer in turn filed with the court. This is the first time Lawyer has heard of any potential defects with affidavits.
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> Bank explained that it had 2 employees signing affidavits for the past 20 years, Signer 1 and Signer 2. Both signers have assistants who present the affidavits to the signers together with copies of Bank’s business records which show the account-specific information contained in each affidavit. Both signers also signed Verifications of foreclosure complaints pursuant to Fla.R.Civ.P. 1.110(b).
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> Signer 1 has always personally verified the figures contained in the affidavits and the facts in foreclosure complaints by looking at the copies of Bank’s business records before signing. Signer 1 has always signed or acknowledged his signature in the presence of his assistant, who then notarizes his signature in his presence.
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> Signer 2 adopted Signer 1’s procedure for signing affidavits and verifications last month. For the previous 19 years and 11 months Signer 2 relied on his highly

experienced and conscientious assistant to check the figures in the affidavits and the information in the foreclosure complaints against Bank's business records and make sure all information correctly reflected the information in Bank's business records. Until last month Signer 2 signed the affidavits and verifications without personally looking at the copies of business records which were paper clipped to each affidavit and proposed foreclosure complaint and verified by his assistant.

Additionally, until last month Signer 2's assistant notarized all of Signer 2's affidavits and complaint verifications whether or not Signer 2 was personally present. Fla. Stat. 117.05 requires notarization in the presence of the signer.

Signer 2's affidavits and verifications executed under the procedure of the previous 19 years and 11 months are referred to below as the "old affidavits" and "old verifications."

Bank has expressed confidence that the figures in all affidavits and the information in all proposed complaints were correct.

Lawyer believes this situation presents a possible question of candor to the tribunal under Rule of Professional Conduct 4-3.3 which may or may not call for remedial action. Lawyer's considered legal opinion is that replacing Signer 2's old affidavits and verifications in approximately 1,000 pending foreclosure cases would raise red flags that would result in costly litigation contrary to Bank's interests but which would have no reasonable likelihood of changing the outcome of the actions.

With regard to the 18,000 closed foreclosure actions, Lawyer's considered legal opinion is that raising an issue as to Signer 2's old affidavits and verifications, if any, would also raise red flags, would be contrary to Bank's interests, would cause instability in the title to those properties which are now in the hands of third parties, would lead to complicated and expensive litigation involving multiple parties and would have no reasonable likelihood of changing the outcome of those actions.

Questions

For all questions below, Lawyer is handling or has handled cases in each of the following postures. Please advise in responding to each question whether there are distinctions in the answer with regard to these different categories of cases.

A. Action pending and no judgment has been entered.

B. Judgment has been entered ordering judicial sale but judicial sale has not yet taken place.
C. Judgment has been entered and property sold at judicial sale to a third party, and
   i. Certificate of Title has not yet issued.
   ii. Certificate of Title has issued.
D. Judgment has been entered and property sold at judicial sale to the servicer as plaintiff in the case, and
   i. Certificate of Title has not yet issued.
   ii. Certificate of Title has issued in the name of servicer but servicer has not yet sold the property to a third party.
E. Judgment has been entered and property sold at judicial sale to the servicer, who assigned its purchase rights to Bank, and
   i. Certificate of Title has not yet issued.
   ii. Certificate of Title has issued in the name of Bank but Bank has not yet sold the property to a third party.
F. Judgment has been entered, property has been sold at judicial sale, Certificate of Title has issued in the name of either servicer or Bank, which has sold the property to a third party in an arm's length transaction.

Question 1. Does Lawyer's filing one of Signer 2's old affidavits constitute "a false statement of material fact or law previously made to the tribunal" as contemplated by Rule 4-3.3(a)(1) such that Lawyer is ethically bound to correct it? Are there any distinctions among the categories of cases indicated above?

Question 2. Giving due consideration to Lawyer's obligations of loyalty to the client and zealous advocacy, is Lawyer obligated under any ethical provision to replace Signer 2's old affidavits in foreclosure cases that are still pending? Are there any distinctions among the categories of cases indicated above?

