HOT TOPICS IN ETHICS IN THE
PRACTICE OF FRANCHISE LAW

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October 16-18, 2013
Orlando, Florida

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* The authors express their appreciation for the assistance and suggestions provided by Jonathan Labukas of Quarles & Brady LLP and Lisa Natter of Schiff Hardin LLP.
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I. INTRODUCTION

Lawyers must obey the ethics rules, whether they concentrate their practices in franchise, divorce, tax, corporate or any other area of the law. But each subject matter presents its own set of challenging factual scenarios that can snare the unwary or even careful lawyer.

When faced with an ethical issue, the franchise lawyer must first identify which ethics rules apply. Each state has its own rules, but most are based on the ABA’s Model Rules of Professional Conduct, so those are the rules that are referenced in this paper. However, in any situation, it is incumbent on the franchise lawyer to read the applicable rules because they vary from state to state, including those states that closely follow the Model Rules.

Some issues that affect the franchise lawyer, such as fee arrangements, are not unique to franchise lawyers, but context can and does change the analysis. Likewise, when franchise disputes include litigation, the lawyers handling the matter must be familiar with their obligations and their clients’ obligations to identify, preserve and produce relevant documents, in whatever format they are stored. This means that the lawyer must be very familiar with the duties attendant to electronically-stored information.

The franchise lawyer must also be able to respond to the ethical challenges that arise when the client is not being truthful or is withholding documents or information. Situations that may arise include the client who is about to offer false testimony or has already given false testimony or who has failed to produce relevant documents.

Nor is the franchise attorney immune from the perils attendant to the inadvertent production of privileged communications. Preserving the attorney client privilege can be especially tricky when a lawyer communicates information to a range of persons within a corporate client. And difficult issues regarding protection of the privilege often arise in the context of a joint defense agreement.

A host of thorny issues arise when the franchise lawyer, directly or through a client or an agent, communicates with an opposing party. Particularly vexing issues arise with the need to gather information about an opposing party’s compliance with system standards, which in turn may require the use of private investigators or secret shoppers to obtain evidence.

II. CONTINGENT, FIXED AND ALTERNATIVE FEE ARRANGEMENTS

A. General Rule: Fees Must Be Reasonable

**Hypothetical:** A franchise lawyer at a large law firm presented her firm’s standard engagement letter to her client, an accountant, who wished to leave the big firm rat race and purchase an accounting franchise so that she can be her own boss. The client, having reviewed the engagement letter, concluded that the hourly rate to be charged by the attorneys who would be handling the negotiations with the potential franchisor and who were to help her set up her new business entity, appeared to be fair. In fact, the rates seemed similar to the rates her prior firm charged its clients. However, now that the work has been completed, the client has objected to the bill she received, which is much higher than she expected. She has complained to the lawyer, arguing that the total hours spent
on the negotiations and on setting up her corporation are excessive. She has said she thinks the bill should be cut in half and refuses to pay anything more than that. The franchise lawyer and her firm are thinking of suing but wonder if they will prevail.

Franchise lawyers who are used to enforcing and defending contracts based on the terms agreed upon by the parties might be surprised to know that contracts negotiated between a lawyer and her client may not be enforceable if the client later objects to either the contract’s terms or the fees and costs charged pursuant to the contract. The rules generally applicable to a lawyer’s conduct require that the fees charged to a client must be reasonable, notwithstanding any agreement the lawyer has negotiated with her client.

In this hypothetical, even though the parties cannot be said to have negotiated a contract in the sense that they exchanged and revised drafts, the client is sophisticated and reviewed the engagement letter before signing it. The lawyers performed the services they promised to do and were able to obtain the franchise agreement for their client, who is excited to be her own boss and the owner of the only franchised accounting office in her area. The lawyers organized her corporation and she is now ready to conduct business.

But the total time spent on procuring the franchise and organizing the corporation amounted to just over 100 hours, which translated into a bill for $30,000, well beyond the client’s expectations. She has spoken to other franchisees who have all told her they paid from $10,000 to $15,000 to their lawyers for similar work.

A court asked to enforce the lawyer’s engagement agreement in a fee dispute with the lawyer’s client will look beyond the contract and determine whether the fees charged to a client are reasonable. The ABA’s Model Rules of Professional Conduct, which prescribe the conduct of attorneys licensed to practice in the lawyer’s state, are applicable in every state but California, either in their entirety or in modified form. Model Rule 1.5 is applicable to fees charged by lawyers. In particular, Model Rule 1.5(a) states that “A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses.” The Restatement also provides guidance on the question of the reasonableness of fees. Rest. (3d) of the Law Governing Lawyers § 34 (1998) states that “A lawyer may not charge a fee larger than is reasonable in the circumstance or that is prohibited by law.”

Whether fees are reasonable (or unreasonable as proscribed by the Model Rules) is a multi-factor test, including:

1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

3) the fee customarily charged in the locality for similar legal services;

4) the amount involved and the results obtained;

5) the time limitations imposed by the client or by the circumstances;

6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Thus, courts asked to enforce an engagement letter or other form of contract between a lawyer and her client will look not only to the terms of the contract to see if they are reasonable, but will also look to the amount charged by the lawyer pursuant to the contract and all the circumstances of the representation itself.\(^1\) If the fees are deemed too high for the work performed, the fees will be disallowed.

Not only will unreasonable fees be disallowed if challenged by the client, unreasonable fees may subject the lawyer to disciplinary proceedings. For example, in \textit{In re Teichner},\(^2\) a lawyer was subject to disciplinary proceedings for charging an excessive fee despite existence of a contract to which the client agreed.\(^3\) Thus, in this hypothetical, in determining the reasonableness of the fees charged, the court would be expected to look not only at the fee agreement, but also to the amount of hours spent on the matter to determine if the fee is excessive. In doing so, the court will most likely look to evidence of the time spent by the lawyers and compare it to time spent by other lawyers for similar work. If the court finds the number of hours to be excessive, it will likely reduce the fee owed by the client to reflect what it believes to be the reasonable amount under the circumstances.

**B. Contingent Fees**

\textbf{Hypothetical:} A lawyer agreed to take a case from a franchisee who wanted to sue his former franchisor. The client claimed his franchisor terminated all ten of his franchise agreements because of a failure to pay royalty fees at just one of his locations. The client owed hundreds of thousands of dollars in lease payments as well as back payroll. The client believed he had a multi-million dollar claim and wanted the lawyer to take the case on a contingency because that is the only way he could pursue his claim. The lawyer was able to quickly obtain a large settlement for the client, but the client now objects to paying the contingent fee since the lawyer never put their agreement in writing. If the lawyer had charged his client on an hourly fee basis, the fee would be reduced by $350,000.

The Model Rules allow for contingent fee agreements but they require that such agreements be in writing. Model Rule 1.5(c) provides, in pertinent part, that “A contingent fee shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage that shall accrue to the lawyer in the event of

\(^1\) See, for example, \textit{Pfeifer v. Sentry Insurance}, 745 F. Supp. 1434, 1443 (E.D. Wis. 1990) (“Courts have inherent power to determine the reasonableness of attorney fees and to refuse to enforce any contract that calls for clearly excessive or unreasonable fees”); \textit{Heng v. Rotech Med. Corp.}, 720 N.W.2d 54 (N.D. 2006) (the court must consider all the factors when considering if fees sought are reasonable).

\(^2\) 470 N.E.2d 972 (Ill. 1984).

\(^3\) See also \textit{In re Sinnott}, 845 A.2d 373 (Vt. 2004) (despite a contract with his client allowing for certain fees and expenses, a lawyer faced reprimand by the court for charging unreasonable fees and expenses).
settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated."

Courts enforce this rule and reject lawyers’ contingent fee arrangements that are not reduced to writing. For example, in *Starkey, Kelly, Blaney & White v. Estate of Nicolaysen*[^4], a lawyer waited for over two years to reduce his contingent fee agreement to writing and as a result, lost his right to recover fees on a contingent basis. Likewise, in *Statewide Grievance Comm. v. Dixon,*[^5] a lawyer was disciplined for his failure to put his contingent fee agreement in writing, in violation of the Model Rules.

If a contingent fee agreement is not in writing, the lawyer may still seek fees based on a quantum merit theory for the reasonable value of his legal services. For example, in *United States v. 36.06 Acres of Land,*[^6], the court rejected a claim for a contingent fee award because the agreement was not in writing. However, the court determined that the lawyer had performed legal services from which his client benefitted and allowed the award of reasonable fees to the lawyer.[^7]

Thus, in our hypothetical, the client would most likely not be required to pay the lawyer on a contingent fee basis. However, the lawyer would be justified in seeking, and the client would be required to pay, fees based on the reasonable hourly rate the lawyer would have charged for the work he performed.

Franchise lawyers should also keep in mind the myriad of issues that may arise when considering a contingent fee arrangement. These issues include: structuring the arrangement as a “reverse contingent fee” in which the lawyer is paid based on the amount of money the lawyer’s services save the client (as in a percentage of proceeds from a patent or a percentage of profits realized by the client); impinging on the client’s control over settlement terms or decisions is not permissible; penalizing the client for firing the lawyer is impermissible (as in requiring onerous provisions for payment of expenses and a share of any recovery if the firm withdraws or is terminated); contingency fees are generally deemed unreasonable if there is no risk that the lawyer will not recover fees (as in a case where a settlement has been agreed upon or where liability is clear and recovery is certain.)

Finally, even if the contingent fee is reduced to writing as the Model Rules require, the lawyer must remember to provide his client with a written statement “stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.” (Rule 1.5(c.).)

C. **Fixed Fees**

**Hypothetical:** A long-time franchisor client of the law firm has a new General Counsel, who has recently introduced cost-saving measures in her department, including the requirement that all law firms on her approved provider list charge no more than an agreed-upon fee for the services the firm provides. The firm is willing to charge a fixed fee, but wonders if there might be some land mines ahead and fears that any misunderstandings about the legal bill down the road will jeopardize its relationship with the client, especially with the new General Counsel.

There is nothing inherently unethical about a fixed fee agreement in which the lawyer and client agree that the lawyer will charge and the client will pay a fixed amount for legal services to be rendered by the lawyer. In fact, fixed fees are becoming more commonplace as clients search for ways to control, or at least budget for, their legal spend. Fixed fees, just like fees based on hourly rates, should be agreed to at the outset of the representation and should be incorporated in a written engagement letter or agreement. And fixed fee agreements, sometimes referred to as lump-sum fees, are, like all other fee agreements, subject to the reasonableness standards of Rule 1.5(a).

It is good practice to anticipate what will happen in cases where the hourly fee for the services performed are either much greater or much lower than the fixed fee amount for the work. In those cases, some lawyers and clients include in their agreements a “collar” arrangement such that the lawyer agrees to refund any amounts that are less than 90% of the amount that would have billed using hourly rates, and the client agrees to pay the hourly rate for fees that are over 110% of the fixed fee amount.

D. **Retainers – Are They Refundable?**

**Hypothetical:** A lawyer hired six weeks ago by a successful multi-unit franchisee to represent him in an anticipated arbitration proceeding with the client’s franchisor regarding unpaid technology improvement fees has been terminated by the client. The client believes his brother in law, who recently passed the bar, would be more responsive than the former lawyer, who did not return telephone calls or emails. The client has demanded that the lawyer return the majority of the retainer the client paid, arguing that the retainer was supposed to cover fees for the entire arbitration, which has not even commenced. The lawyer has refused to do so, countering that the retainer was meant to be a flat fee for any and all work he performed and is explicitly identified in the fee agreement as “non-refundable.” He also notes that he turned down other clients, anticipating that once the arbitration began, he would not have the time to represent anyone else.

