E-DISCOVERY UNDER THE MODEL RULES

A number of Model Rules may apply in an e-discovery context.[31]

Competence Under Model Rule 1.1 and The Rise of E-Discovery Counsel

Model Rule 1.1 provides:

> *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

Comment [6] adds:

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

After having read the brief tutorial above, are you competent to handle e-discovery? You may know how to copy 250 responsive word processing documents onto a rewritable CD. You may not know that if you review documents on a rewritable CD before you transmit it, you may change the metadata associated with the documents you reviewed.[32] You may know what it means to secure a hard drive for forensic imaging. You may not know that merely turning on the computer associated with the drive will effect changes in the drive to be imaged. It is one thing to handle a production of email from a couple of key players. It is quite another to manage the production of email, spreadsheets, presentation files, database information, and word processing documents from different software and storage systems, in multiple locations in the United States or perhaps throughout the world, where numerous key players may have different storage habits and some locations may have different retention policies than other locations, and where translation issues may become significant. A lawyer should know when to tell a client to preserve documents, but will the lawyer know enough to identify when the duty to preserve attaches and whether backup systems should be suspended until the client and the lawyer can understand whether there might be a duty to preserve electronic information stored on backup tapes?

E-discovery will change litigation as many litigators have known it because they are not competent on their own to handle production of electronic documents and may not be competent without assistance to negotiate with a vendor regarding the proper scope of an electronic production. Technology has increased productivity in our personal and business lives. Yet because technology allows parties to

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[31] While the discussion which follows may appear to be exhaustive, I have selected certain rules for coverage here and do not represent that I have identified every Model Rule that may apply to a particular ethics question involving e-discovery.

[32] If the CD is not rewritable (i.e., it is "read only" or "CD-R"), a review will not affect the metadata associated with the documents on the CD-R. However, depending upon how you copy the documents from a CD-R to other media or even to create a new CD-R, all of the metadata may not stay the same. Opening files from a thumb drive or a hard drive will alter the metadata associated with file. (Personal Communication with Arlen Tanner, April 21, 2008.)

store so much information so cheaply it has the potential to greatly increase the cost of litigation if lawyers are not competent to handle e-discovery smartly and sensibly whatever the amount in controversy.

Comment [1] to Model Rule 1.1 identifies relevant factors in determining whether a lawyer has the requisite knowledge and skill to handle a particular matter. They include,

> *the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.*

For entities facing numerous lawsuits, it is not at all unusual any longer to have "e-discovery counsel" who (a) have become familiar with the architecture of the client's electronically stored information; (b) can meaningfully explain that architecture, especially with respect to accessible information and information that is not reasonably accessible because of undue burden or cost; (c) understand the cost implications of each e-discovery commitment; (d) will maintain consistency in e-discovery "meet-and-confer" sessions in different jurisdictions, and (e) can direct an efficient and properly-defensible collection and preservation effort. Where such counsel do not exist, lawyers must be able to take these factors, among others, into account to satisfy the requirements of Rule 1.1.[33]

If the lawyer or the lawyer's colleagues do not have the e-discovery expertise, and e-discovery counsel is not involved, finding a vendor who spends the client's money wisely, and whose mission is to work itself out of a job might be the lawyer's best friend to satisfy the requirements of Model Rule 1.1.[34]

Rule 4.4 and Ethics Issues Associated With Inadvertent Production of Privileged information

E-discovery increases the potential for inadvertent production of privileged information. Producing parties typically do not have mechanisms in place to retrieve, restore, and cost-effectively identify electronically stored information that is privileged. Hence, individual documents have to be reviewed for privilege determinations and in a production of hundreds of thousands, or millions, of pages of electronic documents, a privileged document or two might be missed. Does a lawyer who inadvertently receives a privileged document have an ethical obligation to notify the sender? Or

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[33] Comment [5] to Model Rule 1.1 adds that handling a matter competently "includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c)." Rule 1.2(c) provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

[34] Attending appropriate training programs may also be necessary. See Florida Ethics. Op. 06-2, discussed below (citing to its comment identical to Comment [6] of Model Rule 1.1, Florida RPC 4-1.1 "may necessitate a lawyer's continuing training and education in the use of technology in transmitting and receiving electronic information in order to protect client information under Rule 1.6(a)").

suppose the lawyer is the sender who after the fact discovers the inadvertent transmittal of a privileged document to a requesting party. What should the lawyer do?

