Ethics in Discovery:
Where the Rubber Meets the Road

American Bar Association
Section of Labor and Employment Law
Ethics & Professional Responsibility Committee
Midwinter Meeting

Loews Miami Beach Hotel
Miami Beach, Florida
March 21-23, 2013

Christopher Lage
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Matthew D. Marca
Littler Mendelson
1150 17th Street, NW, Suite 900
Washington, DC 20036

Marisa Warren
Nora Sullivan
Pedowitz & Meister LLP
570 Lexington Avenue, 18th Floor
New York, NY 10022
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>1</td>
</tr>
<tr>
<td>II. The Attorney’s Duty of Candor to the Tribunal During the Discovery Process</td>
<td>1</td>
</tr>
<tr>
<td>A. Dealing With The “Truthful” Client</td>
<td>1</td>
</tr>
<tr>
<td>B. Case Law &amp; Ethics Opinions Concerning Attorney’s Duty of Candor in Discovery</td>
<td>6</td>
</tr>
<tr>
<td>III. Ethics and Electronic Discovery</td>
<td>11</td>
</tr>
<tr>
<td>IV. Ethical Issues in Discovery in EEOC Litigation</td>
<td>17</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>23</td>
</tr>
</tbody>
</table>
# TABLE OF AUTHORITIES

## Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Briggs v. McWeeny</td>
<td>260 Conn. 296, 796 A.2d 516 (Conn. 2002)</td>
</tr>
<tr>
<td>EEOC v. Cintas</td>
<td>699 F.3d 884 (6th Cir. 2012)</td>
</tr>
<tr>
<td>EEOC v. McCormick &amp; Schmick’s Seafood Restaurants</td>
<td>No. 11-02695 (D. Md. 2012)</td>
</tr>
<tr>
<td>In re Fisher</td>
<td>202 P.3d 1186, 1202 (Colo. 2009)</td>
</tr>
<tr>
<td>Jenkins v. Methodist Hospitals of Dallas, Inc.</td>
<td>478 F.3d 255 (5th Cir. 2007)</td>
</tr>
<tr>
<td>People v. Small</td>
<td>962 P.2d 258 (Colo.1998)</td>
</tr>
<tr>
<td>Telecom Int’l America, LTD v. AT&amp;T Corp.</td>
<td>189 F.R.D. 76, 81 (S.D.N.Y. 1999)</td>
</tr>
</tbody>
</table>
Statutes
29 C.F.R. §1602.14 ........................................................................................................... 23
Fed. R. Civ. P. 30 ............................................................................................................. 18
Fed. R. Civ. P. 37 ............................................................................................................. 23

Ethics Opinions
ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-366 ......................... 6, 7
ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-376 ......................... 5, 6, 7, 8
ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-397 ......................... 4

Rules
Model Rule of Prof’l Conduct 1.0 .................................................................................... 4
Model Rule of Prof’l Conduct 1.1 .................................................................................. 15, 23
Model Rule of Prof’l Conduct 1.2 .................................................................................. 3, 7, 15
Model Rule of Prof’l Conduct 1.3 ................................................................................. 20, 23
Model Rule of Prof’l Conduct 1.6 ................................................................................ 3, 5, 6
Model Rule of Prof’l Conduct 1.16 ............................................................................ 6, 15
Model Rule of Prof’l Conduct 3.2 ................................................................................ 19
Model Rule of Prof’l Conduct 3.3 ................................................................................ passim
Model Rule of Prof’l Conduct 3.4 ................................................................................ 11, 19, 20
Model Rule of Prof’l Conduct 4.1 ................................................................................ 3, 4, 5
Model Rule of Prof’l Conduct 4.2 ................................................................................ 21, 23, 24
Model Rule of Prof’l Conduct 4.3 ................................................................................. 20, 23
Model Rule of Prof’l Conduct 8.4 ................................................................................ 3

Treatises
I. Introduction

During the course of discovery, attorneys are faced with difficult ethical issues that have potentially tremendous consequences. In fact, when attorneys fail to comply with the Rules of Professional Conduct, courts have imposed costly sanctions and, in some cases, dole out the harshest of penalties: striking the pleadings. This paper endeavors to equip attorneys with the proper background and knowledge to act ethically when these issues arise. It is important to acknowledge that this paper approaches these dilemmas from a national perspective and it is crucial that practitioners examine the local rules and case law from their jurisdiction to make sure they are ethically compliant when the rubber meets the road.

II. The Attorney’s Duty of Candor to the Tribunal During the Discovery Process

A. Dealing With The “Truthful” Client

No lawyer wants the unfortunate task of being faced with a client or a witness who may not be telling the truth. This can come about at several different stages in the discovery process including at a deposition (during witness preparation or at the actual deposition itself) or EEOC investigation, in responses to discovery requests, or in an affidavit submitted to the Court or other tribunal. In this scenario, a lawyer must act carefully and deliberately to be certain that they are on one hand zealously representing their client’s interests and maintaining client confidences, and on the other hand complying with their ethical duties which require attorneys to act truthfully and, in some cases require a lawyer to take “reasonable remedial measures” if a lawyer comes to know of the falsity of material evidence that he or she presented.

   a. A Lawyer’s Duty of Candor

The American Bar Association’s Model Rules of Professional Conduct (“Model Rules”) contain several provisions that govern a lawyer’s obligation to be truthful throughout their representation of clients.

   • Model Rule 3.3 (“Candor Toward the Tribunal”) states that a lawyer shall not knowingly: “(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . .(3) offer evidence that the lawyer knows to be false.” The Rule also proscribes that “[i]f a lawyer, the lawyer’s client, or a witness called by the
lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Compliance with this rule may require disclosure with information that is protected under Rule 1.6, the ethical rule requiring attorneys to maintain client confidences. *See* Model Rules of Prof’l Conduct R. 3.3(c); 1.6. A tribunal includes a court, arbitrator, legislative body, administrative agency, or other body acting in an adjudicative capacity. *See* Model Rule of Prof’l Conduct R. 1.0. These duties apply only until the conclusion of a proceeding, to the point when a final judgment has been affirmed or the time for review has passed. *See* Model Rules of Prof’l Conduct R. 3.3 cmt 13.