Model Rule 1.5(b) requires that “The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.” Thus, the client is to be told, preferably in writing (and only in writing in the case of a contingent fee) of the basis and rates for fees and expenses that the client is to be charged. The agreement should also spell out the other aspects of the relationship including the identity of the client, the expectation regarding conflicts of interest if they arise, and the scope of the engagement.
But even if the lawyer and client have a written agreement, there may be gaps in the language used that can create problems later. This is especially true where the lawyer accepts a “retainer” without detailing how it will be used and when, if ever, it will be refunded to the client. In our hypothetical, the retainer was not explained adequately and thus there is room for disagreement. But the applicable ethical Rules provide guidance, even if they also require some explanation.

The relevant rules and authority regarding retainers are clear but seemingly contradictory. For example, Model Rule 1.16(d) states that “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as . . . refunding any advance payment of fee or expense that has not been earned or incurred.” However, the Rest. (3d) of the Law Governing Lawyers § 34, cmt. E provides that an engagement retainer fee is reasonable if it bears a reasonable relationship to the income the lawyer sacrifices or expense the lawyer incurs by accepting it, including such costs as turning away other clients, hiring new associates, or keeping up with the relevant field.

The rules are not contradictory if the nature of the retainer at issue is understood. A general retainer is one in which the client pays a lawyer a lump sum, not for particular legal services on a matter, but instead to guarantee that the lawyer will be available to the client when her services are needed. In this type of retainer, actual legal services are billed separately and for an additional fee. The retainer itself is not expected to be refunded.8 However, other retainers, which are paid by the client for services to be rendered, generally should be returned to the client absent performance of services for the advance fees paid.9 Many jurisdictions have therefore held that so-called “nonrefundable” retainers, other than the classic availability retainer described above, violate the ethics rules and are not enforceable. Minnesota, Ohio, Virginia and Washington are among the states in which ethics opinions enjoin the use of “nonrefundable” retainers. Other states, including Arizona, Nevada, Pennsylvania and Wisconsin, permit nonrefundable retainers but insist upon reasonable terms that are clearly explained to and approved by the client.10

E. Other Fee Arrangements

**Hypothetical:** A franchise lawyer is concerned about the financial health of his franchisor client and wishes to place a lien for services rendered on the proceeds of a

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9 See In re Cooperman, 633 N.E.2d 1069 (N.Y. 1994) (distinguishing between the two types of retainers); Wong v. Kennedy, 853 F. Supp. 73 (E.D.N.Y. 1994) (same); see also, Lawyer’s Use of ‘Nonrefundable’ Retainers Violated Ethics Rule on Safekeeping Property, 28 Law. Man. Prof. Conduct 655, 10/24/12.

pending dispute with a supplier. He is concerned however that the ethics rules may prevent him from doing so.

Whether a lawyer can take a security interest in a client’s property is bound up in the rules prohibiting conflicts of interest. Model Rule 1.8 requires that, unless several conditions are met, “A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client.”

This seemingly absolute rule is in fact subject to an exception where the interest, as in a security interest in client proceeds, is explained and agreed to by the client, where the client is advised in writing of the ability and desirability of obtaining independent legal counsel on the transaction, and where the client gives informed written consent to the security interest taken by the attorney.¹¹

Because the lawyer may be considered to be a participant in the transaction for which he represents the client, the lawyer must also disclose the risks associated with the lawyer’s dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer’s interests at the expense of the client.¹² Nevertheless, as the Restatement makes clear, “unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer’s efforts” if certain conditions are met.¹³

The lawyer’s fee claim itself, which is the subject of his lien, must be advanced in good faith and with a reasonable basis in law and fact.¹⁴ Moreover, the “lawyer may also obtain a consensual security interest in a client’s property not involved in the representation, such as a mortgage on the client’s land, a pledge of the client’s stocks, or an escrow arrangement.”¹⁵ But a lawyer’s withdrawal without good cause will forfeit such a lien.¹⁶

The lawyer also has at his disposal the charging lien, which is a security interest in the judgment proceeds until his fees have been paid. A charging lien was a creature of common law, but the lien has been included in many jurisdictions’ statutes. In Illinois, for example, a statute known as the Attorneys Lien Act (770 ILCS 5/1) allows attorneys to place a lien on a client’s judgment or property it recovers by means of providing notice of the lien in a letter to the party against whom the client has a claim. The mechanics and

¹¹ Model Rule 1.8(a)(1)-(c).
¹² Model Rule 1.7.
¹⁵ Rest. (3d) of the Law Governing Lawyers § 43 (1998), Cmt. I; see also In re Martin, 817 F.2d 175 (1st Cir. 1987).
parameters of the charging lien are beyond the scope of this paper, but interested lawyers should refer to the ABA/BNA Manual on Professional Conduct for a complete explanation.

**Hypothetical:** A lawyer who concentrates his practice on franchise litigation refers his franchisor client with some disclosure questions to a friend who practices in that area. Both lawyers intend to represent the client for the work in question because an ongoing investigation implicates both areas of expertise. The lawyers intend to split the total fees charged to the client, who has asked that it receive only one bill.

Model Rule 1.5(e) permits the two lawyers to divide the fees billed to and received from the client even if one lawyer performed more work on the matter than the other. Thus, even if the lawyers’ split of fees is not proportionate to the services they rendered to the client, as long as the lawyers have agreed to assume joint responsibility for the matter and the client has agreed to the arrangement in writing, the fee arrangement contemplated in the hypothetical is permissible.17

As in other areas related to attorney fees, the states vary in their treatment of the division of labor and fees by attorneys. But they for the most part agree that the fees charged to the client must be reasonable and that the fees paid to each lawyer bear some relationship to the work performed.18 As long as the client has consented to the arrangement, it is unlikely that a court will examine in detail the contributions made by each lawyer.

But what if the first lawyer does not plan to do any work and merely wishes to refer the matter to his more qualified friend? May he receive a referral free from the friend? In most jurisdictions, the answer is “no.” Rule 1.5(e) does not permit referral fees. Both attorneys must provide services to the client in order for the attorneys to split the fees received from the client.

However, some jurisdictions have modified Rule 1.5 to permit referral fees in some cases. Generally, states that allow payment of referral fees still require the fee be reasonable, but do not require that the referring lawyer retain any responsibility for the matter or perform any further services. States that have modified Rule 1.5 to permit referral fees include Illinois, Kansas, Maine and West Virginia. California, which has not adopted the Model Rules, permits referral fees in some cases.19

### III. ETHICAL ISSUES IN USING TECHNOLOGY – NAVIGATING E-DISCOVERY

Given the ever-increasing reliance upon electronic documents and communications in the regular course of business, electronic discovery (“e-discovery”)

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17 Model Rule 1.5(e) provides: (1) the division of fees must be proportional to services performed by each lawyer or, (1) by written agreement with client, each lawyer assumes joint responsibility; (2) the client must be advised of and does not object to participation of all lawyers; and (3) the total fee must be reasonable.

18 See, for example, *Florida Bar v. Carson*, 737 So. 2d 1069 (Fla. 1999) (the originating attorney must still retain responsibility for the matter); *Londoff v. Vuylsteke*, 996 S.W.2d 553, (Mo. Ct. App. 1999) (originating attorney who performed little work on the matter and did not assume responsibility for it not entitled to fees).

19 See, for example, *Ryder v. Farmland Mutual Insurance Co.*, 807 P.2d 109 (Kan. 1991) (referral fee permitted even where there is no attorney client relationship after referral is made); *Moran v. Harris*, 182 Cal. Rptr. 519 (Cal. Ct. App. 1982) (allowing referral fee, recognizing they are part of the legal tradition).
has become a staple of American civil litigation. In order to satisfy his or her ethical obligation of competency, a lawyer must have an understanding of how and where a client maintains electronically-stored information (“ESI”). The lawyer must also be prepared to defend his or her conduct during the course of discovery to ensure that such ESI is properly preserved, reviewed and produced. At the same time, the lawyer’s conduct is governed by the Federal Rules of Civil Procedure, which are in place to “secure the just, speedy, and inexpensive determination of every action and proceeding.”

Given the volume of ESI typically available, it is easy for the cost of discovery to become quickly disproportionate to the size of the claims at issue in a lawsuit, and the lawyer faces the challenges of securing “speedy and inexpensive” results while still satisfying his or her discovery obligations. The following is a discussion of what rules govern a lawyer’s conduct when navigating the world of e-discovery. It also sets forth considerations to keep in mind during the various stages of identifying, preserving, and reviewing ESI. Finally, this section addresses what to do in the case of an inadvertent production, either as the producing or the receiving party.

A. What is ESI and Where Can it be Found

ESI consists of many different types of files that can be found in a number of potential locations. At a high level, the term “ESI” refers to “all of the data stored on the hard drives, camera cards, cell phones, GPS devices, digital video recorders, digital answering systems, thumb drives, RAID arrays and any other form of electronic media capable of storing data.” For purposes of civil litigation, the most common types of ESI are emails, databases such as those commonly used for inventory or accounting purposes or personnel records, and various loose files such as Word, Excel, and PowerPoint documents. ESI can also include text messages, voice messages, and instant messages. In addition to those files with which most computer users are familiar, ESI may exist in the form of log entries that contain information about activity on a particular computer, such as when a certain user was logged in, what internet sites were visited, and the movement or accessing of various files on that computer. Finally, it can refer to the raw data that exists, for example, on a hard drive and is not being used by other files. This raw data can contain files or internet history that the computer user has deleted.

When considering where to look for relevant ESI, a lawyer or client is most likely to search the client’s hard drive first, a primary source for responsive information. They should also consider whether the client uses any shared networks in the regular course of business, as well as whether the client has ESI saved to iPhones or Blackberrys or other portable storage devices like thumb drives. All of these sources may be considered fair game when propounding or responding to discovery requests, and both in-house and outside counsel should be familiar with where a client is most likely to store relevant ESI.


22 Id.

23 Id.
B. Fundamental Rules & Authorities

A number of issues can arise during the course of e-discovery, and unfortunately there are no set of black-and-white procedures to guide a lawyer in every case. However, the ABA Model Rules of Professional Conduct (“Model Rules”), in conjunction with the Federal Rules of Civil Procedure (“Federal Rules”), provide a set of guiding principles and obligations. Relying on these sources, courts, legal practitioners and academics are slowly developing additional resources that continue to shed more light on how a lawyer can fulfill his or duty of competency when working with ESI.

1. The Model Rules

The primary rule that governs a lawyer’s ethical obligations regarding ESI is Model Rule 1.1, which requires a lawyer to “provide competent representation to a client,” and competency requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” If there was any doubt that, to be considered sufficiently competent, a lawyer must be familiar with ESI, in August 2012 the ABA amended Comment 6 to Model Rule 1.1 to read as follows:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

An attorney therefore must have a general understanding of the rules and law related to ESI, his or her client’s systems and sources of ESI, and the technology used to collect and search ESI. With regard to the technology, even if an attorney does not understand all of the technological details, he or she must have at least a basic understanding of the processes that the data goes through which results in the production set that goes to the opposing party. In other words, the attorney should know things like when a litigation hold went into effect, who the relevant data was collected from, why those individuals were selected, and whether key word searches were used to narrow the set of documents for review in the event the attorney is called upon to defend the choices made during the course of discovery. In today’s world it is not acceptable for an attorney to claim ignorance with regard to certain technological advances.


26 See Model Rule 3.4 (2012) (“A lawyer shall not unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value,” and “shall not counsel or assist another person to do any such act.”).

