In the legal business, change is a fundamental rule of the game. If the federal laws aren’t changing, the state rules are. There are certain principles that are more constant, such as the canon of stare decisis, whereby courts still adhere to a legacy of case law and long-standing legal policies. From stare decisis, we may develop strategies that can be somewhat uniform, no matter where you practice law. However, there are so many issues of first impression in the foreclosure field of law that every time a new issue is decided, it will change the game; then the rules may change again if the decision is overturned on appeal and new statutes are enacted.

Although this is less the case than perhaps at the beginning of the foreclosure crisis, many bank representatives have no previous experience with litigation or any court matters, and legal principles are foreign to them. They may not understand or might just claim ignorance as to why a homeowner is entitled to receive any of the materials requested in discovery. Bank representatives often resist even more vehemently having to appear for a deposition, and are often shocked at the inherently grueling nature of this proceeding.
Yet the banks must not forget that in filing all of these foreclosure actions, they are no different from any other litigation plaintiff, and “litigation has a tendency to make public the sort of information that individuals otherwise would prefer to keep private.”\(^1\) Although the banks are multibillion-dollar financial behemoths, as so succinctly put by New York Judge Arthur Schack,\(^2\) it is individuals who must answer discovery on behalf of the banks, and often they are in for a rude awakening to the fact that their private information may become public.

Attorneys for banks often endeavor to shield their clients from the rigors of discovery. The competition for banks’ business among foreclosure firms and attorneys is fierce. In the midst of a flailing economy, the foreclosure industry is one of the few job fields that is on the rise today. Thanks in part to the TARP funds, which bailed out many banks, these corporations now have abundant financial resources to dedicate to obtaining foreclosures, and law firms and attorneys everywhere are fighting for a piece of the pie. Law firms that never previously dealt with foreclosures happily opened their doors to the business, drawn in by the irresistible profits.

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Banking is an industry in which the legal business can be controlled far too much by the judgment of non-lawyers. It’s an often-prevailing practice among foreclosure plaintiffs to wash their hands of defaulting borrowers, never mind the reason the borrowers supposedly defaulted in the first place. Bank foreclosure firms, servicers, and client systems will often assume the philosophies and modus operandi of their clients. Attorneys know that they are usually hired by clients to perform stated objectives but expect to use their knowledge and ethics to direct their clients to recommended legal avenues. For bank foreclosure attorneys, customer service must often win out over professional judgment if they wish to keep their clients, and those who do not will lose the business or be fired, whether or not the attorney has a flawless track record (in his professional judgment).

These attorneys know that some of the pitfalls of discovery, such as the highly adversarial direct confrontation, intimidation, and fear (particularly for those unfamiliar with the litigation arena) associated with a deposition can be disastrous for client relations. Therefore, bank attorneys will often expend much more energy to fight foreclosure defense discovery than they will in any other area of the litigation process. Foreclosure law firms often do not even consider a foreclosure action to be “litigated” unless it becomes “contested,” and only at that point do some foreclosure firms refer a case to their litigation department. This is why some banks fail to address litigated issues for quite some time, or even ever—simply because they have not routed a case to the right department, and it just sits in the hands of personnel.

As we can see from a litany of recent case law and investigation results, it is banks that are often directing their attorneys’ professional judgment. It may also be that some clients go over or around the lawyer until they get the answer they want. I don’t believe that most people in the foreclosure industry enjoy putting people out of their homes; it’s merely something to pay the bills. The foreclosure firms are just representing a client that wants to assert a legal position; everyone has the right to counsel, from people injured in a car crash to those accused of murder—even terrorists. Attorneys often do not share the views or philosophies of their clients; they simply have a job to do.
Also, the foreclosure industry often does not take a great deal of interest in the human aspects of their employees to the extent that employees are sometimes not able to produce or deliver the product expected of them. There is so much work to be done and so many foreclosure sales that are expected to be closed that the foreclosure industry has little patience for anything that deviates from a robotic ability to just produce, produce, produce. This is the expectation of the banks; they are all about numbers. In the trend as of late, much work gets farmed out overseas because many companies are opting to receive mechanical product like clockwork. This makes perfect sense for the foreclosure industry; however, banks do need locally licensed attorneys to get their judgments.