- **Model Rule 4.1** (“Truthfulness in Statements to Others”) creates a general obligation to not to knowingly “make a false statement of material fact or law to a third person.” Unlike Rule 3.3, however, Rule 4.1 does not trump Rule 1.6—meaning that a lawyer’s obligation to maintain client confidences should control an attorney’s conduct.

- **Model Rule 1.2(d)** (“Scope Of Representation And Allocation Of Authority Between Client And Lawyer”) States that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” This can include giving the impression of validating material misrepresentations in any context through silence. Similar to Rule 4.1, Rule 1.6 is also superior.

- **Model Rule 8.4** (“Maintaining The Integrity Of The Profession”) states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation” or “engage in conduct that is prejudicial to the administration of justice”. *See* Model Rule Prof’l Conduct R. 8.4(c)-(d).

\[b. \ So \ That’s \ What \ it \ Says, \ But \ What \ Does \ it \ Mean?\]

To fully understand an attorney’s ethical obligations we must define a few key terms. Rule 3.3 states that a lawyer shall not knowingly make a false statement of material fact or law, offer evidence that the lawyer knows to be false, or if a lawyer, lawyer’s client, or witness called by the lawyer has offered material evidence that the lawyer knows to be false, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.
i. What is a “statement”?  

A statement can either be an affirmative statement or an omission. See Model Rule of Prof’l Conduct 4.1 cmt 1. Here are some examples to elucidate this point:

- When an attorney learns that a client has made a transfer of assets contrary to court order which affects the subject of the litigation and impairs the Court’s ability to grant relief, by failing to withdraw, the attorney certifies that there is a possibility of relief. If the court order violation does not affect the Court’s ability to grant effective relief, then the obligation to inform the Court does not attach. ABA Comm. on Ethics and Prof’l Responsibility Formal Op. 98-412.

- A lawyer’s failure to disclose her client’s death created an affirmative misrepresentation that she continued to represent the client. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-397; See also Virzi v. Grand Trunk Warehouse & Storage, 571 F. Supp. 507, 512 (E.D. Mich. 1983) (“There is an absolute duty of candor and fairness on the part of counsel to both the Court and opposing counsel. At the same time, counsel has a duty to zealously represent his client's interests. That zealous representation of interest, however, does not justify a withholding of essential information, such as the death of the client, when the settlement of the case is based largely upon the defense attorney's assessment of the impact the plaintiff would make upon a jury, because of his appearance at depositions. Plaintiff's attorney clearly had a duty to disclose the death of his client both to the Court and to opposing counsel prior to negotiating the final agreement.”)

ii. What is “knowledge”?  

Under the Model Rules, “knowing” denotes actual knowledge of the fact in question, however, a person’s knowledge may be inferred from the circumstances. See Model Rule of Prof’l Conduct Rule 1.0(f). Comment 8 to Rule 3.3 further elaborates that “[a] lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer’s knowledge that evidence is false, however, can be inferred from the circumstances. . . . Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.”

iii. What makes a fact “material”?  

The Model Rules adopt a broad definition of what is “material”. The Comments to Model Rule 4.1 provide that a statement is material if it could have influenced the hearer. See
Model Rule of Prof’l Conduct R. 4.1, cmt. 1.  See also In re Fisher, 202 P.3d 1186, 1202 (Colo. 2009)(“[The ABA’s definition of ‘materiality’] squares with this court's holding in People v. Small, 962 P.2d 258 (Colo.1998), where we found an attorney violated Colo. RPC 3.3(a)(1) even though his misrepresentation to a trial court did not affect the outcome of the case. Accordingly, the concept of materiality encompassed in Colo. RPC 3.3(a)(1) is not directed by the outcome of a particular matter, but rather whether there is potential that the information could influence a determination as to that matter.”).

iv. What are “reasonable remedial measures”?

Although an attorney’s obligation to maintain candor to the tribunal trumps his or her ethical obligations to maintain client confidences under Rule 1.6, a lawyer has an obligation to attempt to remedy the misrepresentation without violating 1.6 before moving on to more drastic measures. The first step is usually to have a conversation with your client, to attempt to persuade them to correct the misrepresentation. The client should be warned that if he does not correct the record, you may have to. See Ill. St. Bar Assoc. Advisory Op. 94-24 (May 17, 1995) (Once an attorney learns of a client’s failure to disclose a material fact during discovery an attorney’s duties in Rule 3.3 apply even if compliance with the rule requires the attorney to disclose privileged information. Under Rule 3.3, the attorney must first attempt to convince his client to reveal the fraud and if this attempt is unsuccessful, the attorney must disclose sufficient information to the court to rectify the fraud. The rules “require disclosure where disclosure is necessary to rectify a fraud perpetrated upon a tribunal while the lawyer is appearing in a professional capacity before that tribunal.”).

In some circumstances the correction can be made without even disclosing the client’s wrongdoing. See e.g. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-376 (incomplete or incorrect answers to deposition questions may be capable of being supplemented or amended in such a way as to correct the record, rectify the perjury, and ensure a fair result without outright disclosure to the tribunal.) If the client does not make the correction, the next steps will depend on the circumstances, and could include: 1) withdrawal; 2) noisy withdrawal; 3) notifying the appropriate parties of the misrepresentation. See Model Rules Prof’l Conduct Rule 3.3 cmt 10; ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-376 Under the Model Rules, a lawyer must withdraw from the representation if it is necessary in order to
avoid assisting the client’s fraud in violation of Rules 3.3 and 1.2(d). See Model Rule 1.16(a)(1) (withdrawal mandatory where continued representation would result in a violation of rules of professional conduct). However, Rule 3.3 gives the lawyer an additional affirmative duty to remedy the perjury, and withdrawal alone is not likely to satisfy this obligation. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-376. The lawyer is only obligated to withdraw representation from matters involving the client’s fraud or misrepresentation. If the lawyer is also representing the client in an unrelated matter, the lawyer may choose to continue with that representation, or may withdraw at her own discretion. Of course, in some cases, withdrawal is not possible, because of the adversity to the client and/or the Judge’s refusal to grant. If counseling your client to correct their own misrepresentation fails, and withdrawal is not an option, then as the attorney, you will be forced to disclose as much information as is strictly required in order to remedy the misrepresentation. See Model Rule 3.3 Cmt 10.

