

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

COUNTY OF COOK,)	
)	Case No. 1:14-cv-09548
Plaintiff,)	
)	Hon. Gary Feinerman
v.)	
)	Mag. Judge Mary Rowland
)	
WELLS FARGO & CO., et al.,)	
)	
Defendants.)	

**DEFENDANTS' MEMORANDUM IN SUPPORT OF
MOTION FOR AN ORDER PERMITTING *EX PARTE*
INTERVIEWS OF STATE COURT OFFICERS AND EMPLOYEES**

Defendants Wells Fargo & Co., Wells Fargo Financial, Inc., and Wells Fargo Bank, N.A (collectively, “Wells Fargo” or “Defendants”), by their attorneys, and pursuant to Comment 6 to Rule 4.2 of the Illinois Rules of Professional Conduct, respectfully request that the Court enter an order permitting counsel for Defendants to contact officers and employees of the State of Illinois’s Circuit Court of Cook County.

I. INTRODUCTION

Once again, the County of Cook (the “County”) is attempting to frustrate Wells Fargo’s ability to investigate the basis of the County’s claims in this action. Previously, the County refused to identify the individuals identified in the Complaint only as “confidential witnesses” (prior employees of Wells Fargo or other financial institutions) upon whose alleged statements it relied to support its claims until ordered to do so by this Court.¹ Now, the County is hoping to

¹ The County’s motivation for withholding this information has now become clear. The confidential witnesses who have spoken with Wells Fargo’s counsel confirmed that they never intended to provide testimony in support of a claim against Wells Fargo, that they were never told that their statements would be included in a complaint, and that they did not have a chance

prevent counsel for Wells Fargo from interviewing employees of the State of Illinois (not Cook County), arguing that Wells Fargo's counsel is prevented from doing so by Rule 4.2 of the Illinois Rules of Professional Conduct, titled "Communication with Person Represented by Counsel." The County is, again, incorrect.

The County is the Plaintiff, and the represented party, in this suit. As such, Rule 4.2 only prevents counsel for Wells Fargo from contacting certain employees of the County regarding this case. *Judges and non-judicial employees of the Circuit Court of Cook County ("State Court") are not employees of Cook County—they are employees of the State of Illinois.* Therefore, judges and non-judicial employees of the State Court are not represented by the lawyers representing the County in this case, and Wells Fargo is free to interview them about the facts underlying the claims that Wells Fargo's conduct proximately caused an injury to the County via "the use of the Cook County Circuit Court to process foreclosure suits." (Mem. Op. and Order dated Mar. 26, 2018 [Dkt. No. 143] ("Dismissal Order") at 11), 314 F. Supp. 3d 975, 984 (N.D. Ill. 2018).

Even if these judges and non-judicial employees were not State employees, counsel for Wells Fargo would still be permitted to contact them under Rule 4.2, unless: (1) they supervise, direct, or regularly consult with the County's lawyers regarding this litigation; (2) they have authority to obligate the County regarding this matter; or (3) their acts or omissions in connection with this matter may be imputed to the County for purposes of civil or criminal liability. Counsel for the County has been unable to identify any individuals who meet this

to review the complaint before it was filed. A number of them are angry or unsettled by the fact that the County made allegations in this lawsuit that purport to include their statements. None of these witnesses who have spoken with Wells Fargo's counsel witnessed any sort of discrimination by Wells Fargo or any evidence that non-prime loans were targeted to minorities. Further, none of the witnesses appear to have had any nexus with Cook County whatsoever.

description within the State Court. Further, counsel for the County has never claimed to represent any employees or officers of the State of Illinois in connection with this case.²

II. BACKGROUND

In order to analyze the County's claimed injuries relating to costs supposedly incurred by the State Court, counsel for Wells Fargo seeks to interview certain State Court employees and judges without the County's interference.

