

# Standing, Foreclosure Litigation & Robo-Signing

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Mortgage Litigation & Regulatory Enforcement

Therese G. (Terry) Franzen  
Franzén and Salzano, P.C.  
40 Technology Parkway South, Suite 202  
Norcross, Georgia 30092  
(770) 248-2882  
[tfranzen@franzen-salzano.com](mailto:tfranzen@franzen-salzano.com)

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# Robo-Signing



(Picture courtesy of John L. Ropiequet, Arnstein and Lehr, LLP)

# Robo-Signing

- Signing affidavits without having personal knowledge of the facts stated therein.

# The “Robo-Signature” Process

The “robo-signing” of affidavits and all other foreclosure documents indicates the inability of loan servicers to demonstrate the facts required to conduct a lawful foreclosure.

# Attorney Ethics in Robo-Signing The ABA Model Rules

## The Advocate

### 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;
  - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

- (3) offer evidence that the lawyer knows to be false. 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, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 (Confidentiality of Information).

# Attorney Ethics in Robo-Signing The ABA Model Rules

## The NY Advocate

- Attorneys must now certify, “under the penalties of perjury,” that they have communicated with a representative of the plaintiff bank or lender and that they have personally reviewed all documents and records related to the case.
- After making this review and “other diligent inquiry,” the attorney must attest that “to the best of my knowledge information and belief, the Summons and Complaint and all other documents filed in support of this action for foreclosure are complete and accurate in all relevant respects.”
- A copy of the attorney affirmation can be found at:  
[http://www.nysba.org/AM/Template.cfm?  
Section=Home&ContentID=43725&Template=/CM/ContentDisplay.cfm](http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=43725&Template=/CM/ContentDisplay.cfm).



# Attorney Ethics in Robo-Signing

## The ABA Model Rules

### Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law...

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

### Transactions with Persons Other Than Clients

#### Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

### Law Firms and Associations

#### 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.
  
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
  - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, *and* knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

### Rule 5.2 Responsibilities Of A Subordinate Lawyer

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
  
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

### Rule 5.3 Responsibilities Regarding Non-Lawyer Assistants

With respect to a non-lawyer 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;
- (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

- a (c) a lawyer shall be responsible for conduct of such person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner *or* has comparable managerial authority in the law firm in which the person is employed, *or* has direct supervisory authority over the person, *and* knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

# Attorney Ethics in Robo-Signing The ABA Model Rules

## Client-Lawyer Relationship

### Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation *or* the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:



# Attorney Ethics in Robo-Signing

## The ABA Model Rules

- ...(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another *and* in furtherance of which the client has used or is using the lawyer's services;
  
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result *or has resulted* from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services...

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

### Maintaining the Integrity of the Profession

#### Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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## The ABA Model Rules

- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

# Attorney Ethics in Robo-Signing The ABA Model Rules

## Maintaining The Integrity Of The Profession

### Rule 8.5 Disciplinary Authority; Choice Of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

# Attorney Ethics in Robo-Signing

## The ABA Model Rules

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; *and*
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, *or*, if the predominant effect of the conduct is in a different. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

# Affidavits

- Require personal knowledge of facts
- Don't just sign a form
- Watch the dates – “effective date” vs. actual date signed
- Never sign a document with blanks
- Review facts/file before executing
- Execute in front of a notary
- Do not provide incentives for number of documents or speedy execution

# AG Settlement

\$25 billion dollars in monetary sanctions and relief from:

- Bank of America Corp.
- JPMorgan Chase & Co.
- Wells Fargo & Co.
- Citigroup Inc.
- Ally Financial Inc. (formerly GMAC)

# AG Settlement

Information in foreclosure affidavits must be personally reviewed and based on competent evidence.



# AG Settlement

- Affidavits/sworn statements utilized in foreclosure proceedings must be accurate as to the amounts owed and the standing of the bank/servicer to file for foreclosure and must be based on the signor's personal knowledge of the facts. The affiant must actually review the bank/servicer records before signing.

# AG Settlement

- Assertions made in foreclosure or bankruptcy proceedings shall be accurate, complete and supported by competent and reliable evidence.
- Affidavits shall be signed in the presence of a notary.

# AG Settlement

- Banks/servicers may not rely on an inaccurate affidavit to obtain a foreclosure judgment.
- Banks/servicer must have standards for qualifications, training and supervision of employees that sign affidavits; and shall ensure that they have an adequate number of employees with reasonable time to prepare, verify and execute affidavits.

# AG Settlement

- The practical impact of this is that it is very difficult and time consuming for our clients to identify that person and ensure that person has sufficient knowledge about the file.
- Banks/servicers shall not pay incentives to employees or third parties to encourage speed in the signing of affidavits.

# AG Settlement

- Banks/servicers shall conduct quarterly reviews of: a sampling of affidavits, sworn statements documents used to foreclose in non-judicial states, ownership information and loss mitigation summaries prepared by bank/servicer employees and agents to ensure the documents are in compliance with the law and this agreement.

# AG Settlement

The final agreement (consent order) has not been signed yet, but will be filed in U.S. District Court in Washington, D.C. under Case No: 1:12-CV-00361-RMC.

# AG Settlement

The Orders with each of the 5 servicers released by the FRB can be found at:

<http://www.federalreserve.gov/newsevents/press/enforcement/20120213a.htm>

# Impact on Non-Judicial Foreclosure States

## Notice of Default

*Anolik v. EMC Mortgage Corp.*, No. C044201  
(Cal.App.4th, April 19, 2005)

- Notice must state specific breach.
- The use of the words “if any” in a notice of default, when referring to the fact of default, violates the legal requirement that the foreclosing entity identify “actually known” breaches and invalidates the entire notice.



# Impact on Non-Judicial Foreclosure States

- Must be able to prove ownership of the note and the right to foreclose.

# Impact on Non-Judicial Foreclosure States

- Should you require an affidavit prior to notice?

# Impact on Non-Judicial Foreclosure States

Is the affidavit from the servicer at time of default sufficient?

- Does a representative from that servicer have personal knowledge of the loan and principal balance?
- Does a representative from that servicer have personal knowledge of the records and how they are kept and what they mean?
- Watch the dates – “effective date” vs. actual date signed

# Impact on Non-Judicial Foreclosure States

The Affidavit in Support of the foreclosure must be signed by a representative with personal knowledge of the file.