Question 3. Regarding Rule 4-3.3(a)(4):
A. Do Signer 2's old affidavits filed by Lawyer constitute "false material evidence" as contemplated by Rule 4-3.3(a)(4) such that Lawyer is ethically bound "to take reasonable remedial measures" required by that rule?
B. If "reasonable remedial measures" are required, do those measures require Lawyer to make a "disclosure to the tribunal"?
C. If a disclosure to the tribunal is required, would any of the following be sufficient to meet Lawyer's ethical obligations?
   i. "Plaintiff is replacing the Affidavit As to Indebtedness filed in this action with the attached affidavit."
   ii. "Plaintiff is replacing the Affidavit As to Indebtedness filed in

this action with the attached affidavit due to technical irregularities in its execution."
iii. "Plaintiff is replacing the Affidavit As to Indebtedness filed in this action with the attached affidavit. Although the information contained in the original affidavit was verified to be accurate by Servicer A (or Servicer B), the original is being replaced due to technical irregularities in its execution."

Are there any distinctions among the categories of cases indicated above?

Question 4. If Lawyer proceeds to seek judgments based on Signer 2's old affidavits without filing new affidavits or making any disclosure to the court, would that constitute failure to "to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," as contemplated by Rule 4-3.3(a)(2)? Are there any distinctions between the categories of cases indicated above?

Question 5. Signer 2 is able to positively identify a large group of verifications that he executed after performing a personal verification of all allegations in the proposed foreclosure complaint but which his assistant notarized outside his presence. Given that Signer 2 properly verified all information in the proposed complaint and give that the verification requirement is found only in Rule 1.110(b), Fla.R.Civ.P., which does not require notarization, does Lawyer have any ethical obligation to take remedial measures due solely to the notarization having taken place outside the presence of the signer?

First, there is no distinction in the answers with regard to the different categories. The answer is the same regardless of whether the action is pending or judgment has been entered, whether there has been a sale or no sale as of yet. Therefore, this ethics opinion will address the five questions presented without regard to the different categories of cases, as the analysis is the same. Additionally, this opinion does not address the inquirer's conclusion that in his opinion, replacing the affidavits in approximately 1000 pending foreclosure cases would have no reasonable likelihood of changing the outcome of the actions, as that requires a legal/factual determination, beyond the scope of an ethics opinion. Procedure 2(a)(1), Florida Bar Procedures for Ruling on Questions of Ethics (these procedures can be found on The Florida Bar's website at http://www.floridabar.org).

The inquiring attorney asks whether the filing of Signer 2's old affidavits constitutes "a false statement of material fact or law previously made to the tribunal" as contemplated by Rule 4-3.3(a)(1), Rules Regulating The Florida Bar. Rule 4-3.3, the "Candor Toward the Tribunal" rule states, in pertinent part:

> **(a) False Evidence; Duty to Disclose.** A lawyer shall not knowingly:
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> (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;
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> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
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> * * *
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> (4) offer evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
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> **(d) Extent of Lawyer's Duties.** The duties stated in this rule continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6 [concerning attorney-client confidentiality].

The Comment to Rule 4-3.3 advises as follows:

> Subdivision (a)(4) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.
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> If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

> The duties stated in this rule apply to all lawyers, including defense counsel in criminal cases.
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> The rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process that the adversary system is designed to implement. See rule 4-1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

Where false evidence has already been offered, the Comment to Rule 4-3.3 provides the following guidance:

> If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially if circumstances permit. In any case, the advocate should ensure disclosure is made to the court. It is for the court then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable.

The first question is whether the filing of an affidavit which was not verified by the signer or notarized properly is a “false statement of material fact” as contemplated by Rule 4-3.3. The Professional Ethics Committee has opined that an attorney has an affirmative obligation, under Rule 4-3.3 of the Rules Regulating the Florida Bar, to notify the court of a potential fraud when the attorney knows that a client has deliberately lied at a deposition. See Florida Ethics Opinion 75-19 (copy enclosed). Additionally, in Florida Ethics Opinion 82-3 (copy enclosed), the committee concluded that if the attorney receives information that clearly establishes that the client has perpetrated a fraud on the court by filing a false affidavit, then the attorney’s duty to the court supersedes the attorney’s duty to the client, and the attorney must reveal the fraud to the court. See also Connecticut Opinion 99-9 and New York State Opinion 797 (copies enclosed).

An attorney's obligation to make disclosures under Rule 4-3.3 is triggered when the attorney *knows* that a client or a witness for the client has made material false statements to a tribunal and

the client or witness refuses to rectify the fraud. Comment, Rule 4-3.3. As defined in the Preamble to the Rules of Professional Conduct "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." *See also*, Florida Ethics Opinion 86-3 (copy enclosed).