Normally, a lawyer’s compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer’s disclosure. The lawyer may, however, be required by Model Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer’s compliance with this Rule’s duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Model Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal’s permission to withdraw. In connection with a request for permission to withdraw that is premised on a client’s misconduct, 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. Model Rule 3.3, cmt 15.

If merely withdrawing will not remedy the fraud or material misrepresentations being committed by your clients, sometimes lawyers are not merely permitted but ethically required to make certain disclosures of confidential client information or disavow the use of various documents that the lawyer has created that reference the misrepresentations in order to avoid assisting in a client’s prospective crime or fraud (i.e. “noisy withdrawal”). See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-366. However, ‘noisy withdrawal’ does not necessarily put either successor counsel or the opposing party on notice as to why the documents are being disaffirmed. Thus, notwithstanding withdrawal and disaffirmance, the fraud could
continue to adversely affect the proceedings and ultimate disposition of the case. Direct disclosure under Rule 3.3, to the opposing party or if need be to the court, may prove to be the only reasonable remedial measure in the client fraud situations most likely to be encountered in pretrial proceedings.” ABA Comm. on Ethics and Prof’l Responsibility Formal Op. 93-376. See also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-366. (Client corporation had attorney certify documents that, unbeknownst to the attorney, materially misrepresented client’s financial status for the purpose of obtaining a loan. Attorney later learned of this fact, and also learned that client intended to continue to use the fraudulent certifications to obtain loans in the future. Attorney could disavow former work product, but only because she knew of its intended future use. If attorney had only learned of the past, already completed fraud, she would not be allowed to disaffirm prior work product.).

B. Case Law & Ethics Opinions Concerning Attorney’s Duty of Candor in Discovery

a. Client/Witness Misstatements at a Deposition

Model Rule 3.3 requires that attorneys have candor toward the tribunal. Although the definition of “tribunal” (see supra pg 3) does not specifically include a deposition, comment 1 to Rule 3.3 states that an attorney’s rule of candor also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

Model Rule 3.3 cmt 1.

Therefore, when lawyer learns, after the fact, that a client has lied about a material issue in a deposition in a civil case, a lawyer must take reasonable remedial measures starting by counseling the client to correct the testimony. See NYCLA Comm. on Prof’l Ethics Formal Op. 741 (Mar. 1, 2010). This remonstration should include an inquiry whether the client may be mistaken or intentionally offering false testimony. If the client might be mistaken, the attorney should refresh the client’s recollection or demonstrate to the client that his testimony is not correct. If the attorney concludes that the client is acting intentionally, stronger remonstration including reference to the attorney’s duty under the Rules to disclosure false testimony of fraudulent testimony to the court. If your client is a corporation, this may include reporting the
known false testimony up the latter to the general counsel, chief legal officer, board of directors, or chief executive officer. *See NYCLA Comm. on Prof’l Ethics Formal Op. 741 (Mar. 1, 2010).*

If remonstration is ineffective, the lawyer must take additional remedial measures, including, if necessary, disclosure to the tribunal but must do so in a way to minimize the disclosure of confidential information. The attorney should attempt to rectify the material misrepresentation it is relied upon to another’s detriment. In these cases, withdrawal is not sufficient as it does not correct the false deposition testimony. Withdrawal is only acceptable if the withdrawing attorney explains to the substituting attorney the nature of the problem so that the substituting attorney can correct it. *See NYCLA Formal Op. 741.*

Philadelphia Ethics Op. No. 95-3 (1995) addresses a very common scenario: what to do when a plaintiff, suing a corporation, lies during a deposition to protect the identity of one of defendant’s employees who supplied him with information. If the attorney knows that the plaintiff is lying in their deposition to protect this individual’s identity, the Ethics Opinion states that, so long as counsel does not submit this particular deposition testimony to a tribunal for any purpose then an attorney is not offering any evidence that the lawyer knows to be false. Further, if the attorney determines that this fact is not “material” to the underlying proceeding, then no obligation arises under Rule 3.3.

### b. Misrepresentation Responses To Discovery Requests

ABA Comm. Prof’l Ethics Formal Op. 93-376 (1993) addresses directly the lawyer’s obligations where a client lies in response to discovery requests. The Opinion is clear that once discovery materials are signed and used for motions they are clearly governed by 3.3. Further, even before these documents are filed there is potential ongoing reliance upon their content which would be outcome-determinative, resulting in an inevitable deception of the other side and a subversion of the truth-finding process which the adversary system is designed to implement. Thus Model Rules 3.3(a)(2) & (4) apply. Continued participation by the lawyer in the matter without rectification or disclosure would assist the client in committing a crime or fraud in violation of Rule 3.3(a)(2).

For example, in *Matter of Shannon*, 179 Ariz. 52, 63-64, 876 P.2d 548, 559-60 *modified*, 181 Ariz. 307, 890 P.2d 602 (1994), after a client provided his attorney with his answer to
interrogatories with a sworn verification, the attorney attempted to get the client to change his answers to be consistent with the representations of another client that he was also representing in the action. Once the client refused to change the answers, the attorney revised these interrogatory answers with a computer and used the same verification. The attorney knew that his client had not seen the revised answers and disagreed with the answers, yet submitted them anyways. The Court concluded that this was a violation of Rule 3.3. Although the attorney argued that he did not believe that his client’s answers were true, and that he believed the revised answers were true to the best of the lawyer’s knowledge, the court held that he had submitted false evidence to the court as the interrogatory answers did not accurately reflect his client’s position. See also Briggs v. McWeeny, 260 Conn. 296, 796 A.2d 516 (Conn. 2002) (sanction of disqualification of attorney from representing school district not disproportionate to attorney's violation of ethical rules, where attorney attempted to suppress relevant, discoverable engineering report to opposing parties that was inimical to district's interests in litigation, attempted to prevent repair contractor who had commissioned report from disclosing it, and attempted to subvert the discovery process).