27 See, e.g., Martin v. Northwestern Mut. Life Ins. Co., No. 804-CV-2328T23-MAP, 2006 WL 148991, at *2 (M.D. Fla. Jan. 19, 2006) (imposing monetary sanctions against the plaintiff and his lawyer who claimed that his discovery violations should be excused because he was “computer illiterate”); U.S. v. McNamara, 867 F. Supp. 369, 375 (E.D. Va. 1994) (“As technology and resources develop, the minimum knowledge and preparation required by lawyers develops as well”); Garcia v. Berkshire Life Ins. Co. of Am., No. 04-cv-01619-LTB-BNB, 2007 WL 3407376, at *5 (D. Colo. Nov. 13, 2007) (“Perhaps plaintiff’s counsel can be heard to plead technical ignorance or mistake in his initial dealings with the DVD, but . . . he was on notice of
In addition to the duty of competency, under Model Rule 3.2 a lawyer “shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

A lawyer must therefore look for ways to expedite the litigation and not allow the cost of discovery and discovery disputes to overshadow the actual dispute at issue or exceed the value of the case to the client. Given the tremendous volume of ESI available today, that is not always easy to do, but a lawyer should keep Model Rule 3.2 in mind when propounding and responding to written discovery requests and identifying the universe of ESI to review for production.

2. Federal Rules of Civil Procedure

The Federal Rules impose a duty on a lawyer to be cognizant of e-discovery issues at the outset of a case. For example, Federal Rule 26(a) requires a lawyer to include a “description by category and location . . . of all documents, electronically stored information . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses . . . .” Similarly, Federal Rule 26(f) requires that the parties meet and discuss a series of issues, including each party’s computer systems and the way in which they will handle ESI. The discovery plan required by the Rule must include “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”

Federal Rule 26 also provides for a concept of “proportionality.” Specifically, the court may limit the extent of discovery – on its own or at the request of a party - “if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

3. Sedona Conference

Another valuable resource for lawyers trying to stay abreast of e-discovery issues comes from the Sedona Conference, a legal think tank composed of attorneys, consultants, and academics. In 2004, the Sedona Conference first proposed a series of Principles of Electronic Discovery (the “Sedona Principles”) intended to offer guidance to lawyers navigating e-discovery issues. The purpose of the Sedona Principles was to

the potential problem and was obligated to seek competent professional assistance to ascertain the truth about the contents of the DVD”); Phoenix Four, Inc. v. Strategic Resources Corp., No. 05 Civ. 4837 (HB), 2006 WL 1409413, at *5 (S.D.N.Y. May 23, 2006) (imposing sanctions and holding that an attorney’s obligation “extends to an inquiry as to whether information was stored on that server, and had, the defendants been unable to answer that question, directing that a technician examine the server.”).

28 Model Rule 3.2 (2012).


refocus on litigating the merits of a case, not on e-discovery. The Sedona Principles are intended to “complement the Federal Rules of Civil Procedure, which provide only broad standards, by establishing guidelines specifically tailored to address the unique challenges posed by electronic document production.” The members of the working group responsible for the Sedona Principles sought to provide guidelines that were “concrete enough to provide actual direction, but flexible enough to allow courts to fashion solutions.”

The Sedona Conference has continued to revise the Sedona Principles and issue numerous publications to guide lawyers and their clients with regard to e-discovery, and courts across the country are increasingly relying on and citing to these principles and publications to resolve discovery disputes and further hone the expectations of attorneys engaged in e-discovery. Indeed, as of October 31, 2012, over 120 judges across 31 states have endorsed the Sedona Conference Cooperation Proclamation (the “Cooperation Proclamation”), which is intended to “assemble and promote a variety of proven judicial management tools to help parties develop and execute appropriate, cost-effective, cooperative discovery plans; avoid unnecessary discovery disputes; and resolve discovery disputes that may arise in a fair and expeditious manner.”


34 Id.


4. **Local Court Rules or Model Orders**

Finally, a lawyer must consider local court rules. Some jurisdictions have developed e-discovery guidelines or model orders that set forth an attorney’s duties regarding e-discovery, particularly when it comes to preparing for a Rule 26(f) discovery conference. For example, the United States District Court for the District of Delaware has developed a “Default Standard for Discovery, Including Discovery of ESI,” (the “Delaware Standard”) which imposes a duty of “proportionality” on the parties that includes “identifying appropriate limits to discovery, including limits on custodians, identification of relevant subject matter, time periods for discovery, and other parameters to limit and guide preservation and discovery issues.”

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requires that, if a party chooses to use search terms to locate potentially responsive ESI, it must disclose those search terms to the opposing party.\textsuperscript{40} And while some might object to such a disclosure on grounds that it constitutes work product or provides an advantage to the opposing party, courts are increasingly disagreeing. Indeed, the United States District Court for the Northern District of California “expects cooperation” when it comes to e-discovery and has concluded that, “an attorney’s zealous representation is not compromised by conducting discovery in a cooperative manner.”\textsuperscript{41}

A major focus of all of the developing rules is cooperation between the parties. The United States Court of Appeals for the Seventh Circuit has developed an E-Discovery Pilot Program that has garnered national recognition for some of the more innovative ideas that it promotes, such as using “e-discovery liaisons” to assist the parties in efficiently managing complex e-discovery issues.\textsuperscript{42} The first principle set forth in the Seventh Circuit's Model Standing Order states, “The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.”\textsuperscript{43} Clearly an attorney should be familiar with any local rules or pilot programs regarding e-discovery and consider them in developing and effectuating a plan for e-discovery.

C. Processes to Consider in Order to Satisfy Competency Obligations

Although every case differs and a lawyer must be flexible in his or her approach toward e-discovery, there are certain steps that generally must always be considered in order to provide competent representation, expedite the litigation in a manner consistent with the client’s expectations, and heed the duty of proportionality contemplated by the Federal Rules.

1. Preservation

\textbf{Hypothetical:} In-house counsel for a franchisor has learned that two female managers of the franchisor company have complained that the company’s failure to promote them to Vice President constitutes gender discrimination. Does the lawyer have a duty to issue a litigation hold to preserve any ESI related to the complaints? If so, what is the scope of preservation required?

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} U.S. District Court for the Northern District of California, Guidelines for the Discovery of Electronically Stored Information, available at http://cand.uscourts.gov/eDiscoveryGuidelines (last visited June 5, 2013); see also, David J. Waxse, \textit{Cooperation – What Is It and Why Do It?}, XVIII Rich. J. L. & Tech. at 7-8 (noting that the ABA Model Rules of Professional Conduct “removed the former ethical obligation of zealous advocacy from the ABA Model Code of Professional Responsibility when the ABA Model Rules of Professional Conduct replaced the Code in 1983.”) Currently, Model Rule 1.3 states that a lawyer “shall act with reasonable diligence and promptness in representing a client.” \textit{Id.} (citing Model Rules of Prof’l Conduct R. 1.3 (2006)). Only the comment to the rule mentions “zealous advocacy,” and even then it notes that a lawyer “is not bound, however, to press for every advantage that might be realized for a client.” \textit{Id.}


\textsuperscript{43} \textit{Id.}, at Model Standing Order.
It is critical that a lawyer understand his or her duties with regard to preserving ESI because this is the step in processing that carries the greatest potential for sanctions.\textsuperscript{44} The duty to preserve arises when a party anticipates or reasonably should anticipate that litigation is going to occur.\textsuperscript{45} Under this standard, it becomes a fact-specific inquiry.\textsuperscript{46} Courts have held that "whether preservation or discovery is acceptable in a case depends on what is \textit{reasonable}, and that in turn depends on what was done – or not done – was \textit{proportional} to that case and consistent with clearly established standards."\textsuperscript{47} In this case, factors to consider in determining "reasonableness" might include looking at to whom the complaint was made, what the company typically does under similar circumstances, and how frequently similar complaints result in litigation. It depends on a number of factors, but if the complaint is made to in-house counsel – as opposed to a fellow employee in the course of casual conversation – it may be reasonable at that point to anticipate litigation.

The consequences for failing to preserve relevant evidence properly can be grave, and a lawyer should understand the laws regarding spoliation and e-discovery in the jurisdiction where a case is pending. In some cases, courts are willing to impose sanctions and give adverse inference instructions only when a lawyer has acted in bad faith with regard to preservation\textsuperscript{48}, but other courts have expressly stated that mere negligence in failing to preserve data is enough.\textsuperscript{49} As discussed above, a lawyer is expected to be sufficiently competent and will likely not be able to argue ignorance of how technology works or the client’s document retention policy if called upon to defend his or her actions regarding preservation. In the hypothetical set forth above, a lawyer should consider suspending any routine document retention/destruction policy and initiate a litigation hold.

If the lawyer decides to proceed with a litigation hold, the hold notice must be communicated to all individuals “likely to have discoverable information that the disclosing

\textsuperscript{44} Dan H. Willoughby, Jr., et al. Sanctions for E-Discovery Violations: By the Numbers, 60 Duke L.J. 789, 803 (2010) ("[i]n the 230 cases in which sanctions were awarded [in the study], the most common misconduct was failure to preserve ESI").


\textsuperscript{46} Rimkus Consulting Group, Inc., 688 F. Supp. 2d at 613.

\textsuperscript{47} Id.

\textsuperscript{48} Id. at 614 ("[i]n this circuit, the severe sanctions of granting default judgment, striking pleadings, or giving adverse instructions may not be imposed unless there is evidence of ‘bad faith’); Bull v. UPS, Inc., 665 F.3d 68, 79 (3d Cir. 2012) (‘a finding of bad faith is pivotal to a spoliation determination’); Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008) (same).

\textsuperscript{49} Zubulake, 220 F.R.D. at 219-20 ("In this circuit, a 'culpable state of mind' for purposes of a spoliation inference includes ordinary negligence"); Voom HD Holdings LLC, 93 A.D.3d at 45 (same); Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002) (negligence may suffice to support adverse inference instruction); Beaven v. U.S. DOJ, 622 F.3d 540, 554 (6th Cir. 2010) (same); Talavera v. Shah, 638 F.3d 303, 312 (D.C. Cir. 2011) (non-accidental but negligent spoliation may suffice to support adverse inference instruction); but see Apple, Inc., 881 F. Supp. 2d at 1147 (requiring not bad faith, but a "conscious disregard" of preservation obligations, including a failure to follow-up and confirm whether a single custodian was in compliance with the litigation hold).
party may have to support its claims or defenses." The duty to preserve evidence also "includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation." In the hypothetical involving the female employees, it would not be sufficient to preserve just the emails and network files for those individuals or, if the complaint turned into a lawsuit, just the documents specifically referenced in the complaint. At the other end of the spectrum, the duty is likely not so broad that the company would have to preserve all documents by all employees in the event the female employees wish to establish some type of claim about pattern and practice. Of course, if the company is aware of ESI related to other employees that will likely be used to support or defend against claims, that data should be preserved. In terms of the technological scope of preservation required, according to the Federal Rules, a party "need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost." In many cases, a company’s backup tapes are considered "not reasonably accessible."

Once outside counsel has worked with in-house counsel and the IT department at the client’s company to put a litigation hold in place, the lawyer’s job is not done. Under the Federal Rules, outside counsel is obligated to ensure that the preservation directives communicated to the client’s employees are being followed. Specifically, under Federal Rule 26, when a lawyer signs a discovery response, he or she certifies that, to the best of his or her "knowledge, information and belief formed after a reasonable inquiry it is complete and correct as of the time it is made." In other words, if a lawyer certifies that all relevant non-privileged documents will be or have been produced, he or she is bound to ensure that that is indeed what happens. Additionally, under Model Rule 5.1, a lawyer is responsible for another lawyer’s violation of the Model Rules if the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved. Outside counsel cannot later blame in-house counsel or the company’s employees for a subsequent failure to properly preserve ESI.