As the rule indicates, if an attorney knows that any material false representations have been made on the record by a client to any court or tribunal, then the attorney must follow the instructions in the Comment to Rule 4-3.3 and ask the client to correct these false statements on the record. In the pending cases, if the client will consent to the affidavits being replaced, then the attorney may do so. The disclosure needs to be made to the court that the affidavit was improperly verified and notarized. The specific language required in the disclosure and the method by which the inquirer will "replace" the old affidavit or provide a new affidavit are beyond the scope of an ethics opinion. Procedure 2(a)(1), Florida Bar Procedures for Ruling on Questions of Ethics (these procedures can be found on The Florida Bar's website at http://www.floridabar.org). Therefore, this opinion will not address whether the disclosure language offered in question 3 is sufficient to meet the attorney's obligations.

With regard to the cases that have already been closed and judgment has already been entered, the duties and obligations under Rule 4-3.3 continue beyond the conclusion of the proceeding. See Rule 4-3.3(d). Therefore, the fact that improperly verified and notarized affidavits have been filed with the court needs to be disclosed to the court in the closed cases as well as the pending ones. As above, the attorney would have to discuss this with the client and obtain consent. If consent is obtained, how procedurally to disclose to the court in the closed cases is beyond the scope of an ethics opinion. As provided in the Comment, "...the advocate should ensure disclosure is made to the court. It is for the court then to determine what should be done – making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing."

In either case, whether the case is currently pending or already closed, if the client refuses to give consent to the attorney to disclose, then the attorney must make these disclosures him/herself, preferably in an *in camera* proceeding if possible. Disclosure should be made to the presiding judge that the affidavits were improperly verified and notarized, and guidance should be requested from the court. Rule 4-3.3 and Ethics Opinions 75-19, 86-3 and 90-6 (Reconsideration) (copies of ethics opinions enclosed). As set forth in the Comment to Rule 4-3.3, such action causes a conflict with the client, requiring withdrawal of the attorney from the representation in pending cases, where the client refuses to consent to disclosure. See Rule 4-1.16.

Other Rules of Professional Conduct are also implicated here. Rule 4-1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. Similarly, Rule 4-3.4(b) prohibits a lawyer from fabricating evidence or assisting a witness to testify falsely. Rule 4-8.4(a) prohibits a lawyer from violating the Rules of

Professional Conduct or knowingly assisting another to do so. Finally, Rule 4-8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and Rule 4-8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice. *See also, Dodd v. The Florida Bar*, 118 So.2d 17 (Fla. 1960); *The Florida Bar v. Agar*, 394 So.2d 405 (Fla. 1981); and *The Florida Bar v. Simons* , 391 So.2d 684 (Fla. 1980).

Although not ethically required to withdraw if the client will permit the inquiring attorney to make the required disclosure, if the inquiring attorney nevertheless feels compelled to withdraw, the inquiring attorney should do so in a manner that neither breaches the duty of confidentiality to the client nor materially prejudices the client. Therefore, any motion to withdraw should state only general grounds. *See*, *The Florida Bar v. Lange*, 711 So.2d 518 (Fla. 1998). Further, even if the duties of the inquiring attorney under Rule 4-3.3 are triggered, putting the information into a motion to withdraw is *not* a recommended way to inform the court. The Comment to Rule 4-1.6 explains that where disclosure of confidential information is necessary, the attorney should avoid any unnecessary disclosure, should limit disclosure to persons having a need to know, and obtain protective orders or make other appropriate arrangements to minimize risk of disclosure.

In conclusion, the inquiring attorney first should attempt to have the client correct the improperly verified and notarized affidavits. The inquiring attorney should advise the client that if the client fails to correct the affidavits, then the inquiring attorney will have to withdraw and will have to reveal the truth to the court. If the client refuses to take the required corrective action, the inquiring attorney will have to reveal the fact that there has been an improperly verified and notarized affidavit filed in each of these cases, whether they are pending or already closed. The inquiring attorney also will have to move to withdraw from further representation of the client in pending cases, where the client refuses to correct the affidavits, while making as minimal a disclosure as necessary when doing so.

Index: 4-3.3, 4-1.2(d), 4-3.4(b), 4-8.4(a), (c) and (d), 4-1.6

NOTE: This ethics opinion was authored in response to a specific inquiry and may not be applicable to anyone other than the inquiring attorney referenced herein.