c. Misrepresentation in Filings Submitted to Tribunal

In Schlafly v. Schlafly, 33 S.W.3d 863 (Tex. Ct. App. 2000), a Texas Appellate court awarded sanctions finding that a party blatantly misrepresented and mischaracterized the facts of the lower court proceedings in his appellate brief, giving the Court good cause for ordering him to pay all costs of the appeal. The Court noted:

When counsel misrepresent the facts on which their legal arguments are based, they not only delay the entire process by unnecessarily adding to the court's workload but also render a tremendous disservice to their clients. It is also very poor strategy to misrepresent the record because any material misstatements and/or omissions will almost certainly be detected by opposing counsel, the appellate panel, and/or the court's alert and able staff. In this case, Mike's factual representations constituted such an obvious mischaracterization of the record that the discrepancies were apparent to all.... Our adversary system contemplates that each party's advocate will present and argue favorable and unfavorable facts in the light most advantageous to his client; it does not contemplate misrepresentation or mischaracterization of those facts.

Id. at 873-74.
N.Y. State Ethics Op. No. 797 (2006) states that if a lawyer determines that a client has made false representations to the court in an affidavit, the lawyer must call upon the client to correct the information in the affidavit, and, if the client refuses, the lawyer must withdraw any misstatements the lawyer made in certifying the client's statements; the lawyer must also consider whether the lawyer is required or permitted to withdraw from the representation. In another New York opinion, N.Y. State Ethics Op. No. 781 (2004), the committee held that a lawyer who learns that a financial statement submitted by the lawyer to the court contains a material omission, and that the client has perpetrated a fraud on the tribunal, must call upon the client to correct the material omission; if the lawyer knows or it is obvious that continued employment will result in violation of a disciplinary rule, the lawyer must withdraw from the representation, with the court's permission if required under its rules. See also Jenkins v. Methodist Hospitals of Dallas, Inc., 478 F.3d 255 (5th Cir. 2007) (trial court did not abuse its discretion in imposing, sua sponte, Rule 11 public reprimand sanctions against plaintiff's attorney for a misrepresentation in his brief in opposition to summary judgment motion in section 1981 race discrimination case-attorney misquoted plaintiff's affidavit statement that the chief of the hospital's department of medicine told him that he would not let plaintiff treat his dog as "Boy, I would not let you treat my dog," inserting the racially charged word "Boy" at the beginning of the statement; although the error was pointed out by opposing counsel in November 2003, the attorney did not correct it until roughly two months later, at the summary judgment hearing).

d. Client/Witness Preparation for Deposition

Model Rule 1.1 requires that lawyers provide competent representation to a client. “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” This undoubtedly includes an attorney’s responsibility to prepare his witness for deposition. But what is the line between developing effective testimony and telling the witness what to say? According to the Comments to Rule 1.1, “[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and . . . adequate preparation.” See Model Rule 1.1 cmt 5. Comment 1 to Model Rule 3.4 states that “[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly coaching witnesses,
obstructive tactics in discovery procedure, and the like.” See Model Rule 3.4 cmt. 1 (emphasis added).

Although it seems obvious that the Model Rules would prohibit an attorney from telling or employing other methods to get their witness to testify falsely, there are no other defined bounds as to what proper preparation of the witness can or cannot ethically include. Section 116 of the Restatement (Third) of the Law Governing Lawyers confirms that there is “relatively sparse authority” on witness preparation. Restatement (Third) of the Law Governing Lawyers § 116, reporter's note to cmt. b (2000) (collecting cases). The Restatement provides some guidance, however:

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following:

1. discussing the role of the witness and effective courtroom demeanor;

2. discussing the witness's recollection and probable testimony;

3. revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light;

4. discussing the applicability of law to the events in issue;

5. reviewing the factual context into which the witness's observations or opinions will fit;

6. reviewing documents or other physical evidence that may be introduced; and

7. discussing probable lines of cross-examination that the witness should be prepared to meet.

Witness preparation may include rehearsal of testimony. A lawyer may suggest [a] choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.

III. **Ethics and Electronic Discovery**

It has been estimated that only one percent of the data existing in the world today is in hard copy format. Thus, 99 percent of it is in an electronic format. It has also been estimated that, as of 2007, over 295 exabytes of electronic data existed worldwide. If this amount of data were stored digitally on CDs, the stack of discs would reach beyond the moon.¹

Discovery has changed dramatically with the addition of the e-discovery amendments to the Federal Rules of Civil Procedure over seven years ago. What used to be the norm is no longer adequate. For example, after a charge was lodged in employment litigation, on the defense side you used to tell your client to send over the personnel files, investigation files, performance reviews, and files maintained by HR personnel. There would have been limited areas to look for written documents. On the plaintiff’s side, there would only be a few paper documents that could support the charge.

Now, electronic evidence has vastly expanded the landscape of what attorneys on both sides should routinely request of their clients and raised questions about how to preserve data that can be destroyed oftentimes with the simple click of the “delete” key.

Initially, it is important to note two exemplar cases that set the scene for the ethical landscape of e-discovery at the trial level. The first is a 2005 Florida circuit court case, in which Coleman Holdings had sued Morgan Stanley for fraud in connection with a sale of stock of Coleman to Sunbeam Corporation. During this case, the court found discovery misconduct by defendant including over-writing emails, providing a certificate of compliance known to be false and not timely withdrawing it, and failing to conduct proper searches for backup tapes that may have contained emails, and many other problematic issues surrounding the preservation and production of electronic data. The court commented:

> Electronic data are the modern day equivalent of the paper trail. Indeed, because of the informalities of e-mail, correspondents may be less guarded than with paper correspondence. In this case, the paper trail is critical to [Plaintiff’s] ability to make out its prima facie case. Thus, [Defendant’s] acts have severely hindered [Plaintiff’s] ability to proceed. The only way

---

to test the potentially self-serving testimony of [defendant’s] personnel is with the written record of events.