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50 Id. at 217-218. Additionally, the lawyer and client are probably not obligated to notify any third parties of a duty to preserve potentially relevant ESI unless the data is arguably under the client’s control. See Fed. R. Civ. P. 34.


53 Fed. R. Civ. P. 26(g).

54 Model Rule 5.1(c) (2012); see also Rosenthal Collins Group, LLC v. Trading Techs., Int'l, No. 05 C 4088, 2011 WL 722467 (N.D. Ill. Feb. 23, 2011) (sanctions imposed on attorney and client for failure to properly preserve and holding that simply telling a computer programmer consultant hired by the company to preserve everything related to a certain subject matter was not a reasonable means of ensuring preservation of meaningful evidence).
2. Investigation

**Hypothetical:** The two employees have filed a lawsuit for discrimination, and the case looks likely to proceed to discovery. Outside counsel has asked in-house counsel for assistance collecting documents from individuals likely to have ESI in support of the claims and defenses at issue. In-house counsel asks the relevant individuals to search their computers for any documents or emails related to the claims and defenses and forward them to the lawyers. Is this sufficient?

Generally speaking, the lawyer should not leave it up to the individual employees or “custodians” to search for and collect ESI. A lawyer will not have engaged in the requisite “reasonable inquiry” contemplated by Federal Rule 26(g) if he or she relies entirely on the client and individual employees to provide discovery responses without making "an independent inquiry into how documents [are] stored, and how thoroughly they were searched for and produced.”

3. Negotiation

**Hypothetical:** In-house counsel is frustrated by the potential cost of collecting and processing all ESI likely to be related to the claims and defenses. As a result, she directs outside counsel to raise every objection possible to requests from the employees’ lawyers. Similarly, she wants outside counsel to make the most expansive document requests possible to the employee-plaintiffs so that they too have to engage in the burden of finding and reviewing relevant ESI. Can outside counsel follow the direction of his or her client and play hardball with the discovery requests and responses?

Although a lawyer is an advocate first and foremost for his or client, as discussed above, courts are increasingly expecting a level of cooperation from counsel with regard to e-discovery. There is universal concern that the growing cost of e-discovery is “pricing litigants out of court,” forcing meritless cases to settle because it costs too much to litigate them, or deterring some parties from filing what may be deserving cases at all. In this climate, a lawyer should steer away from the kind of tactics proposed by the client in this hypothetical.

Not only do the Federal Rules call for “the just, speedy, and inexpensive determination of every action and proceeding,” but there are additional Model Rules that impose ethical obligations in this particular regard. Model Rule 3.4(d) says that a lawyer

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55 See, e.g., Voom HD Holdings LLC, 93 A.D.3d at 44-45.

56 Play Visions, Inc. v. Dollar Tree Stores, Inc., No. C09-1769, 2011 WL 2292326, at * 8 (W.D. Wash. June 8, 2011) (imposing sanctions jointly and severally on a party and its counsel); In re A & M Florida Properties II, LLC, No. 09-15173, 2011 WL 1418861 (B.R. S.D.N.Y. April 7, 2010) (imposing sanctions and holding that “[c]ounsel has an obligation to not just request documents of his client, but to search for sources of information . . . . Counsel must communicate with the client, identify all sources of relevant information, and become fully familiar with the client’s document retention policies, as well as the client’s data retention architecture”) (citations omitted).


“shall not make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request from an opposing party.”\textsuperscript{59} And Model Rule 4.4 states that a lawyer “shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”\textsuperscript{60} In fact, courts may be unwilling to accept “boilerplate” objections that certain discovery requests are overly burdensome\textsuperscript{61}, and may even require the objecting party to be able to support such objections with actual data about the volume of ESI that exists and specific costs associated with collecting and reviewing that data.

4. Collection and Culling

Once the parties have a discovery plan in place and the lawyers are familiar with where the client may have stored relevant ESI, the next step is to collect the data and identify a universe of documents to review for production. This topic is beyond the scope of this paper, in that one could dedicate an entire discussion solely to the advantages and disadvantages of various collection processes.\textsuperscript{62} Needless to say, in terms of his or her ethical obligations regarding this stage, a lawyer should be familiar with how the client stores data, who the key custodians are, and what the claims and defenses are in the case, and then work with the client, the individual data custodians, and the client’s IT team to target relevant data. The goal is to avoid over-collection, where the attorneys are reviewing thousands of irrelevant documents at great expense, and at the same time avoid under-collection and the potential to incur sanctions for failing to search for all responsive ESI.

59 Model Rule 3.4(d) (2012).

60 Model Rule 4.4 (2012).

61 Mancia, 253 F.R.D. at 359 (“This Court has characterized these types of objections as worthless for anything beyond delay of the discovery”); see also U.S. Court of Appeals for the Federal Circuit, Proposed E-Discovery Model Order, http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf (last visited June 5, 2013), ¶ 3 (“Costs will be shifted for disproportionate ESI production requests pursuant to Federal Rule of Civil Procedure 26. Likewise, a party’s nonresponsive or dilatory discovery tactics will be cost-shifting considerations”), ¶ 4 (“A party’s meaningful compliance with this Order and efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations”); U.S. Court of Appeals for the Seventh Circuit, Electronic Discovery Pilot Program, http://www.discoverypilot.com/, Principle 1.03 (“The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions”); see generally, The Sedona Conference, Commentary on Proportionality in Electronic Discovery (2013), available at https://thesedonacconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Proportionality.

62 In particular, there is a persistent debate about which of two approaches is more efficient and more likely to identify responsive ESI. Most parties identify search terms or key words that they then run against all of the locations where responsive ESI is likely to be saved. An attorney then reviews all of the documents that contain those key words or terms. There is a developing school of thought, however, that it may make more sense to use “predictive coding” to identify and “review” relevant data. See generally, Hon. Andrew Peck, Search, Forward: Will manual document review and keyword searches be replaced by computer-assisted coding?, available at http://www.recommind.com/sites/default/files/LTN_Search_Forward_Peck_Recommind.pdf (last visited June 5, 2013). Under this method, an attorney reviews a sample set of documents and codes them as responsive or non-responsive. The computer software then “learns” from this sample set and applies it to the larger universe of ESI to identify responsive data. This latter approach is not yet commonly employed, and critics question its accuracy and the potential risk for the inadvertent production of privileged materials.
5. Attorney Review of Data

**Hypothetical:** In-house counsel would like to retain contract attorneys to conduct the document review in the discrimination lawsuit. Outside counsel wants to be involved in managing the review, but the client does not want to pay for that oversight.

Despite the client’s concerns about cost, the outside lawyer has an ethical duty to assess the reasonableness of outsourcing work to non-firm lawyers and to provide adequate supervision to these lawyers. Under Model Rule 1.1 requiring competent representation, the reasonableness of the decision to retain contract attorneys to review documents will depend on several factors, “including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.”

Give this rule, it is certainly permissible to use nonfirm contract attorneys to assist with document review, but outside counsel should oversee the training of the contract attorneys and conduct some type of quality control to ensure that the proper decisions are being made with regard to responsiveness.

D. Mining Your Adversary’s Data

**Hypothetical:** The plaintiff employees in the discrimination lawsuit have produced memoranda summarizing their performance reviews. The lawyers for the company have a “metadata scrubber” that allows them to track changes made in the document, including looking for hidden text or information that was deleted in an attempt to make the memoranda more favorable prior to production. May the lawyers try to “mine” this metadata?

The ethics committees and bar associations have not come to a consensus as to whether or not a lawyer may “mine” an adversary’s metadata. Technology exists that allows the receiving lawyer to, for example, see prior drafts of a contract that are produced and possibly learn the identity of who made certain revisions, without the knowledge or consent of the producing party. Certain jurisdictions generally prohibit a lawyer from

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63 Model Rule 1.1, Cmt. 6 (2012) (The lawyer “must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client”); see also, Model Rule 5.3, Cmt. 3 (2012) (“A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client,” including “hiring a document management company to create and maintain a database for complex litigation,” but must “make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations”) (emphasis added).

64 See D.C. Ct. of Appeals Comm. on the Unauthorized Practice of Law, Op. 21-12 (Jan. 2012), available at http://www.dcappeals.gov/internet/documents/21-Opinion-21-12.pdf (last visited June 5, 2013) (defining the scope of services that a discovery service company may offer as follows: (1) the final selection of attorneys to staff a document review project must be made by a member of the D.C. bar with an attorney-client relationship with the client; (2) the document review attorney’s legal work must be directed or supervised by a D.C. bar member who represents the client; and (3) discovery services companies may not attempt to supervise the document review attorney); N.Y.C. Bar Committee on Professional and Judicial Ethics, Op. 2006-3 (August 2006), available at http://www2.nycbar.org/Ethics/eth2006.htm (last visited June 5, 2013) (concluding a lawyer may delegate review to nonlawyer overseas personnel so long as the attorney “at every step shoulder[s] complete responsibility for the non-lawyer’s work”).
examining a file to search the metadata.65 These opinions appear to presume that metadata is per se confidential.66 In contrast, opinions from the ABA and the Vermont Bar Association suggest that it is not only permissible67, but may even be required in order to fulfill obligations of competency and diligence.68 Before “scrubbing” the memoranda produced by the plaintiff employees, the lawyers should first familiarize themselves with any ethical opinions available in the relevant jurisdiction.

E. Inadvertent Productions

**Hypothetical**: During discovery, outside counsel for the company inadvertently produces a summary of the company’s potential exposure for plaintiffs’ claims drafted by in-house counsel. Has outside counsel violated its ethical obligation to the client? Does the production constitute a waiver?

Under Model Rule 1.6, a lawyer “shall not reveal information relating to the representation of a client unless the client gives informed consent.”69 The comments to the Rule state that a lawyer must “act competently to safeguard information,” but inadvertent disclosure will not constitute a violation of the rule if “the lawyer has made reasonable efforts to prevent the access or disclosure.”70 Factors considered in determining reasonableness include “the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty employing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use.)”71 In this scenario, if outside counsel acted reasonably in storing the client’s data and conducting a thorough privilege review, it is unlikely that the inadvertent production of one document will constitute a violation of Rule 1.6.

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69 Model Rule 1.6(c) (2012).

70 Id. at Cmt. 18.

71 Id.; see also New York State Bar Ass’n Comm. on Prof’l Ethics, Advisory Op. 842 (2010), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=42697&TEMPLATE=/CM/ContentDisplay.cfm (last visited June 5, 2013) (recognizing that the exercise of reasonable care may differ from one case to the next).
Fortunately, Federal Rule of Evidence 502 provides that disclosure of privileged materials will not constitute a waiver if the disclosure is inadvertent; the producing party took “reasonable steps” to prevent disclosure; and the producing party took reasonable steps to rectify the error.  With regard to rectifying the error, in this case the lawyers for the company should notify counsel for the plaintiff employees as soon as they learn of the inadvertent production. If the company’s lawyers fail to notify the opposing parties timely and allow the plaintiff employees to use the document, for example, in depositions without objection, that may waive the protection afforded by Rule 502.

Of course, in order to avoid getting into a dispute about whether a lawyer “made reasonable efforts” to prevent disclosure, the Federal Rules encourage parties to obtain a court order pursuant to Federal Rule of Evidence 502(d). Such a protective order can help protect against any disclosure of privileged information, regardless of whether a party’s discovery practices are deemed to be unreasonable.