Model Rule 4.4(b) and F.R.Civ.P. 26(b)(5)(b) now address this subject. Model Rule 4.4 provides that a lawyer who receives documents that the lawyer knows or reasonably should know were sent inadvertently[35] must "promptly notify the sender." Rule 4.4(b) reads in full:

> *(b) A lawyer who receives a document relating to the representation of the lawyer's client[36] and knows or reasonably should know that the document was inadvertently sent shall promptly[37] notify the sender.*

Comment [2] to Rule 4.4 suggests that Rule 4.4 is not limited to privileged documents, but embraces any documents "that were mistakenly sent or produced by opposing parties or their lawyers." Comment [2] further states that whether the lawyer is required to do more than give notice to the sender, "such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived."[38]

F.R.Civ.P. 26(b)(5)(B) addresses the former question. It explains what a lawyer is supposed to do if the lawyer is informed by a sender that a privileged document was inadvertently transmitted to the lawyer; i.e., the lawyer does not have to "notify the sender" under Model Rule 4.4, because the sender discovered the mistake before the recipient did. Since December, 1, 2006, in federal courts, F.R.Civ.P. 26(b)(5)(B) provides:

> *(B) If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed*

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[35] How is a lawyer to know whether a privileged document was sent inadvertently? In some cases, it will be obvious by the first line or few lines of the document. Or one might just ask one's opponent.

[36] The phrase "relating to the representation of the client" is language taken from Rule 1.6 which is discussed below. A document or information "relating to the representation of a client" includes one covered by the attorney-client privilege.

[37] "Promptly" connotes an ethically-required immediacy. While not every state has adopted Rule 4.4, it would still seem prudent for a lawyer-recipient, in the absence of an agreement between counsel or a court order, to advise everyone on the document review team that if a produced document appears to be privileged, it should be brought to the attention of the lawyer to ensure that the lawyer can determine whether the lawyer has a Rule 4.4 notification obligation.

[38] Comment [3] to Model Rule 4.4 provides: "Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4." Lawyers should consider "applicable law" and the RPC and ethics decisions of the jurisdiction in which the lawyer is offering legal services in evaluating how to proceed under Rule 4.4. Model Rule 1.2 provides in pertinent part that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." Model Rule 1.4(a) provides in part that a lawyer shall "(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;" "(3) keep the client reasonably informed about the status of the matter"; and "(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

> *it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.*

In other words, returning the document(s) would not be required unless the recipient fails to sequester or destroy the documents. But whichever document-handling option is chosen by the recipient of the inadvertently produced information, the recipient must also not use the information until the claim of privilege is resolved and must take reasonable steps to get copies of the documents back if they had already been disseminated before notice was received.

The combination of Rule 4.4 and F.R.Civ.P. 26(b)(5)(B) has sparked a debate among a number of ethics opinion writers on the propriety of "mining" metadata associated with the inadvertent transmittal or production of privileged documents.

ABA Formal Opinion 06-442: Mining of Metadata Permissible

In Formal Opinion 06-442, the ABA Standing Committee on Ethics and Professional Responsibility[39] determined that the Model Rules "generally"[40] permit a lawyer to "review and use embedded information contained in email and other electronic documents, whether received from opposing counsel, an adverse party or an agent of an adverse party." After first noting that most metadata is insignificant, the Standing Committee determined that the Model Rules "do not contain any specific prohibition against" the practice. Appearing to distinguish between the document and its associated metadata, the Standing Committee found Model Rule 4.4(b) inapplicable because it is silent "as to the ethical propriety of a lawyer's review or use of" the metadata or the inadvertently produced privileged document.[41]

Florida Bar Ethics Committee Opinion 06-2: Mining of Metadata Impermissible

Under ABA Ethics Op. 06-442, a lawyer's compliance with Model Rule 4.4(b) is limited to notice to the sender, and not forbearance from reviewing privileged documents and any associated metadata. The Florida Bar Ethics Committee reached just the opposite conclusion in Opinion 06-2 (September 15, 2006).[42] Relying on Florida Rule 4-4(b), which is identical to Model Rule 4.4(b), the Florida Bar Ethics Committee determined that it is the "recipient lawyer's" obligation,

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[39] The Standing Committee explained that its determination was based on the Model Rules and that, "The laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling." ABA Ethics Op. 06-442, n.2.

[40] Why the Standing Committee uses this word is not clear since Formal Opinion 06-442 does not offer a scenario under which a lawyer would be violating a Model Rule by reviewing metadata associated with a document received by the lawyer from an opposing counsel.

[41] If the document in question was produced in federal court litigation, F.R.Civ.P. 26(b)(5)(B) would undermine this rationale. It provides that once a recipient is on notice of an inadvertently produced privileged information, the recipient must not "use or disclose" the "information until the claim of privilege is resolved." It is not likely that a federal district court would regard metadata associated with a privileged document as distinct from the document, if that is, in fact, part of the rationale underlying Formal Opinion 06-442.