Given this e-discovery misconduct, the trial court reversed the burden of proof for fraud based on the defendant’s “willful and gross abuse of its discovery obligations” The plaintiff was allowed to read a statement to the jury detailing the defendant’s efforts to hide its emails as evidence of evil intent. After even more e-discovery violations came to light, the court granted the plaintiff’s motion for sanctions which allowed Plaintiff to read to the jury a 12-page adverse inference instruction that included portions of the amended complaint describing the alleged fraudulent scheme in extensive detail. In the end, the jury awarded Plaintiff over $1.5 billion in damages consisting of $850 million in punitive damages.

The next case, Qualcomm, Inc. v. Broadcom Corp. 2008 WL 66932 (S.D. Cal. Jan. 7, 2008), was a patent infringement action brought by Qualcomm regarding video compression standards. Broadcom’s primary defense was waiver because, it claimed, the plaintiff had participated in joint, industry meetings regarding the standards in 2002. The plaintiff adamantly and repeatedly claimed that it did not participate in the meetings in 2002 and early 2003. It presented this defense throughout the litigation in written discovery, summary judgment, depositions, expert reports, motions in limine, pretrial memos of fact and law, during trial, and a motion for judgment as a matter of law. As the case progressed, plaintiff became “increasingly aggressive” in its claim that it did not participate in any joint, industry meetings during the time the standards-setting body was creating the video compression standard.

However, during discovery the plaintiff’s attorneys had not searched the emails of two 30(b)(6) witnesses who were produced regarding participation in the joint meetings. It was only during trial preparation, in a basic search of a laptop, that an associate located 21 previously unproduced emails that unequivocally demonstrated the plaintiff’s active participation in the joint meetings during the relevant time period. Plaintiff ultimately produced the emails to defendant during trial but only after a cross-examination during trial revealed the existence of these emails. These 21 emails were only the tip of the iceberg.
After a further review, plaintiff located 46,000 responsive documents (totaling over 300,000 pages) that had not been produced during discovery, and which were “inconsistent” with its argument that it did not participate in the joint meetings. In response, the judge ordered plaintiff to pay defendant $8.5 million for its “monumental and intentional discovery violations,” referred outside counsel to the State Bar of California for ethics violations, and ordered Plaintiff’s outside and in-house counsel to participate in a “CREDO” (Case Review and Evaluation of Discovery Obligations Protocol). The court-mandated CREDO required: (1) identifying the factors that contributed to the discovery violations; (2) creating and evaluating proposals, procedures, and processes that will correct the e-discovery deficiencies from the case; (3) developing a comprehensive protocol that will prevent future discovery violations; (4) applying the protocol that is developed to other factual situations; (5) identifying and evaluating data tracking systems, software, or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents; and (6) any other information or suggestions that will help prevent discovery violations.

It is from these two cases that lawyers, e-discovery counsel, and clients started to take a closer look at the dynamics of e-discovery obligations and ethics. The above two cases make the point that in today’s digital world, in-house and outside counsel must go beyond traditional requests for documents or even basic requests for emails in order to comply with Model Rules of Professional Conduct.

Plaintiffs’ attorneys are not immune. In today’s digital world, there is a host of data sources that individuals control that may have to be preserved and produced in litigation, including social media accounts, instant messages, and text messages. See generally, Electronic Discovery Special Report: Plaintiffs Have Their Own Duty to Preserve, Paul Weiner, NAT’L L.J., Dec. 19, 2011 (baseline e-discovery duties and obligations apply just as forcefully to

---

2 See e.g., McMillen v. Hummingbird Speedway, Inc., 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *3 (C.C.P. Jefferson Cnty., Pa. Sept. 9, 2010) (ordering plaintiff to provide his Facebook and MySpace user names and passwords to counsel for defendants, rejecting plaintiff’s argument that communications shared among one’s “private” friends is somehow protected against disclosure in discovery and instructing “‘no social network site privilege’ has been adopted by our legislature or appellate courts”).

3 See, e.g., In re Air Crash Near Clarence Center N.Y., 2011 U.S. Dist. LEXIS 146551 (W.D.N.Y. 2011) (directing plaintiffs to produce relevant electronic communications, including "social media accounts, emails, text messages, and instant messages").

4 See, e.g., Smith v. Café Asia, 246 F.R.D. 19 (D.D.C. 2007) (court ordered plaintiff to preserve text messages stored on cell phone as they might bear on defendant’s claim that plaintiff invited the alleged sexual harassment forming the basis for her claims).
individuals that are plaintiffs in litigation – who often anticipate litigation well in advance of any defendant).\(^5\)

**ABA Rule 1.1: Competence:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.\(^6\)

Courts have repeatedly emphasized the paramount role of the lawyer in fulfilling a client’s duty to preserve evidence. “Once on notice, the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligation to retain pertinent documents that may be relevant to the litigation.” Telecom Int’l Am., Ltd. v. AT&T Corp., 189 F.R.D. 76, 81 (S.D.N.Y. 1999). Moreover, most cases hold that technological ignorance is not an excuse with respect to lack of preservation or production. See, e.g., Martin v. Northwestern Mut. Life Ins. Co., 2006 WL 148991 (M.D. Fla. Jan. 19, 2006) (holding that a claim that counsel is computer illiterate and therefore incapable of retrieving emails did not serve as a good faith defense to a sanctions motion). This means that counsel must be familiar with the technology systems of their clients so they can advise as to the client’s obligations to preserve and ultimately produce electronic data. It also means that attorneys who lack familiarity with technology must become educated in this regard and/or hire competent e-discovery counsel to handle these issues.

**ABA Rule 1.2 (a): Allocation of Authority Between Client and Lawyer:** [A] lawyer shall abide by a client’s decisions concerning the objectives of representation and…consult the client as to the means by which they are to be pursued...

**ABA Rule 1.16 (a): Declining or Terminating Representation:** (a)... a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law.

The allocation of authority between client and a lawyer is always a difficult ethical issue. Navigating e-discovery obligations with clients is often difficult. In many instances, lawyers have to push the client to seek the roadmap to the client’s technological infrastructure. Clients


\(^6\) In August 2012, the comment to the ABA model rule on competence was amended to require attorneys to keep abreast of “the benefits and risks associated with relevant technology.” ABA Model Rule 1.1 cmt. 8 See, infra, p. 23.
do not always understand e-discovery obligations and this lack of understanding and proper explanation can in many instances push the attorney-client relationship into uncomfortable territory. But the courts have been consistently clear that the duty to preserve is only the beginning and an attorney’s ethical obligation extends to knowing where the data is, and overseeing and monitoring compliance with preservation and production of data.