**Hypothetical:** The lawyers for the company learn that the memoranda they received from plaintiffs summarizing the plaintiffs’ performance reviews were memoranda prepared for lawyers and were inadvertently produced. What are the company’s lawyers obligated to do with the documents once they have received them? May the lawyers read the documents?

Model Rule 4.4(b) requires a lawyer who receives privileged and inadvertently-produced ESI to “promptly notify the sender.” However, beyond requiring notice to the producing party, the Model Rules “do not address the legal duties of a lawyer” who receives such information. Indeed, as with other discovery-related issues, depending on which jurisdiction the lawyers on will dictate whether or not they may read the privileged memoranda. For example, in New York and New Jersey, the lawyers who receive the inadvertently produced materials must refrain from reading them and can face sanctions for a failure to do so. On the other hand, some courts have suggested that where a lawyer receives an opponent’s privileged materials through no wrongdoing of his or her own during the course of discovery, reading those materials may not necessarily warrant sanctions, particularly where the producing party has not suffered actual prejudice as a result. Given the ambiguity, the best course of action for the lawyers would be to notify the producing party and set the privileged materials aside without further review.

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72 Fed. R. Evid. 502(b).

73 Fed. R. Evid. 502(d) (“A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.”).

74 Model Rule 4.4(b) (2012).

75 Id. at Cmt. 2.


77 See, e.g., In re Meador, 968 S.W.2d 346, 351-53 (Tex. 1998).
IV. WHEN YOUR CLIENT IS NOT BEING TRUTHFUL OR IS WITHHOLDING DOCUMENTS

A. When the Lawyer Believes Her Client is About to Offer False Testimony

**Hypothetical:** A lawyer representing a single store franchisee in a dispute with her franchisor over late royalty payments has overheard the client on her cell phone telling someone that she is going to “lie my way out of this mess.” The testimony portion of the arbitration begins tomorrow, with the client expected to be the first witness.

Model Rule 3.3(b) speaks directly to the issue of a lawyer who knows that her client intends to lie under oath. It requires that “A lawyer who represents a client in an adjudicative proceeding and who knows that person intends to engage . . . in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

But in our hypothetical, does the lawyer “know” that testimony his client is about to offer is false? Based on the slim set of facts presented, the answer is “no.” Presumably, in most cases, the lawyer will have had the opportunity to create the direct testimony outline, to compare to the facts that have been developed in the case and to ask the client about any inconsistencies between the planned testimony and the facts as the lawyer knows them. Unless the lawyer is reasonably certain that the client is about to lie, she has no duty to deviate from the planned examination or to tell the tribunal in advance of her concerns.

It is the unusual case when a lawyer “knows” that a client is going to lie to the tribunal. Suspicion alone is not enough for a lawyer to act to prevent a client from testifying. But given the circumstances, the lawyer may know enough to have the reasonable belief that her client is about to lie, and thus the obligation to inform the tribunal becomes mandatory. And in the civil action where discovery has taken place, it is generally easier to ascertain that the client intends to lie given the breadth of facts known to the lawyer.

78 Model Rule 3.3(b) (2012).

79 Nix v. Whiteside, 475 U.S. 157 (1986); United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988) (even when client announces she intends to lie, she might in the end decide to tell the truth based on circumstances as they exist at the time of trial). See Appel, The Limited Impact of Nix v. Whiteside on Attorney-Client Relations, 136 U. Pa. L. Rev. 1913, 1937 (1988) (it is unusual for lawyers to actually know that a client is going to lie to the tribunal).

80 For example, in United States v. Midgett, 342 F.3d 321 (4th Cir. 2003), a lawyer’s belief that his client’s testimony was “far-fetched” was not enough to allow him to refuse assistance of counsel. Likewise, in State v. Regier, 621 P.2d 431 (Kan. 1980) the unconfirmed suspicion of potential perjury was not knowledge of perjury that had to be revealed to the tribunal.

81 See, e.g., Commonwealth v. Alderman, 437 A.2d 36 (Pa. Super. Ct. 1981) (changes in the witness’s story was enough to give attorney basis for belief that client would engage in perjury); State v. Fleck, 744 P.2d 628 (Wash. Ct. App. 1987) (a combination of factors, including an informer who stated that client admitted involvement in crime, the results of a polygraph examination and the client’s behavior were enough to rise above the level of belief or suspicion to require disclosure).
If the lawyer knows the client intends to give false testimony, she has an ethical duty first to try and “persuade the client that the evidence should not be offered.” 82 If the client still intends to testify falsely and the lawyer continues her representation, she must not call the client as a witness.83 Alternatively, the lawyer could seek withdrawal under Model Rule 1.16, which calls for mandatory withdrawal if “the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct,” and allows for permissive withdrawal if the client “persists in a course of action that the lawyer reasonably believes is criminal or fraudulent.”84

An important question to consider if the lawyer wishes to withdraw representation is whether she can or should inform the court of her reasons for withdrawal. In some jurisdictions, a lawyer is encouraged to disclose a client’s intent to testify falsely.85 Withdrawal may result in prejudice to the client, creating a tension between the duties owed to the client and the court. However, under Model Rule 3.3, in moving for leave to withdraw, “a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6,”86 which, of course, imposes a duty of confidentiality on the lawyer.87 Moreover, to the extent the lawyer seeks permissive withdrawal based on a “reasonable belief” that the client intends to offer false testimony – as opposed to mandatory withdrawal based on actual knowledge – the lawyer may not reveal confidential information. This is because the provisions in Model Rule 3.3 favoring candor toward the tribunal, even over confidentiality obligations mandated by Model Rule 1.6, only applies to instances in which the lawyer knows that the client intends to testify untruthfully.88

B. When the Lawyer Learns That Her Client Has Already Given False Testimony.

**Hypothetical:** Prior to testifying, some of the details in the client’s story about whether the client franchisee was late in making royalty payments to the franchisor were inconsistent with the client’s prior recollections. Nonetheless, the lawyer chalked this up to the client having a poor memory with regard to detailed transactions that took place several years ago, and the lawyer called the client to testify at the arbitration hearing. Shortly after the client finishes testifying, the lawyer learned that the client gave false testimony.

Generally speaking, the same ethical considerations govern a lawyer’s conduct when she learns that her client has testified falsely, as those discussed above when the

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82 Model Rule 3.3, Cmt. 6 (2012).
83 Id.
84 Model Rule 1.16, Cmts. 2, 7 (2012).
85 See, e.g., In re Callan, 331 A.2d 612, 615-16 (N.J. 1975).
87 Model Rule 1.6 (2012).
88 Model Rule 3.3(c) (2012).
lawyer anticipates false testimony. The primary distinction is the lawyer’s duty with regard to disclosure. As noted, under Model Rule 3.3(b), a lawyer “shall take remedial measures” if he or she knows that a person has engaged in fraudulent conduct. The comments to the rule shed some light on what remedial measures are required subsequent to the client’s perjury. Specifically, the lawyer must first talk to the client in confidence and attempt to “seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence.” However, if that fails, the lawyer has a duty to “undo the effect of the false evidence” and “must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.” While disclosure should be seen as a last resort, a number of jurisdictions require it following client perjury.

C. When the Client Has Failed to Produce All Relevant Documents

Hypothetical: In the same case involving allegations of late royalty payments, discovery has closed. The lawyer has signed and served responses to the franchisor’s discovery requests and produced all relevant documents she was able to identify with the help of the client. In talking with one of the franchisee employees, the lawyer learns about a number of emails exchanged between a former franchisee employee and the franchisor that are directly relevant to the dispute and potentially harmful to the franchisee’s case. Those emails have not been produced.

As discussed above, the lawyer has a duty of candor under Rule 3.3 that prohibits her from making a false statement of fact to a tribunal, and there are circumstances where “the failure to make a disclosure is the equivalent of an affirmative misrepresentation.” Additionally, Model Rule 3.4 provides that a lawyer “shall not unlawfully obstruct another party’s access to evidence or unlawfuly alter, destroy or conceal a document or other material having potential evidentiary value,” nor “assist another person to do any such act.”

In light of these ethical obligations, once the lawyer learns of the additional documents not yet produced, she should notify opposing counsel and, to the extent

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89 Model Rule 3.3(b) (2012).

90 Id., Cmt. 10.

91 Id. (emphasis added).


94 Id. at cmt. 3.

95 Model Rule 3.4(a) (2012).
possible, make a supplemental production. At this time, the lawyer has already signed the
discovery responses certifying them as complete, and a failure to disclose could result not
only in ethical violations but also in sanctions under the Federal Rules.96

V. PRESERVATION OF THE ATTORNEY-CLIENT PRIVILEGE

A. Lawyer Inadvertently Produces Privileged Communications with
Client.

Section III(E) of this paper presented hypotheticals and a discussion of inadvertent
productions arising in the context of ESI. ESI presents greater opportunities for
inadvertent production due to the volume of information and the less formal nature of
email and other electronic communications.97 For example, an attorney on international
travel may use a personal email account to communicate with a client due to accessibility
issues while overseas. Such email may only include the attorney’s first name. There is a
greater risk of inadvertently producing such an attorney-client privileged communication
than a formal legal memorandum from outside counsel contained in the client’s “legal”
files. Nevertheless, inadvertent production concerns are not limited to the realm of ESI.

As noted in Section III(E), Model Rule 1.6 is the principal authority governing the
preservation of privileged information. Additionally, the Restatement confirms that the
right to assert or waive a privilege belongs to the client, not the client’s attorney.98 The
comments to Rule 1.6 state that an inadvertent disclosure will not constitute a violation of
the Rule if “the lawyer has made reasonable efforts to prevent the access or disclosure.”99
The Restatement provides guidance as what constitutes “reasonable efforts” to prevent
inadvertent disclosure:

What is reasonable depends on the circumstances, including: the relative importance of the communication (the
more sensitive the communication, the greater the necessary protection measures); the efficacy of precautions
taken and of additional precautions that might have been taken; whether there were externally imposed pressures of
time or in the volume of required disclosure; whether disclosure was by act of the client or by third
person; and the degree of disclosure to nonprivileged persons.100

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96 Fed. R. Civ. P. 26(g) and 37.

inadvertent production of privileged materials in circumstances involving a large amount of electronic data “are
a common occurrence in ESI discovery”).


99 Model Rule 1.6(c) (2012).

100 Restatement (Third) of the Law Governing Lawyers § 79 cmt. h. See also Sidney I. v. Focused Retail Prop.
I, LLC, 274 F.R.D. 212, 216 (N.D. Ill. 2011) (describing efforts and finding that reasonable steps were not taken
to protect privilege and, therefore, waived).
In addition to preventive steps taken by counsel to prevent inadvertent disclosure, remedial measures taken following discovery of inadvertent disclosure may impact whether there has been a waiver of the privilege, thus bearing on whether there has been a violation of Rule 1.6. Pursuant to Federal Rule of Evidence 502, an important part of avoiding a waiver is the steps that the disclosing attorney took following discovery of the disclosure. For example, a finding of waiver would not be appropriate where: “(1) the party asserting the privilege intended to maintain confidentiality and took reasonable steps to prevent the documents’ disclosure; (2) the party promptly sought to remedy the situation after learning of the disclosure; and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted.”

The value of prompt notice is borne out in the Federal Rules of Civil Procedure. Rule 26(b)(5)(B) provides that a party making inadvertent production should notify the receiving party. Upon notice, the receiving party must promptly return, sequester, or destroy the specified information; must not use or disclose the information until the privilege claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the privilege claim.

In connection with satisfying its obligations pursuant to Rule 1.6, counsel should also consider the use of an express “clawback” agreement, which specifies the terms and conditions pursuant to which a party may seek the return of inadvertently produced documents.