The Court has limited the County's potentially-recoverable damages in this action to any injuries in the form of "*increased* expenditures by the Cook County Sheriff's Office and the Cook County Circuit Court in connection with administering and processing an increased number of foreclosures." (Dismissal Order at 37 (emphasis added).) However, in the context of the ongoing discovery conferral process, counsel for the County has explained that the County does not intend to calculate any *increased* expenditures by the State Court directly resulting from an increased number of allegedly discriminatory foreclosure cases. Instead, the County intends to simply allocate a portion of the State Court's normal operating expenditures to each challenged Wells Fargo foreclosure.³ To do this, the County intends to first calculate a "fully loaded cost" associated with processing each procedural step (as recorded in a State Court docket entry) in a foreclosure case generally, and then to simply use the docket sheet for each challenged Wells Fargo foreclosure to tally up an overall cost for that foreclosure.⁴ In other

² To run the issue to ground, Wells Fargo specifically requested that the County provide a copy of its agreement retaining the private lawyers litigating this case on its behalf. Although any such retainer agreement with the County is presumably a public record, the County ignored Wells Fargo's request. In any event, the State of Illinois is barred by the doctrines of res judicata and collateral estoppel from bringing the claims asserted against Wells Fargo in this lawsuit.

³ A copy of the County's amended Rule 26(a) initial disclosures, served January 29, 2019, is attached as **Exhibit A**.

⁴ For a variety of reasons, Wells Fargo disputes as a matter of law that this is a valid measure of the County's damages arising from purported increased expenditures of the State Court to process Wells Fargo foreclosure cases. But to test the County's calculations, Wells Fargo must

words, even if there were *no increased expenditures at all* resulting from any increase in foreclosure cases, the County still hopes to recover what it has characterized as “from hundreds of dollars to tens of thousands of dollars per foreclosure.” (Letter from counsel for the County dated November 21, 2018, attached hereto as **Exhibit B**.)

There are a number of problems with the County’s damages theory, each of which counsel for Wells Fargo is entitled to discuss with State Court judges and employees without the interference of counsel for the County. *First*, as set forth above, the County intends to ignore the Court’s Dismissal Order regarding what State Court costs might constitute a cognizable injury—*i.e.*, only *increased* expenditures.

Second, it is a matter of public record (and will be a matter of indisputable fact) that the State Court is largely funded by the State, not the County. Therefore, even if the State Court’s expenditures increased as a result of challenged Wells Fargo foreclosures, the cost of that increase would have been borne in large part (if not completely) by the State.⁵

Third, the State Court collected a handsome filing fee in connection with each foreclosure case, which Wells Fargo has reason to believe more than paid for any costs associated with processing the associated foreclosure cases.⁶ In fact, the very study that the

now review *all dockets* from *all cases* in the State Court in order to determine whether the County’s purported sum of the “fully loaded costs” associated with all of those docket entries in each year is equal to the State Court’s annual budget for that year (*i.e.*, the denominator), and to determine whether the County allocated the correct dollar amount to a particular procedural step in a foreclosure case (*i.e.*, the numerator).

⁵ The County’s Complaint is silent as to the role of the State of Illinois in operating or funding the State Court, yet another link in the County’s long causal chain that will not only bar the County’s recovery of increased expenditures to the State Court on grounds of proximate cause, but calls into question whether the County can prove it suffered such an injury at all.

⁶ Similarly, the County has recently produced budgets from the Cook County Sheriff’s Office that remarkably evidence that one of the Sheriff’s budgetary goals was to *increase* the number of judicial sales of foreclosed properties processed by the Sheriff, as these foreclosure-related activities were apparently a prime source of revenue.

County relies upon to support the damages claim in its Complaint⁷ concludes that any “cost” to the State Court of processing a foreclosure case is “offset ... by the \$271 court fee” and the State Court actually “*nets* some \$43 per case processed.” William C. Apgar, Mark Duda, & Rochelle N. Gorey, *The Municipal Cost of Foreclosures: A Chicago Case Study*, Homeownership Pres. Found. (Feb. 27, 2005), at 42.