Perhaps still the clearest language illustrative of attorney obligations is in the often cited, *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). As Judge Shira Scheindlin explained in that landmark case, to make certain that all sources of potentially relevant information are identified:

> counsel must become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of [the client’s] recycling policy. It will also involve communicating with the “key players” in the litigation, in order to understand how they stored information.

* * *

A party’s discovery obligations do not end with the implementation of a “litigation hold” – to the contrary, that’s only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.

*Id.* at 432.

Recent cases have only continued to emphasize that counsel must oversee compliance with the litigation hold.

In the end, attorneys must get out of their respective comfort zones to competently conduct e-discovery and understand the client’s technology infrastructure, and be able to competently develop a plan that ensures continuing compliance with preservation and production obligations.
The obligation will only grow and become increasingly more complex when addressing e-discovery of social media content. Social media continues to play an important role in electronic discovery with a number of courts focusing on a party’s preservation and production obligations of relevant content from Facebook and Twitter accounts.

In 2011, courts put personal injury and employment plaintiffs on notice that relevant chat conversations, photographs, and wall posts are potentially relevant and subject to production irrespective of whether the material is maintained publicly or according to self-set “privacy” settings. In Zimmerman v. Weis Markets, Inc., No. CV-09-1535 (Pa. Commw. Ct. 2011), Judge Charles Saylor, of the Northumberland County Court of Common Pleas, ordered the plaintiff to turn over all passwords, user names, and log-in names related to his MySpace and Facebook accounts. See also Gallion v. Gallion, FA114116955S (Conn. Super. Ct. 2011) (court ordered opposing divorce lawyers to exchange their client’s respective Facebook and dating website passwords).

But the import of these early cases is that posting on social media sites is a modern form of electronic communication in a highly public forum. When such communications become relevant in civil litigation, they are discoverable regardless of the self-set “privacy” setting of such content. See, e.g., A Litigator’s Guide to Discovery of Social Media ESI in Civil Actions, THE LEGAL INTELLIGENCE, Jan. 29, 2013, available at http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202586011014&thepage=1 (last accessed Feb. 26, 2013) (a party cannot hide behind self-set privacy controls because "no privilege exists ... for information posted in the nonpublic sections of social websites” and "[t]o permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial"). This means that attorneys should actively discuss with their clients what social media sites the client has used and how best to go about preserving and producing this social media content.

Hopefully, we can learn from the initial “mistakes” (some perhaps purposeful and some from technological ignorance) made in the Qualcomm and Morgan Stanley cases. With recent
rules, resources, increased awareness, and cooperation among parties,\(^7\) (coupled with the needed addition of dedicated e-discovery counsel, attorneys can learn the tools to successfully navigate the proper preservation and production of electronic data while avoiding the billion-dollar sanction.

IV. Ethical Issues in Discovery in EEOC Litigation

Over the past several years, there has been a detectable increase in the number of cases in which the Commission has sought and obtained sanctions for discovery abuses. In these cases, the conduct warranting sanctions can be matched neatly with duties and prohibitions in the ABA model rules of professional conduct. This paper uses the conduct described by the courts in a slate of opinions, discussed below, as the basis for applying the ABA model rules of professional conduct and other ethical guidelines relating to discovery.\(^8\)

In an extreme example of discovery-related misconduct experienced by the Commission, the defendant intentionally withheld relevant evidence through tampering with documents, lodging baseless objections to production, purposefully misleading the court and the parties, and delaying in responding to permissible discovery requests. In \textit{EEOC v. Fry’s Electronics}, No. C10-1562, ___ F.R.D. ___, 2012 WL 2576283 (W.D. Wash. 2012), the EEOC brought suit alleging that the defendant subjected a group of women to sexual harassment and retaliatory discharge. During the deposition of the defendant’s Fed. R. Civ. P. 30(b)(6) designee, the EEOC learned that the alleged harasser had previously been accused of sexual harassment and that an investigation had been conducted. The defendant’s counsel had “intentionally withheld this information and the related documents” by raising “unfounded objections and ‘negotiating’ a narrowing of the discovery requests.” \textit{Id.} at *1. Because of the defendant’s attorneys’ conduct, the EEOC lost the opportunity to question witnesses about the prior accusations in earlier depositions. Earlier in the case, the Court had sanctioned the defendant for its “disturbing lack of candor toward the tribunal” and for compromising the “integrity of the judicial process.” \textit{Id.} As

\(^7\) See, e.g., The Sedona Conference, \textit{The Sedona Conference Cooperation Proclamation} 1 (2008), available at http://www.thesedonaconference.org, which has been publically endorsed by over 125 state and federal judges across the country.

\(^8\) The views in this section of the paper are the author’s alone and do not necessarily represent the view of the EEOC or the U.S. government. This section of the paper makes no assessment whether the attorneys in these cases actually violated any ethical rule but rather uses the conduct described in the court opinions to illustrate how specific discovery tactics can run afoul of the ethical rules.
recounted by the Court, the defendant’s discovery responses were “baseless, blanket objections” resulting in “a slow trickle of responsive documents.” \textit{Id.} at *2. In addition, the defendant’s counsel had unilaterally redacted documents the Court had ordered it to produce (by concealing witness contact information), made an “urgent presentation” of hundreds of pages of irrelevant phone records for the purpose of misleading the court and the other parties, and removed interview notes from the files of the defendant’s internal investigation of sexual harassment. \textit{Id.} at *1. In addition, the defendant failed to produce responsive evidence including sales performance data and computer hard drives. \textit{Id.}

The Court found that the defendant’s conduct was “unfair, unwarranted, unprincipled, and unacceptable.” \textit{Id.} The Court concluded that counsel’s conduct fell “outside the acceptable realm of zealous advocacy,” was “frivolous and/or intended to harass,” “unreasonably and vexatiously multiplied these proceedings,” and demonstrated a lack of “diligence, compliance, and good faith,” and that counsel “deliberately engaged in deceptive practices that undermine the integrity and orderly administration of these proceedings.” \textit{Id.} at *2, *3. Ultimately, the Court struck the affirmative defense to the harassment claim, deemed improperly withheld documents presumptively admissible at trial, ordered a jury instruction that one of the justifications for firing a plaintiff was pretextual, permitted EEOC to argue adverse inference at trial, and imposed $100,000 in sanctions ($25,000 to each of three plaintiffs and $25,000 to the court). \textit{Id.} at *1, *4. In addition, the Court appointed a special master to review and report to the court about defendant’s compliance with outstanding discovery requests. \textit{Id.} at *4.