B. Preservation of Privilege When Lawyer Communicates Privileged Information to Range of Persons Within Corporate Client.

Whether representing a franchisor or a franchisee, an attorney is frequently representing a corporation or other legal entity, rather than a natural person. In such situations, the lawyer “represents the organization acting through its duly authorized constituents.” Provided that the lawyer properly obtains consent to dual representation, the lawyer may also represent any of the organizations’ directors, officers, shareholders, members, employees or other constituents. However, a lawyer should not undertake such dual representation if the organization and the constituent have adverse interests. In the event of adverse interests between an organization represented by the attorney and a constituent, the lawyer shall explain that the organization, rather than the constituent, is the lawyer’s client in connection with the lawyer’s dealings with the organization’s directors, officers, shareholders, members, employees or other constituents.

103 See Carlock v. Williamson, No. 08-3075, 2011 WL 308608, at *6 (C.D. Ill. Jan. 27, 2011) (Defendants could “claw-back” the privileged information because they took reasonable steps to prevent the disclosure and to rectify the inadvertent disclosure.). See also Fed. R. Evid. 502(d).
104 Model Rule 1.13(a).
105 Model Rule 1.13(g).
106 Model Rule 1.13(f).
Because an organization may act through many different directors, officers, shareholders, members, employees or other constituents, a question may arise as to whom the attorney-client privilege extends. According to the Restatement, in the context of organizational clients, the attorney-client privilege extends to communications that: (1) otherwise qualify as privileged; (2) are between an agent of the corporation and another person to whom the privilege applies; (3) concern “a legal matter of interest to the organization;” and (4) are disclosed only to persons to whom the privilege applies and “other agents of the organization who reasonably need to know of the communication in order to act for the organization.”

Pursuant to the Restatement, the attorney-client privilege would apply to communications between the organization’s lawyer and anyone within the organization who reasonably would be provided access to the communication in connection with his or her role in the organization:

The need-to-know limitation . . . permits disclosing privileged communications to other agents of the organization who reasonably need to know of the privileged communication in order to act for the organization in the matter. Those agents include persons who are responsible for accepting or rejecting a lawyer’s advice on behalf of the organization or for acting on legal assistance, such as general legal advice, provided by the lawyer.

The Restatement test is consistent with decisions in various jurisdictions applying a “subject matter” test, which provides that the privilege is retained when communications are made to, or shared with, lower echelon employees in the organization, provided that the communication relates to the “subject matter” of the representation. However, some decisions have applied a more limited “control group” test that limits the extension of the privilege only to persons within the organization’s “control group,” or the “persons within the organization who have authority to mold organizational policy or to take action in accordance with the lawyer’s advice.”

**Hypothetical:** Lawyer provides the President of its franchisor client with a memorandum describing the franchisor’s contractual relationship with a supplier, advising the client that the contract could be terminated without liability. Franchisor’s President forwards the memorandum to the franchisor’s purchasing manager, asking whether purchasing manager believes the contract should nevertheless be retained for business reasons. Has privilege been waived due to the sharing of the memorandum with the franchisor’s purchasing manager?

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107 Restatement (Third) of the Law Governing Lawyers § 73.
108 Restatement (Third) of the Law Governing Lawyers § 73 cmt. g.
109 Restatement (Third) of the Law Governing Lawyers § 73 cmt. d.
110 Id.
At least pursuant to the Restatement and the “subject matter” test, the attorney-client privilege would not be waived as a result of the President forwarding the memorandum to the purchasing manager. The purchasing manager’s response to the President would reasonably depend upon various factors, including an assessment of Lawyer’s reason for the advice that the contract could be terminated. Accordingly, the attorney-client privilege would not be waived because the purchasing manager would satisfy the “need-to-know” requirement and would also satisfy the “subject matter” test.\(^{111}\)

**Hypothetical:** Lawyer is retained to represent corporate entity franchisee in breach of contract case against franchisor. Lawyer interviews two cashiers employed by franchisee in order to discuss cashiers’ knowledge of potential breach by franchisor. During course of joint interview of two cashiers, one cashier advises Lawyer that cashier believes owner of franchisee fired one of their co-workers based upon the co-worker’s age in light of comments made by owner following co-worker’s departure. Are cashier’s comments to Lawyer regarding the fired co-worker protected by the attorney-client privilege?

Cashier’s comments likely would not be privileged because they did not relate to the matter for which the Lawyer was retained, and they were made in the presence of another employee who did not reasonably need to know of this communication in order to act for the franchisee.

As discussed above, the right to assert or waive a privilege belongs to the client. In the event of an organizational client, who may assert or waive a privilege is a separate inquiry from to whom a communication may be shared while still preserving the privilege.\(^ {112}\) As a general rule, the constituents who may assert or waive the privilege is a more limited group of constituents.\(^ {113}\)

**C. Preservation of Privileges in Connection with Joint Defense Agreement.**

In litigation matters involving multiple defendants, the defendants may consider entering a joint defense agreement in order to save costs, coordinate strategy, and to capitalize upon a more complete factual picture that can be determined based upon the knowledge of the various defendants.\(^ {114}\) One of the more significant benefits of a joint defense agreement, which underlies the aforementioned potential reasons for entering a joint defense agreement, is the ability of the parties to have shared and joint privileged communications, without waiving the privilege.

\(^{111}\) See Restatement (Third) of the Law Governing Lawyers § 73 cmt. g, illus. 1.

\(^{112}\) Restatement (Third) of the Law Governing Lawyers § 73 cmt. j.

\(^{113}\) See United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996) (“The power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors.”).

However, in addition to potential benefits, joint defense arrangements also carry potential drawbacks. For example, parties may sacrifice some control over the strategy of the case in pursuing a joint strategy, and disagreements may arise between parties to the joint defense arrangement regarding whether they are bearing an appropriate share of the costs of the defense, particularly when they perceive a gap between their degree of control and their level of expenses.\footnote{Id. at 30-31.} Some of the most significant issues with joint defense arrangements arise when a party withdraws from the joint defense agreement, or following completion of the litigation matter for which the joint defense agreement was entered.

The joint defense privilege extends the protections afforded by the attorney-client privilege and the work product doctrine to communications involving parties to the joint defense agreement. “The joint defense privilege generally allows a defendant to assert the attorney-client privilege to protect his statements made in confidence not only to his own lawyer, but to an attorney for a co-defendant for a common purpose related to the defense of both.”\footnote{Id. at 35.} Pursuant to the Restatement, “[i]f two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.”\footnote{Restatement (Third) of the Law Governing Lawyers § 76.}

“The party asserting the attorney-client privilege in a common interest arrangement must show that the communication at issue was made in the course of a joint defense or common enterprise, that the communication was designed to further the shared interests, that the communication is otherwise privileged and that the privilege has not been waived.”\footnote{In re Megan-Racine Assocs. Inc., 189 B.R. 562, 571-572 (Bkrtcy. N.D.N.Y. 1995) (citing In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d. 120, 126 (3d. Cir. 1986)).} Entry into a joint defense agreement may also help avoid misunderstandings as to whether an attorney was authorized by its client to share privileged information with other parties to a joint defense agreement. Pursuant to Model Rule 1.6, “[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).” Although disclosure of privileged information may be impliedly authorized pursuant to Model Rule 1.6, a joint defense agreement may provide better evidence that the privileged information was authorized to be shared by the clients pursuant to the terms of the agreement.

Although joint defense agreements are not required to be reduced to writing, it is beneficial to do so in order to ensure all participants agree upon the terms of the joint defense arrangement and because the written agreement will assist parties in meeting their burden of establishing a joint defense agreement when they invoke the joint defense
In order to ensure that the parties have a mutual understanding and to minimize potential disputes and unintentional waivers of privilege with respect to communications during the course of the joint defense arrangement, parties would be well-advised to enter a comprehensive joint defense agreement that addresses the following points bearing on issues of privilege:

- Identity of the parties to the joint defense arrangement;
- Identification of who is covered by the joint defense agreement, including the participating clients, their employees, their attorneys, experts, and agents;
- Affirmation that the parties share a mutual interest in formulating a common legal strategy with respect to an actual or specific potential litigation;\(^{120}\)
- Types of information and communications covered by the agreement;
- Acknowledgment that communications prior to the formal entry of the joint defense agreement are subject to the joint defense privilege;
- Specific restriction of use of shared materials for purposes of the joint defense;
- Acknowledgment that privileged materials can only be shared with parties to the joint defense arrangement or other approved persons;
- Acknowledgement that each party to the agreement is represented by its own attorney and not any attorney for any of the other parties;
- Acknowledgment that consent of all parties is required for disclosure of information shared pursuant to the joint defense arrangement;
- Waiver of conflict of interest claim or right to seek disqualification against an attorney who received confidential information pursuant to the joint defense agreement;
- An acknowledgement that no attorney has a duty of loyalty to any party other than the party it represents;
- Procedures applying to a party withdrawing from the joint defense agreement, including a requirement to return privileged materials; and

\(^{119}\) See In re Megan-Racine Assocs. Inc., 189 B.R. at 571-572 (“The party asserting the privilege under the common interest doctrine has the burden of establishing an agreement to pursue a joint defense or common interest.”).

\(^{120}\) Generally speaking, a joint defense agreement cannot apply to what is merely a common concern, but must relate to a specific litigation matter, whether pending or potential. See Wastewater Reclamation v. Continental Cas. Co., 142 F.R.D. 471 (D. Colo. 1992) (“the joint defense privilege arises only where the common interest of the parties relates to the joint defense of existing or impending litigation”).
A provision regarding remedies for breach of the joint defense agreement, including that any party is entitled to injunctive relief to prevent disclosures.\textsuperscript{121}

As noted above, potential issues regarding privileged communications made pursuant to a joint defense agreement may arise when a party withdraws from the joint defense arrangement. In particular, issues may arise regarding the extent to which one party may waive another party’s privilege. Most authorities hold that a party may only waive privilege with respect to its own communications.\textsuperscript{122} Accordingly, consent of all parties is required to waive the common defense privilege generally.\textsuperscript{123} However, predictability in these circumstances can be aided significantly by proactively addressing such considerations in the parties’ joint defense agreement.

VI. COMMUNICATIONS BETWEEN ADVERSE PARTIES

A. Communications Between a Lawyer and an Adverse Pro Se Party.

The Model Rules impose obligations upon attorneys in their dealings with unrepresented parties. Rule 4.3 provides that “[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.” Accordingly, a lawyer preparing settlement documents on behalf of a franchisor in resolving a dispute with an unrepresented franchisee should not imply that the lawyer is acting as an impartial scrivener.

And, when the lawyer perceives that the unrepresented party misunderstands the lawyer’s role in the matter, he or she is required to take reasonable steps to correct the misunderstanding.\textsuperscript{124} If in the preceding example of a lawyer preparing a settlement agreement, the unrepresented party seeks advice from the attorney as to whether it should be accepting the settlement, the attorney should tell the franchisee that he or she cannot provide legal advice to the franchisee and should recommend that the franchisee retain its own counsel for advice regarding the settlement.\textsuperscript{125}

\textsuperscript{121}See Nahrstadt & Rogers, \textit{supra} at 32-34 (setting forth 33 different key provisions that should be considered in entering a joint defense agreement).

\textsuperscript{122}See, \textit{e.g.}, \textit{Interfaith Hous. Delaware, Inc. v. Town of Georgetown}, 841 F. Supp. 1393 (D. Del. 1994) (waiver by one party to joint defense agreement does not waive privilege as to other members).