In an abundance of caution, before contacting any State Court judges or non-judicial employees about these issues, counsel for Wells Fargo sent a letter to counsel for the County, stating as follows:

I am writing to advise you that Wells Fargo may communicate with certain individuals employed by the State of Illinois who work in the Cook County judicial system in connection with the County’s fair-housing suit. We understand that you represent the County government, and you have represented to us that certain County offices and agencies have agreed to provide documents in response to Wells Fargo’s discovery requests. To our knowledge, however, you do not represent the State or any State employees. If you disagree with that assessment, please let me know as soon as possible.

(A copy of this letter dated Dec. 18, 2018 is attached hereto as **Exhibit C.**) Nearly a month later, counsel for the County responded, incorrectly asserting that, “[i]f the individuals work in the Cook County judicial system, as you state, those individuals are constituents and/or agents of the Cook County judicial system, even if their salaries are paid by the State of Illinois.” (A copy of the letter from counsel dated Jan. 14, 2019 is attached hereto as **Exhibit D.**) The County argued that any “unauthorized contact with such individuals would be a violation of Illinois Rule of Professional Conduct 4.2.” (*Id.*).

⁷ See Ex. B at 1 (County’s counsel “explained that the damages estimate in the complaint is based on an academic study estimating damages,” namely, the “study ... entitled *The Municipal Cost of Foreclosures: A Chicago Case Study*”).

Counsel for Wells Fargo then informed the County that, under Illinois law, the judges and employees of the State Court are not employees of the County but of the State of Illinois. (A copy of the letter dated Jan. 29, 2019 is attached hereto as **Exhibit E**.) Counsel further explained that even if these State Court employees were County employees, they could be contacted in accordance with Rule 4.2 unless they supervised or regularly consulted with the County's attorneys about this case, they have the authority to obligate the County in this action, or their acts or omissions in connection with this case may be imputed the County for the purpose of liability. (*Id.*) Counsel for Wells Fargo wrote: "[t]o the extent you are being supervised or directed by, or are regularly consulting with, any State employees working within the judiciary, please promptly identify those individuals on or before February 1, 2019, and explain the basis on which you believe they are 'constituents' of the County." (*Id.*)

Counsel for the County has not disputed that the judges and employees of the State Court are, in fact, employees of the State and not the County. Instead, the County's private contingency-fee counsel responded as follows: "[a]s a matter of general course, the Cook County State's Attorneys Office represents the Cook County Office of the Chief Judge and the Cook County Clerk's Office and their employees in civil litigation and other matters arising out of their official duties." (A copy of the letter dated Jan. 31, 2019 is attached hereto as **Exhibit F**.) Notably, counsel for the County did not claim to represent the State Court or any of its judges or employees in connection with *this* case. Counsel closed the letter (and the conferrals on this matter) by encouraging Wells Fargo to "raise this issue with the Court at the February 12th status conference." (*Id.*)

III. ARGUMENT

A. The Limitations of Rule 4.2 of the Illinois Rules of Professional Conduct

Rule 4.2 of the Illinois Rules of Professional Conduct is titled “Communication with Person Represented by Counsel,” and states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order.

Comment 7 to the Rule states, in part:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

“Constituent,” as used in the Rules, is a defined term: “[o]fficers, directors, employees and shareholders are the constituents of the corporate organizational client.” *See* Rule 1.13, cmt. 1.

Comment 6 to Rule 4.2 states, in part, that “[a] lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order.” Further, Judge Castillo has affirmed that “an attorney seeking to ascertain an appropriate course of conduct need only request permission from the company's attorney *or* seek permission from the court prior to making any informal contacts” and “the attorney who seeks court approval before contact does not risk an ethical violation, but one who does not acts at his or her own peril.” *In re Air Crash Disaster Near Roselawn, Indiana on Oct. 31, 1994*, 909 F. Supp. 1116, 1122 (N.D. Ill. 1995) (quoting *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104 (M.D.N.C. 1993)). Therefore, Wells Fargo has filed this motion requesting an order permitting Wells Fargo to contact the employees and judges of the State Court.