[42] http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+06-2?opendocument

Lawyers should be mindful of Rule 1.1 and 5.3 before undertaking the responsibility to manage a third-party e-discovery vendor.[102]

QUALCOMM V. BROADCOM

In *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Calif. Jan. 7, 2008), the magistrate judge sanctioned six lawyers for the failure of their client to conduct a proper search for electronic documents. Qualcomm ultimately produced—after trial—46,000 documents representing more than 300,000 pages that were relevant to the issues in the litigation and that, according to Qualcomm's letter of apology to the district court, "revealed facts that appear to be inconsistent with certain arguments that [counsel] made on Qualcomm's behalf at trial and in the equitable hearing following trial." *Id.* at *6. The lawyers were referred to the California Bar for "an appropriate investigation and imposition of possible sanctions." *Id.* at *18. The six sanctioned lawyers were not permitted by the magistrate judge to use attorney-client privileged communications to defend themselves. *Id.* at *13. They appealed the magistrate's decision in this regard.

The district court agreed with the six sanctioned attorneys and vacated this portion of the magistrate's order to permit the attorneys to put on evidence, presumably about who was responsible for the failure to produce the electronically stored information during discovery. 2008 WL 638108,*3 (S.D. Calif. March 5, 2008). In words that should give no comfort to either the six sanctioned attorneys or the Qualcomm attorneys, whose actions, presumably, will be the focus of the sanctioned attorneys' defense, the district court told the magistrate judge that her discretion "regarding responsibility and sanctions, if any, are not limited, either upwardly or downwardly, by the Order of Remand." *Id.* at *2.

The Duty of Candor Under Model Rule 3.3 Trumps Confidentiality Under Model Rule 1.6

Qualcomm represents a colossal e-discovery failure. The magistrate judge noted several provisions of the California RPC that may have been violated.

> *If Mammen and Batchelder were unable to get Qualcomm to conduct a competent and thorough document search, they should have withdrawn from the case or taken*

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[102] The dollars involved in dealing with e-discovery vendors can be large. To illustrate, Sullivan & Cromwell sued a vendor for alleged mistakes in handling e-discovery issues. In a complaint filed December 28, 2007 in the Southern District of New York, S&C accused Electronic Evidence Discovery, Inc. (EED) of "untimely and inaccurate" work. S&C asked the district court to declare that it did not have to pay a $710,000 bill from EED. See http://www.law.com/jsp/article.jsp?id=1199441137204. EED responded by suing S&C in King County Superior Court in Washington on January 7, 2008, demanding payment of $660,016.17 plus interest in the amount of $58,592.07. The matter was quickly and confidentially settled according to a January 18, 2008 report in the New York Law Journal. Disputes can also arise where a vendor is terminated in the middle of litigation and raises cost demands before returning the client's electronically stored information. Vendors do make mistakes. *PSEG Power New York Inc. v. Alberici Constructors*, 2007 U.S. Dist. Lexis 66767 (N.D.N.Y. Sept. 7, 2007) (vendor separated 3000 emails from their attachments); *In Re Seroquel Products Liability Litigation*, 2007 U.S. Dist. LEXIS 61287, *37-38 (M.D. Fla. Aug. 21, 2007) ("a significant portion of the production had blank pages; new load files were not searchable, in part because the date formats in the metadata were inconsistently loaded and email attachments not consistently associated or identified; authors were not identified as custodians for files; transposed metadata recipients/authors; and no page breaks were inserted in 3.75 million pages.")

> *other action to ensure production of the evidence. See The State Bar of California, Rules of Professional Conduct, Rule 5-220 (a lawyer shall not suppress evidence that the lawyer or the lawyer's client has a legal obligation to reveal); Rule 3-700 (a lawyer shall withdraw from employment if the lawyer knows or should know that continued employment will result in a violation of these rules or the client insists that the lawyer pursue a course of conduct prohibited under these rules). Attorneys' ethical obligations do not permit them to participate in an inadequate document search and then provide misleading and incomplete information to their opponents and false arguments to the court. Id.; Rule 5-200 (a lawyer shall not seek to mislead the judge or jury by a false statement of fact or law); see also,* In re Marriage of Gong and Kwong, *157 Cal.App.4th 939, 951 (1st Dist. 2007) ("[a]n attorney in a civil case is not a hired gun required to carry out every direction given by the client;" he must act like the professional he is).*

The analogous Model Rules are Model Rules 3.4(a)(1) and Rule 1.16(a), both discussed above, and Model Rule 3.3 which has not yet been mentioned. For ease of reference, again, Model Rule 3.4(a) provides:

> *A lawyer shall not:*
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> *(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;…*