\textsuperscript{123}See, \textit{e.g.}, \textit{In re Grand Jury Subpoenas 89-3 & 89-4}, 902 F.2d 244 (4th Cir. 1990) (consent of all parties required to waive common defense privilege); \textit{Madison Management Group, Inc. v. Fogel}, 212 B.R. 894, 898 (N.D. Ill. 1997) (“Joint defense privilege would be stripped of its purpose and effectiveness if one party could unilaterally waive the privilege in favor of a third party, even if the original defendants had become adversaries.”).

\textsuperscript{124}Model Rule 4.3.

\textsuperscript{125}\textit{Id.} (“The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”).
In-house franchisor counsel should be particularly attuned to their obligations in dealing with unrepresented franchisees. In some systems, franchisees may have routine contact with the franchisor's in-house counsel. Such routine contact may lead some franchisees to forget that the in-house counsel represents the franchisor's interests, not the franchisee's interests. Accordingly, if in-house counsel is reasonably aware that an unrepresented franchisee is relying upon advice from the in-house counsel with respect to a matter where the franchisor and the franchisee have adverse interests, in-house counsel should take steps to eliminate such misperception.

**Hypothetical:** Franchisee provides franchisor notice that it would like to renew its franchise at the end of its current term. Franchisor sends Franchise Disclosure Document (“FDD”) to franchisee. Upon reviewing FDD, franchisee observes that renewal agreement offered to it contains an arbitration provision. Having spoken with franchisor’s in-house counsel on many occasions during the term of its initial agreement, franchisee calls in-house counsel. During the course of the call, franchisee notes that the new agreement contains an arbitration provision, while its prior agreement did not. Franchisee then asks in-house counsel about the advantages and disadvantages of arbitration and whether the in-house counsel would recommend that the franchisee sign the renewal agreement. How should in-house counsel respond?

As noted in Comment 1 to Rule 4.3, “[a]n unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.” This hypothetical illustrates such a mistaken assumption by an unrepresented franchisee. In-house counsel should remind the franchisee that the lawyer represents the franchisor, cannot provide legal advice to the franchisee, and that the franchisee should retain its own counsel for advice regarding its questions about the renewal agreement.

The principles discussed above may lead a lawyer to be concerned about whether he or she can ever deal directly with a pro se party without violating Rule 4.3. Of course a lawyer may. A party who chooses to be represented by counsel may not be denied its right to be represented by counsel merely because an adverse party is not represented. Comment 2 to Rule 4.3 provides substantial guidance regarding interactions between a lawyer and an unrepresented party with interests adverse to its client:

> This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an

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126 See Comment 2 to Model Rule 4.3 (“Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.”).

127 See id. (“The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer’s client and those in which the person’s interests are not in conflict with the client’s. In the former situation, the possibility that the lawyer will compromise the unrepresented person’s interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel.”).
agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.  

B. Communications Between a Lawyer and a Franchisee Who is a Member of an Association Represented by Counsel.

Many communications between a lawyer and a franchisee who is a member of an association represented by counsel may take place, consistent with the Rules. As a starting point, any communications outside the scope of the lawyer's representation of the association are not prohibited by Rule 4.2, the “no contact” rule. As set forth in the comments, “[t]his Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.”

Even if the association is represented by counsel with respect to the subject about which the lawyer seeks to contact some of its member franchisees, such contact is likely permissible for members who do not have a significant role in the decision-making processes of the association. Older decisions viewed attorneys for unincorporated associations as attorneys for each of the members, even though attorneys for a corporation are not deemed to represent all of a corporation's employees. However, the trend has been to treat unincorporated associations more like corporations. “The mere status of being a member of an unincorporated association no longer makes one a client of the association's attorneys.” Consistent with that evolution, the Comments to the Model Rules refer to “organizations” and “constituents.” Accordingly, a similar analysis likely applies to contacts with members of both incorporated and unincorporated associations. Comment 7 to Rule 4.2 confirms that the 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.” Even where such description applies to a constituent, if the constituent is represented by its own attorney, such attorney may consent to the contact.

However, in connection with any permitted communication with a constituent, “a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.” Additionally, if the franchisee is represented by its own counsel, the

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128 Id.
129 Comment 4 to Model Rule 4.2.
131 See also Restatement (Third) of the Law Governing Lawyers § 100. However, different courts have adopted various tests for determining which constituents are included within the scope of Rule 4.2. See Palmer v. Pioneer Inn Assocs., Ltd., 118 Nev. 943 (Nev. 2002) (surveying tests adopted by various courts in the context of communications with employees of an organization).
132 Comment 7 to Model Rule 4.2.
133 Id.
lawyer must comply with Rule 4.2, and if the franchisee is not represented by counsel, the lawyer must comply with Rule 4.3, as discussed in the preceding section regarding communications with pro se parties.

C. Advising Clients on Their Communications with Parties Who Are Represented by Counsel.

Most attorneys are familiar with the general rule that parties represented by counsel may still communicate directly with each other. This principle is particularly important in the area of franchise law because disputes often arise between parties who are continuing in a franchise relationship and will have frequent interactions during the course of resolving their dispute. The general rule permitting parties to a dispute to communicate directly with each other even extends to the issue in dispute, as well as the settlement of the dispute.135

However, given conflicting guidance from the courts and from ethics opinions in various jurisdictions, attorneys may not be as comfortable with the extent to which they are permitted to counsel their clients in connection with communications with parties who are represented by counsel. In 2011, the ABA issued a formal opinion that provides substantial guidance on this issue in jurisdictions that follow the Model Rules.136

In Formal Opinion 11-461, the Ethics Committee observed that there is tension between Rule 4.2 and Rule 8.4(a) and their comments as to the extent to which an attorney may advise its client regarding communications with a represented party. Model Rule 4.2, known as the “no contact” rule, provides that “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 4 to Rule 4.2 further provides that “[a] lawyer may not make a communication prohibited by this Rule through the acts of another.” Similarly, Rule 8.4(a) states that “[i]t is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce

134 Restatement (Third) of the Law Governing Lawyers § 99 cmt. k. (“No general rule prevents a lawyer’s client, either personally or through a nonlawyer agent, from communicating directly with a represented nonclient. Thus, while neither a lawyer nor a lawyer’s investigator or other agent . . . may contact the represented nonclient, the same bar does not extend to the client of the lawyer or the client’s investigator or other agent.”).

135 See Betz v. Diamond Jim’s Auto Sales, 825 N.W.2d 508, 514 (Wisc. App. 2012), cert. granted (“[G]enerally, nothing forbids a party from settling with a represented party without the presence or consent of the represented party’s lawyer . . . ”). However, such a settlement may be found void, if entered in violation of public policy. Id. (noting that settlements entered directly by represented parties, “like all contracts, are scrutinized in light of public-policy interests,” and holding the settlement agreement at issue was void where settling plaintiff had assigned to its attorney the right to collect attorneys’ fees and where plaintiff had asserted claims under a fee-shifting statute). The Wisconsin Supreme Court has granted certiorari in Betz, including to consider the issue of “Whether public policy supporting the right of a party to settle a dispute and protecting the sanctity of negotiated settlement agreements may be superseded by the policy supporting fee-shifting statutes such that a party’s desire to settle a disputed claim may be vetoed by that party’s attorney who seeks to override the party’s right to settle in pursuit of an award of attorney’s fees.” Wisconsin Court System, Wisconsin Supreme Court Table of Pending Cases (June 13, 2013), available at http://www.wicourts.gov/sc/sccase/DisplayDocument.pdf?content=pdf&seqNo=98202.

another to do so, or do so through the acts of another.” However, the comments to Rule 8.4(a) clarify that the rule “does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.”137 And, as discussed above, a client is permitted to have direct communications with a represented party.

In 1992, the Ethics Committee opined that “a lawyer may ethically advise the client to communicate directly with a represented adversary to determine if the adverse party’s lawyer had informed them that a settlement offer was pending.”138 Underlying that opinion was a request from an attorney representing a plaintiff who had made a settlement offer to defendant’s counsel and who suspected that defendant’s counsel had not made the defendant aware of the settlement offer. That opinion similarly recognized the tension between a lawyer’s decision to advise a client to communicate directly with an adversary and the prohibition in Rule 8.4(a) on a lawyer doing indirectly what could not be done directly. However, the Committee concluded that “Rule 8.4(a) should not be read to preclude the lawyer’s fulfilling the lawyer’s duty, reasonably expected by the client, fully and fairly to advise the client of the lawyers’ best professional judgment as to the exercise of the client’s rights in furtherance of the representation.”139

The Ethics Committee extended that reasoning to assistance by a lawyer with respect to other communications between the lawyer’s client and an adversary in Formal Opinion 11-461, stating that “without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary.”140 Specific types of advice that may properly be given include “the subjects or topics to be addressed, issues to be raised and strategies to be used.”141 Similarly, a lawyer may advise its client about the content of communications the client intends to have with a represented person. This can include reviewing and revising proposed talking points or a letter the client desires to send to its opponent.142 Such assistance may even extend to preparing the basic terms of a potential settlement agreement or a formal settlement agreement that the parties may execute in their direct dealings.143 Moreover, the propriety of the assistance does not turn on whether the assistance was initiated at the request of the client or on the attorney’s own initiative.144

However, the Committee made clear that its Opinion did not completely do away with Rule 8.4(a) and that an attorney is not permitted to merely use the client as a straw person, such that the attorney is effectively communicating with the other side in an effort to deprive the party of the benefits of the attorney it has retained to represent its interests.

137 Model Rule 8.4(a) cmt. 1.
139 Id. (quoting ABA Formal Op. 92-362 (1992)).
141 Id.
142 Id.
143 Id.
144 Id.
The Opinion notes the following as “[p]rime examples of overreaching”: “assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel.”\textsuperscript{145} Additionally, when an attorney has drafted a proposed agreement for the client to deliver to the represented adversary for execution, the agreement should conspicuously warn the other party to consult with its counsel before signing the agreement.\textsuperscript{146}

D. Use of Secret Shoppers or Private Investigators.

**Hypothetical:** It has come to a franchisor’s attention that a recently terminated franchisee is using the franchisor’s marks in the operation of a competing business, in violation of the franchisee’s post-termination obligations. Franchisor’s in-house counsel contacts outside counsel and requests that outside counsel investigate the matter for potential litigation, including by using a secret shopper and/or private investigator to conduct an on-site visit. Franchisor’s outside counsel instructs a private investigator to visit the former franchisee’s business, pose as a potential customer, and report on his findings. Assuming the private investigator performs his job as instructed, has in-house counsel or outside counsel violated any ethics rules?

Although discovery is a necessary and useful part of the litigation process, independent development of facts is also important. For example, before filing a complaint, a party has an obligation to investigate the issues and verify that there is a factual basis for the claims it asserts.\textsuperscript{147} Additionally, following the grant of a temporary restraining order or a preliminary injunction, a party may want to determine promptly whether the enjoined party is complying with the injunction, without the delays inherent in formal discovery. The need for such independent factual development frequently arises in disputes between franchisors and terminated franchisees with respect to compliance with post-termination obligations, including cessation of use of the franchisor’s trademarks and confidential information and compliance with any post-termination non-competition obligations.

Outside the litigation context, a franchisor may be interested in verifying the quality of services provided by its franchisees or whether franchisees are complying with the franchisors’ system standards. Although scheduled visits from a franchisor’s employee can be helpful, a more accurate assessment of the franchisee’s conduct may come from an unannounced visit by an unknown person.

