

Automated Communication Between Lawyer and Client

In some industries clients use databases and automated systems to communicate with their counsel. A recent case raises the question of whether this is an appropriate means of communication and illustrates how it can be fraught with peril for both the lawyer and the client if they are not careful.

In re: Taylor, 655 F.3d 274 (3d Cir. 2011), arises out of a Chapter 13 bankruptcy and a mortgage foreclosure action brought against debtors' home. The bank retained one law firm to represent it in the bankruptcy action to file a proof of claim "which includes a statement of the claim and its amount and supporting documentation" with respect to the debtors' mortgage. Instead of sending a copy of the mortgage and other relevant documentation, the bank allowed the lawyer to access its "computerized mortgage servicing database." The lawyer filed the proof of claim without first having a bank employee review it to confirm its accuracy. As a result, it contained several errors that were not caught before filing, including but not limited to the fact that the home's value was understated and the wrong mortgage note was attached.

Thereafter the bank hired a different law firm to file a motion in the bankruptcy action, seeking to lift the automatic stay so the bank could proceed with a mortgage foreclosure action against the debtors' home and to prosecute the foreclosure action. However, the bank failed to inform its new counsel that the debtors were disputing flood zone insurance that the bank passed on to them because they disputed the factual premise that their home was located in a flood plain. Therefore, debtors were only in default because they were refusing to pay the portion of the monthly payment earmarked for the insurance premium, which they arguably did not owe.

The bank and its counsel did not communicate directly in this and in other matters that were part of the bank's high-

volume foreclosure work. Instead they used a computerized system provided by a third party "to assign individual firms discrete assignments and provide the limited data the system deems relevant to each assignment." There was no direct human involvement in this process and counsel had no means through the system to check the accuracy of the data, including "the amount of the mortgage payment or the amount in arrears." Contacting the bank directly was discouraged and, moreover, one of the lawyers sanctioned in this matter believed that the bank did not permit it.

The motion to seek relief from the stay was prepared by non-lawyer staff of the bank's counsel based only upon the information provided by the computerized system. As a result it contained several errors, including a monthly payment higher than what was stated in the proof of claim prepared by the first law firm retained by the bank in this matter. The computerized system did not provide any information concerning the debtors' equity in their home; the form language of the motion incorrectly stated that the debtors had "inconsequential or no equity." And of course the motion was silent with respect to the flood insurance dispute. The bank's counsel "did nothing to verify the information in the motion for relief from stay besides check it against 'screen prints' " of the computerized system; she did not actually access the computerized system.

Bank's counsel filed the motion. At the same time, they served debtors' counsel with a request for admissions, which inaccurately sought admissions that debtors had made no payments instead of reduced payments during the period in question and that debtors had no equity in their home. Debtors filed a response to the petition in which they denied that they had made no payment. Attached to their response were copies of checks to the bank for the relevant period, four of which had been cashed by the bank.

Thereafter debtors filed an objection to the bank's proof of claim. There they contended that the bank "had misstated the payment due on the mortgage and pointed out the dispute over the flood insurance." Bank's counsel filed a response to the objection to the proof of claim, which was silent on the flood insurance issue but alleged that the proof of claim correctly stated the amount owed, notwithstanding that the court later found that this statement was "indisputably incorrect, because the proof of claim listed an inaccurate monthly mortgage payment (which was also a different figure from the payment listed in [the bank counsel's] own motion for relief from stay)."



Avoiding Liability



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The bankruptcy court held a hearing concerning both the claim objection and the motion for relief, which another member of the firm representing the bank attended. Ultimately he had to admit that the bank had received the mortgage payments when the response to the claim objection and the motion for relief stated the contrary. Nevertheless, he attempted to offer the request for admissions, which the bankruptcy court denied, "noting that the firm 'closed their eyes to the fact that there was evidence they ask me [to deem admitted]. They ... had evidence 'that the assertions in its motion were not accurate' in [their] possession and [they] went ahead like [they] never saw it.' "

After that hearing bank's counsel attempted to obtain an accounting from the bank to determine the correct arrearage on the mortgage by making inquiries via the computerized system. At the next hearing "he told the court that he was literally unable to contact [the bank] — his firm's client — directly to verify information which his firm had already represented to the court that it believed to be true."

The bankruptcy court later found that one of the attorneys representing the bank had violated Rule 1901 for "pressing the motion for relief based on claims he knew to be untrue" and against another member of that firm "for failing to make reasonable inquiry concerning the representations she made in the motion for relief from stay and the response to the claim objection." The court found that the bank also violated Rule 1901 "for practices which caused the failure to adhere to [bankruptcy] Rule 9011."

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This latter rule “requires that parties making representations to the court certify that ‘the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support.’ ” Because of his inexperience, the attorney who had pressed the motion for relief was not sanctioned but the other lawyer and the bank, along with another lawyer, were. The individual lawyers and the law firm, but not the bank, appealed.

The district court overturned the order, in part because “the bankruptcy court seemed more concerned with ‘sending a message’ to the bar concerning use of computerized systems than with the conduct in the particular case. ...” The U.S. Trustee filed an appeal to the 3rd U.S. Circuit Court of Appeals.

Among other things, the Court of Appeals reversed the district court on the imposition of sanctions against the individual lawyer and the law firm and affirmed the overturning of imposition of sanctions against the other individual lawyer. But it refused to find “that the use of databases or even certain automated communications between counsel and client are presumptively unreasonable.”

The lesson this case teaches, other than the duty of candor to the court, is that the lawyer has a duty to make inquiry of his or her client when he or she has received conflicting information from the client. It remains to be seen if such inquiry should include a request for the actual documents prepared by a human being.