While the Court did not consider whether the defendant’s attorneys violated any rule of professional responsibility, the discovery tactics described by the Court run afoul of multiple duties and prohibitions in the ABA model rules. Rule 3.2 expressly prohibits delay solely for purpose of frustrating opposing party; Rule 3.4 expressly prohibits failing to make a diligent effort to comply with legally permissible discovery requests, destroying, concealing or altering relevant evidence, and engaging in obstructive tactics. The conduct described by the Court easily falls within both of these prohibitions. That the defendant’s attorneys may have been zealously advocating for their client is no defense for this type of conduct. As noted by the Court itself, the duty to zealously protect and pursue a client’s legitimate interests does not authorize an attorney to engage in unfair and unprofessional conduct. \textit{See} ABA Model Rule 1.3 cmt 1 (“The lawyer’s duty to act with reasonable diligence does not require the use of offensive
tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”). In any event, the conduct described by the Court ultimately worked against the legitimate interests of the client rather than zealously protecting them.

The misconduct described in the Fry’s Electronics case is at the extreme end of unprofessional conduct encountered in Commission litigation. A much more typical example of discovery-related misconduct is the lodging of frivolous or blanket objections to discovery requests. For example, in EEOC v. McCormick & Schmick’s Seafood Restaurants, No. 11-02695 (D. Md. 2012) (unpublished, see ECF #39-41), the EEOC alleged that the defendant’s in-house counsel provided incomplete answers to interrogatories, propounded frivolous and conclusory objections, made disingenuous representations, and agreed to produce materials but then did not produce them. The Court granted the EEOC’s motion to compel, and the defendant’s counsel paid attorneys’ fees as a sanction. Similarly, in EEOC v. Baltimore County, No. 07-2500, 2011 WL 5375044 (D. Md. 2011), the defendant’s in-house counsel objected to numerous requests for admissions based on its objections to some of the terminology used in the requests. The Court found that the defendant’s denials “quibble over terminology while ignoring the clear object of the requests” and “focus[] on semantics in order to sidestep the substantive content of the requests.” Id. at *2, *4. The Court noted that the defendant could have “addressed the request while simply noting its objection.” Id. at *2. As a remedy, the Court deemed many of the requests as admitted, deemed some admitted with minor changes, and ordered the defendant to respond to others. The court also found that the defendant’s denials and objections were not substantially justified, and the defendant paid attorneys’ fees as a sanction. Id. *3-*7.

Although the conduct described in these cases is disturbingly common in Commission litigation, it plainly violates Rule 3.4’s prohibition against failing to comply with legally permissible discovery requests and may also violate Rule 3.3’s prohibition against delaying in the production of responsive information for the sole purpose of frustrating the opposing party.

Another discovery practice that is particularly troublesome in EEOC litigation is the issuance of third-party subpoenas as a “back door” method to obtain personal and confidential information about charging parties. In some cases, defense counsel have issued such subpoenas for medical, financial and personnel records and argued that the Commission lacks standing to seek court intervention to limit them. However, courts have generally rejected this argument and allowed the Commission to act to protect the privacy interests of charging parties. See, e.g.
EEOC v. Original Honeybaked Ham Co. of Georgia, No. 11-CV-2560, 2012 WL 934312 (D. Colo. 2012) (recognizing EEOC’s standing to raise privilege or privacy issues on behalf of charging parties and granting motion for protective order placing limits on third-party subpoena to protect charging party’s privacy interests). In some cases, defense counsel have issued subpoenas directly to charging parties in violation of the no contact rule. See Parker v. Pepsi-Cola Gen. Bottlers, Inc., 249 F. Supp. 2d 1006, 1010-11 (N.D. Ill. 2003) (holding that the “authorized by law” exception to the local equivalent of ABA Model Rule 4.2 creates no safe harbor for issuing a subpoena directly to a represented party). In other cases, opposing counsel have issued third-party subpoenas without providing any notice to the Commission.

In one case, EEOC v. Dillon Companies, No. 09-02237, (D. Colo. 2010) (unpublished, ECF #77), defense repeatedly issued third-party subpoenas with short response times and used the U.S. mail to provide notice to the EEOC. In response to this practice, the court required that counsel use email to notify the Commission at the time of service. After the Court order, the defendant again served notice of a subpoena by U.S. mail. The EEOC filed a motion to quash and for sanctions. The defendant withdrew the subpoena, not because of regard for court’s order, but because of late service. With the motion pending, defense counsel again did exactly the same thing. The Court denied EEOC’s request to quash the subpoena as a sanction but ordered the payment of attorneys’ fees. Subpoena practice that deprives the Commission of a fair opportunity to object and participate in the discovery process would seem to violate Rule 3.4’s duty of fairness to opposing counsel because it impedes fair competition in the adversary litigation system.