Because a party may be unwilling to provide accurate and complete information voluntarily in the event of potential litigation or following the termination of the parties’ agreement, parties may consider the use of secret shoppers or private investigators to gather such information. Similarly, a secret shopper or private investigator may be useful to evaluating a franchisee’s services or compliance with system standards.

\textsuperscript{145} Id.

\textsuperscript{146} Id.

\textsuperscript{147} \textit{See}, e.g., Fed. R. Civ. P. 11.
1. Potentially Applicable Rules of Professional Conduct

When an attorney, either in-house counsel or outside counsel, is involved in the use of a secret shopper or a private investigator, a number of Rules of Professional Conduct may be implicated. The first set of rules that may be implicated are those dealing with contacts with represented or unrepresented persons. As discussed above, Rule 4.2 (the “no contact” rule) provides that “[i]n 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.” As discussed above, lawyers also must take care not to mislead unrepresented persons as to their role.\(^{148}\)

These rules also apply when another person is acting on behalf of the lawyer. Rule 8.4(a) states that “[i]t is professional misconduct for a lawyer to 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.” And, a lawyer with direct supervisory authority over a non-lawyer “shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”\(^{149}\) According to the Restatement: “The [anti-contact] rule also applies to nonlawyer employees and other agents of a lawyer, such as an investigator.”\(^{150}\) However:

No general rule prevents a lawyer’s client, either personally or through a nonlawyer agent, from communicating directly with a represented nonclient. Thus, while neither a lawyer nor a lawyer’s investigator or other agent . . . may contact the represented nonclient, the same bar does not extend to the client of the lawyer or the client’s investigator or other agent.\(^{151}\)

In their efforts to gather information candidly, secret shoppers or private investigators are unlikely to identify themselves affirmatively as representatives of the opposing party or its counsel. Even further, they may pose as a customer or other third party in order to obtain information about a party’s operations. Accordingly, rules regarding deception may also be implicated by the use of secret shoppers or private investigators. For example, the Rules provide that “[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact . . . to a third person.”\(^{152}\) Similarly, “[i]t is professional misconduct for a lawyer to . . . (c) engage in conduct that involves dishonesty, fraud, deceit or misrepresentation.”\(^{153}\) As observed above, such principles also apply to actions taken by other persons acting on behalf of lawyers.

\(^{148}\) See Model Rule 4.3.

\(^{149}\) Model Rule 5.3(b).

\(^{150}\) Restatement (Third) of the Law Governing Lawyers § 99 cmt. b.

\(^{151}\) Restatement (Third) of the Law Governing Lawyers § 99 cmt. k.

\(^{152}\) Model Rule 4.1.

\(^{153}\) Model Rule 8.4.
2. **Use of Secret Shoppers or Private Investigators to Monitor Compliance with System Standards**

Although decisions involving the use of secret shoppers or private investigators posing as others while gathering facts have been inconsistent, and indeed contradictory on similar facts, their use in the ordinary course of business appears to be the most generally acceptable use of such persons to gather information.\(^{154}\) This is particularly the case when the program is administered by the client directly, without involvement of counsel.\(^{155}\) A party can also take steps to further support the use of such persons to gather information. Such steps include obtaining an express agreement to the use of secret shoppers in the franchise agreement or providing information regarding the use of secret shoppers to monitor system standards and compliance in the franchisor’s manual containing the system standards. For example, the Buffalo Wild Wings franchise agreement contains the following provision regarding “Evaluations,” with specific reference to “mystery shoppers”:

G. Evaluations. We or our authorized representative have the right to enter your Restaurant at all reasonable times during the business day for the purpose of making periodic evaluations and to ascertain if the provisions of this Agreement are being observed by you, to inspect and evaluate your building, land and equipment, and to test, sample, inspect and evaluate your supplies, ingredients and products, as well as the storage, preparation and formulation and the conditions of sanitation and cleanliness in the storage, production, handling and serving. If we determine that any condition in the Restaurant presents a threat to customers or public health or safety, we may take whatever measures we deem necessary, including requiring you to immediately close the Restaurant until the situation is remedied to our satisfaction. Our inspections and evaluations may include a “mystery shopper” program from time to time throughout the term of this Agreement. We hire various vendors who send the “mystery shoppers” into the BUFFALO WILD WINGS restaurants. You will be obligated to pay for 3 "mystery shopper" visits during the first 3 months after you open your Restaurant. In addition, any time you fail an evaluation, by us or by a mystery shopper, you must pay the next three mystery shoppers we send to your Restaurant. The current fee charged by the vendors is approximately $100 fee per visit, which you must pay directly to the vendor. The fee per visit includes the

\(^{154}\) See Kevin M. Kennedy, Phillip H. Rudolph, and Peter R. Silverman, *Key Legal and Business Ethics Issues for Franchise Lawyers*, in International Franchise Association: 44th ANNUAL LEGAL SYMPOSIUM, 23 (May 15-17, 2011) ("[A] pre-litigation interview conducted of salespeople who interact with the public regularly is more likely to pass muster than interviews of upper level management conducted after a lawsuit is commenced and the opposing party is known to be represented by counsel.").

\(^{155}\) Restatement (Third) of the Law Governing Lawyers § 99 cmt. k.
reimbursement of the tab paid by the mystery shopper for the items consumed at your Restaurant and, therefore, the actual fee for each visit will vary.\textsuperscript{156}

3. \textbf{Use of Secret Shoppers or Private Investigators in Connection with Pending or Anticipated Litigation}

Due to the varying opinions regarding the use of private investigators in connection with pending litigation, an attorney considering use of a secret shopper or private investigator should assess the facts at issue and the jurisdictions whose rules may be implicated by the use of an investigator.\textsuperscript{157} Given the absence of bright-line rules in this area, a party and its lawyer should determine the jurisdictions potentially implicated, assess the facts, and take steps to increase the likelihood that the use of an investigator will be found acceptable under the applicable rules.

First, use of a private investigator to gather information is more likely to be found compliant if the investigator is merely posing as a member of the general public or a potential customer of the other party to obtain information that would be perceived by other potential customers. Most courts have held that private investigators contacting or entering a represented party’s business does not violate Rule 4.2 “where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation.”\textsuperscript{158} Such conduct is not likely to violate the rules of professional conduct, even when the investigator assumes a false identity in connection with gathering information from a party that would be observable to the general public or the business’ customers.\textsuperscript{159} “The prevailing understanding in the legal profession is that a public or private lawyer’s use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.”\textsuperscript{160}

\textsuperscript{156} Buffalo Wild Wings® Franchise Agreement, at Section 6(G), available at http://www.sec.gov/Archives/edgar/data/1062449/000115752306002232/a5091516ex10_11.txt.

\textsuperscript{157} See Robert W. Sacoff, The Ethics of Deception: Pretext Investigations in Trademark Cases, presentation to the Colorado Bar Association, April 1, 2010, at 2 (“A thoughtful examination of these questions for bright-line rules [regarding the use of private investigators] and distinctions will probably leave you disappointed, as the answers are heavily fact-dependent and vary with the governing law where your office is located and where the investigation occurs.”).


\textsuperscript{160} Apple Corps Ltd., 15 F. Supp. 2d at 475.
The risk of a rule violation, along with a risk of exclusion of evidence, increases when the interactions go beyond standard business interactions. For example, in Hill v. Shell Oil, the Court observed that lawyers and investigators “probably can employ persons to play the role of customers seeking services on the same basis as the general public. They can videotape protected employees going about their activities in what those employees believe is the normal course.” However, the court also stated that “Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say.”

In Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc., the Eighth Circuit affirmed the district court’s finding of an ethics violation and exclusion of evidence arising from the use of a private investigator in a franchise dispute. In Midwest Motor Sports, the defendant/appellant hired a private investigator to visit two different franchisee’s stores to obtain evidence in the case. The investigator was aware of a pending lawsuit and that the two franchisees were represented by counsel. The investigator, who was posing as a customer, did not advise either franchisee that he was visiting them at the behest of defendant/appellant’s counsel or that he was recording the conversations. The investigator admitted that his purpose was not merely to observe the business operations as could be observed by other customers, but to “elicit evidence in a pending civil case on behalf of the lawyers that hired him.” It is possible that Midwest Motor Sports may be distinguished from Apple Corps Ltd. and similar cases on the grounds that the investigator in Midwest Motor Sports acknowledged that he was attempting to “elicit” specific evidence, rather than merely to observe the franchisees’ operations as they could be observed by any potential customer, and knowingly engaged the president and owner of one of the franchisees, rather than lower level employees. However, given the similarity of the facts in these cases, Midwest Motor Sports more likely serves as a reminder that there are no bright-line rules and that the results of any challenges to the use of private investigators may vary depending upon the jurisdiction.

In light of the conflicting authority with respect to the use of private investigators who are posing as other persons, the following are some guidelines to consider:

- Before proceeding with an investigator, evaluate local ethics rules and opinions, disciplinary rulings, and court decisions in the various applicable jurisdictions, including the jurisdiction where the action is pending or will be filed, the jurisdiction where the investigation will take place, and the jurisdictions where any attorneys involved are admitted.


162 Id.


164 See also Orso v. Bayer Corp., No. 04-C-0114, 2006 U.S. Dist. LEXIS 73647 (N.D. Ill. Sept. 27, 2006) (holding that a lawyer/pharmacist violated the "no-contact" rule when he relied upon his status as a pharmacist to gather evidence to oppose a motion to dismiss in a product liability action and later entered his appearance in the matter and submitted an affidavit with the information he gleaned from his inquiries).
- Both to avoid a situation where the attorney may need to be a witness and to avoid unnecessary additional risks under the ethics rules, an attorney should avoid doing the investigation himself or herself.\footnote{Restatement (Third) of the Law Governing Lawyers § 99 cmt. k. ("No general rule prevents a lawyer’s client, either personally or through a nonlawyer agent, from communicating directly with a represented nonclient. Thus, while neither a lawyer nor a lawyer’s investigator or other agent . . . may contact the represented nonclient, the same bar does not extend to the client of the lawyer or the client’s investigator or other agent.").}

- Additional risks are likely presented when the investigation relates to pending litigation or when the party to be investigated is known to be represented by counsel with respect to the subject matter of the potential investigation.

- The investigator’s conduct will more likely be found proper if the investigator is gathering information that would be available to the general public or a typical customer.

- Additional care should be taken if the investigator intends to ask questions, rather than merely observe operations that would be apparent to the general public or a typical customer.

- In order to ensure the level of risk undertaken in connection with an investigation matches the contemplated level of risk, consider providing additional guidance regarding persons to be engaged or not engaged during a visit, the types of questions to be asked, and other guidelines for the investigation.

- If the investigator will be recording any conversations, confirm that such recordings are done consistently with applicable law.\footnote{Although federal law (18 U.S.C. § 2511(2)(d)) and the laws of thirty-eight states and the District of Columbia only require that one party consent to the recording of a conversation, twelve states make it a crime to record or eavesdrop on any confidential communication, including a private conversation or telephone call, without the consent of all parties to the conversation. See, e.g., Cal. Penal Code § 632. See also California v. Gibbons, 215 Cal. App. 3d 1204 (Cal Ct. App. 1989) (statute extends to the use of hidden video cameras to record conversations). Note, however, that federal law, and many states’ laws do not protect the recording if it is done for a criminal or tortious purpose.}

\section*{VII. CONCLUSION}

Whether facing the familiar issues of fee arrangements or the newest challenges posed by electronic document discovery, the franchise lawyer must be aware of the ethics issues that no doubt will arise in these and other situations with increasing frequency as the pace of transactions and litigation continues to accelerate with new technology. Staying abreast of the applicable rules and recent ethics opinions will help avoid the traps for the unwary that a franchise lawyer may encounter.
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