B. Case Law is Clear that State Court Employees are Employed by the State of Illinois, not by Plaintiff Cook County, and Thus Rule 4.2 Presents No Barrier to Wells Fargo's Ability to Contact Them

The State Court is a single-county circuit court of the State of Illinois created by a 1964 amendment to the Illinois Constitution. Ill. Const., Art. VI, Sec. 2, 7(a). Non-judicial personnel who work in the State Court are not employees of the County, but employees of the State of Illinois. *Orenic v. Illinois State Labor Relations Bd.*, 127 Ill.2d 453, 476 (1989) (“[T]he State, not a county, is the sole employer of all court employees”); *Drury v. McLean Cnty.*, 89 Ill.2d 417, 420 (1982) (“We hold that under our constitution of 1970 the clerks of the circuit courts in this State are not county officials, but are nonjudicial members of the judicial branch of State government,” despite the fact that the county boards are required to pay and fix their salaries).

In *Orenic*, four chief judges of Illinois circuit courts (represented by the Attorney General, not the State’s Attorney) brought an action against the State Labor Relations Board for a writ of prohibition or mandamus finding that the nonjudicial employees of the circuit courts were employees of the State rather than the County. 127 Ill.2d 453. The Supreme Court of Illinois held that “the State, personified by the chief judge of each circuit,” is the sole employer of nonjudicial employees in the judicial branch. *Id.* at 476. This is true even for employees of the State Court whose salaries are paid by the County. *Id.*; *Drury*, 89 Ill.2d at 425 (“The fact that counties pay the salaries and expenses of circuit court clerks does not make the office of circuit court clerk a county office”).

Circuit court judges, also, are State officers, not County constituents. *See Drury* 89 Ill.2d at 425 (finding that there is a unified court system throughout the state, that administration of justice is a matter of statewide concern, not subject to the control of any local government);

Orenic, 127 Ill.2d at 477 (noting that the provision of the Illinois Constitution that permits a county to supplement a judge's salary obviously does not make the judge a county employee).

The County does not appear to dispute the fact that all employees and judges who work in the State Court are employees of the State of Illinois and not employees of the County. *See* Exs. D and F. Nor does the County contend that it represents the State Court, or any of its constituents, in connection with this action. This alone is enough to establish that, under Rule 4.2, counsel for Wells Fargo may contact these State Court constituents *ex parte* to investigate the County's claims in this matter.

C. Even if State Court Judges and Non-Judicial Personnel Were Employees of the County (and the Case Law is Clear They Are Not), They Are Not "Constituents" as Defined by Rule 4.2

Even if counsel for the County represented the State Court in this action by virtue of representing the County, which the County has never contended, counsel for Wells Fargo would still be permitted to contact officers and employees of the State Court unless: (1) the officers or employees supervise, direct, or regularly consult with the County's counsel concerning this litigation; (2) the officers or employees have authority to obligate the County with respect to this litigation; or (3) the act or omission of the officer or employee in connection with this litigation may be imputed to the County for purposes of civil or criminal liability.

Wells Fargo has expressly asked the County to identify any such officers or employees of the State Court, and the County has failed to do so in the nearly two months that have elapsed since Wells Fargo raised the issue. Therefore, Wells Fargo is left to presume that no officers or employees of the State Court fall within any of these categories of "constituents" under Rule 4.2, and for this additional reason counsel for Wells Fargo should be permitted to contact the officers and employees of the State Court without the County's interference.

IV. CONCLUSION AND RELIEF REQUESTED

WHEREFORE Defendants respectfully request this Court enter an order granting counsel for Wells Fargo permission to contact the judges and employees of the Circuit Court of Cook County *ex parte*, and for such further relief as the Court finds just and equitable.

Dated: February 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019, I caused a true and correct copy of the foregoing to be served upon the following counsel of record as of this date by filing same through the ECF system:

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