Another example of discovery-related misconduct often experienced by the Commission is the failure to place an adequate litigation hold on potentially relevant documents. In EEOC v. Resources for Human Development, Inc., 843 F. Supp. 2d 670 (E.D. La. 2012), a suit challenging discharge based on disability in which the charging party had died prior to suit filing, the EEOC learned during a deposition that the two decision-makers kept notes of their conversations with each other and with the charging party about her performance but had destroyed their notes. The EEOC learned that the defendant’s general counsel had failed to instruct the decision-makers to retain all records or documents concerning the charging party. Id. at 673. To rectify the problem, one of the decision makers attempted to reconstruct his notes from his memory. The Court rejected the defendant’s contention that the notes contained
irrelevant information and found it “preposterous and absurd” to believe that no prejudice flowed
from the destruction, especially as the charging party had died and could not respond to the
defendant’s allegations about her performance. Id. The Court concluded that the notes were
“callously destroyed or lost in bad faith violation of Defendant’s legal duty” to preserve them
and ordered the sanction of fees. Id. The Court struck the reconstructed notes, permitted the
EEOC to retake the depositions, and threatened an adverse inference instruction if depositions
did not remedy the problem. As another example of failing to preserve, in a nationwide claim of
race discrimination in hiring filed last year, the Commission alleged in its complaint that the
defendant failed to retain a litany of relevant records, including employment applications, test
administered to applicants, list of job candidates, electronic messages and audio recordings of
efforts to contact the corporate complaint center, even after receiving notice of a Commissioner’s
charge. See Second Amended Complaint, EEOC v. Bass Pro Outdoor World, LLC, No. 4:11-
CV-3425 (S.D. Tex. filed Jul. 20, 2012), ECF #61 at ¶507.

In the past several years, the Commission has focused increasingly on the discovery of
electronically stored information (ESI), and in some cases has found inadequate or no litigation
#160), the EEOC brought suit alleging, inter alia, that the defendant removed female employees
from the mortgage consultant “call queue” and transferred lucrative calls to male employees.
The EEOC’s theory depended on data in the defendant’s electronic “skill login” data records
insofar as a statistical analysis of the data could reveal a pattern of disparate treatment. After
EEOC filed suit, the defendant destroyed its skill login data for a full year covered by the suit.
The Court rejected the defendant’s claims that it lacked notice of the class nature of the EEOC’s
claim, pointing to numerous written notices to that effect from the Commission, which came
immediately prior to the destruction of the data. The Court found that the defendant’s “failure to
establish a litigation hold is inexcusable” and that “Defendant’s dubious failure if not outright
refusal to recognize or accept the scope of this litigation” eliminated any argument that the data
was purged as a result of the routine, good faith operation of an ESI system. The Court
characterized the defendant’s conduct as “at least negligence and reaches for willful blindness
bordering on intentionality.” As a remedy, the Court denied the defendant’s pending motion for
summary judgment, which turned in part on skill login data, and also granted an adverse
inference instruction regarding the destroyed data.
In *EEOC v. New Breed Logistics*, No. 10-2696, 2012 WL 4361449 (W.D. Tenn. Sep. 25, 2012), the EEOC brought suit alleging that a group of women were subjected to sexual harassment and retaliatory discharge. After in-house counsel received notice of the charge and investigation, the defendant did not issue a litigation hold letter, take steps to preserve emails, or collect emails from the company’s key players until after the EEOC filed suit. The defendant also overwrote back-up tapes and purged the charging party’s email account. After the defendant fired one of the harassers, it purged his email. Once the defendant hired outside counsel, it immediately preserved emails for certain key players and issued a litigation hold. However, even then, the defendant did not preserve emails for one of the key players. *Id.* at *4. The Court concluded that the duty to preserve extended to the spoliated emails and that the defendant should have mitigated the spoliation by preserving the back up tapes. *Id.* at *7. The Court denied the EEOC’s request for an adverse inference instruction and fees, but ordered a forensic evaluation of certain back up tapes at the defendant’s expense (at an estimated cost of $6-10,000). *Id.* at *7-9.

In all of these spoliation cases, the conduct described suggests a lack of diligence in the representation of a client in violation of Rule 1.3, as well as perhaps a lack of sufficient competence in violation of Rule 1.1. In EEOC matters, a competent and diligent attorney must advise clients that any personnel record made or kept must be preserved until the final disposition of the charge. See 29 C.F.R. §1602.14. This preservation requirement extends to electronically stored information ESI. *See, e.g.*, *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) (articulating duty to suspend routine document retention/destruction policy and put in place a litigation hold once a party reasonably anticipates litigation). The destruction of relevant ESI may result in discovery sanctions if there is no intervention to modify or suspend features of the routine operation of information systems to prevent the loss of information. *See* Fed. R. Civ. P. 37(e) (precluding sanctions where ESI is destroyed due to routine, good faith operation of an information system) & cmt. to 2006 Amendment (“Good faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine to prevent the loss of information, if that information is subject to a preservation obligation” and “the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’”). In August 2012, the ABA model rule on competence was amended to require attorneys to keep abreast of “the benefits and risks associated with
relevant technology.” ABA Model Rule 1.1 cmt. 8; 
http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf; cf. Sedona Conference Commentary on Legal Holds, Sedona Conference Journal (vol. 11, Fall 2010), 269-70 (setting out eleven guidelines for preserving ESI). Thus, if a lawyer’s lack of familiarity with the operation of a client’s email system, ESI destruction and retention system, or other system of information governance leads to a failure to preserve, the lawyer has failed to meet the duty of competent representation.

As the Commission has expanded its focus on systemic discrimination, another discovery-related ethical issue has centered on the permissibility of contacts with putative class members. It is often unclear how to apply the ethical rules on ex parte contacts (Model Rule 4.2) and communications with unrepresented parties (Model Rule 4.3) in EEOC systemic litigation, since the EEOC does not “represent” individuals in the way that private counsel does and the class certification rules do not apply to EEOC actions. Nonetheless, a real potential for abuse exists when defense counsel contact putative class members in EEOC systemic cases. The Commission generally takes the position that communications with all individuals for whom the EEOC seeks relief are covered by Rule 4.2. Even if Rule 4.2 does apply, there is a significant potential of overreaching in such contacts. Accordingly, the Commission generally seeks a protective order whenever defense counsel seeks to communicate directly with putative class members concerning the subject matter of an EEOC suit.⁹

⁹ See Christopher Lage, Avoiding and Dealing with Unethical Communications with Putative Class members in Systemic Cases, 27 ABA J. Lab. & Empl. L. 43 (2011) for a thorough discussion of this issue.
V. Conclusion

This paper demonstrates that the ethical duties faced during discovery are indeed very complicated. It is our hope that with the knowledge gained in this paper and through our presentation, attorneys can have a greater awareness of their ethical obligations and counsel their clients accordingly so that these ethical missteps can be prevented before they occur.