Model Rule 1.16(a)(1) provides:

> *(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:*
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> *(1) the representation will result in violation of the rules of professional conduct or other law;…*

Finally, Model Rule 3.3(a)(1) and (3) are part of the duty of candor that every lawyer owes to a court. They provide:

> *(a) A lawyer shall not knowingly:*
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> *(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; …*
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> *(3) offer evidence that the lawyer knows to be false. If 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. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.*

As discussed earlier, Model Rule 1.6 requires lawyers to maintain the confidentiality of client information. Model Rules Rule 1.6(b) does, however, permit disclosure "to the extent the lawyer reasonably believes necessary:"[103]

> *(1) to prevent reasonably certain death or substantial bodily harm;*
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> *(2) to prevent the client from committing a crime or fraud[104] that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; and*
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> *(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.*
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> *(4) to secure legal advice about the lawyer's compliance with the Model Rules;*
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> *(5) to establish a claim or a defense in a controversy between the lawyer and the client, to establish a defense in a criminal or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or*
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> *(6) to comply with other law or court order.*

Model Rule 1.6(b)(5) codifies the common law right of a lawyer to use privileged information where necessary to establish a defense where there is "controversy" between the client and the lawyer. Had *Qualcomm* arisen in a model-rule jurisdiction, the lawyers accused of discovery misconduct should

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[103] Comment [14] (2003) gives content to this phrase. "Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable."

[104] Model Rule 1.0(d) defines "fraud": "'Fraud' or 'fraudulent' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."

have been able to invoke Model Rule 1.6(b)(5) in the initial sanctions hearing before the magistrate judge.[105]

That is hardly comforting, of course. The thought of a sanctions hearing at which in-house counsel and outside counsel are pointing fingers to establish each other's culpability should terrify all in-house counsel and their outside litigation counsel alike. If *Qualcomm* does not result in early and often collaboration and constant communication between companies with in-house counsel and their litigation counsel on e-discovery, the magistrate judge's final words will, indeed, have fallen on deaf ears:

> *While no one can undo the misconduct in this case, this process,*[106] *hopefully, will establish a baseline for other cases. Perhaps it also will establish a turning point in what the Court perceives as a decline in and deterioration of civility, professionalism and ethical conduct in the litigation arena. To the extent it does so, everyone benefits - Broadcom, Qualcomm, and all attorneys who engage in, and judges who preside over, complex litigation. If nothing else, it will provide a road map to assist counsel and corporate clients in complying with their ethical and discovery obligations and conducting the requisite "reasonable inquiry."*

2008 WL 66932, at *20.

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[105] The district court in *Qualcomm* explained that declarations filed by Qualcomm employees were "exonerative of Qualcomm and critical of the services and advice of their retained counsel. None were filed under seal." As a result of this "introduction of accusatory adversity between Qualcomm and its retained counsel regarding the issue of assessing responsibility for the failure of discovery" the factual basis "which supported the court's earlier order denying the self-defense exception to Qualcomm's attorney-client privilege" was changed. 2008 WL 638108 at *3 (citing *Meyerhofer v. Empire Fire & Marine Ins. Co.,* 497 F.2d 1190, 1194-95 (2d Cir.1974); *Hearn v. Rhay,* 68 F.R.D. 574, 581 (E.D. Wash. 1975); *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.,* 110 F.R.D. 557, 560-68 (S.D.N.Y.1986); A.B.A. Model Rules of Prof. Conduct 1.6(b)(5) & comment 10). Comment [10] to Model Rule 1.6(b) provides in pertinent part that, "Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.…The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced." The district court in *Qualcomm* concluded that, "The attorneys have a due process right to defend themselves under the totality of circumstances presented in this sanctions hearing where their alleged conduct regarding discovery is in conflict with that alleged by Qualcomm concerning performance of discovery responsibilities. *See,* e.g., *Miranda v. So. Pac. Transp. Co.,* 710 F.2d 516, 522-23 (9th Cir.1983)." 2008 WL 638108, at *3.

[106] The magistrate judge was referring to a protocol she required the Qualcomm attorneys and the six sanctioned attorneys to prepare for publication. She called it the "Comprehensive Case Review and Enforcement of Discovery Obligations" or "CREDO" program. It was to contain a "detailed analysis" of what went wrong, how to fix what went wrong, and how to ensure that a similar e-discovery failure would not occur, not just at Qualcomm but at other organizations facing e-discovery obligations. 2008 WL 66932 at *19.

Had Qualcomm's outside counsel[107] known of the failure to produce documents, they would have had to honor their certification and investigative obligations under F.R.Civ.P. 26(g)[108] and supplementation obligations under F.R.Civ.P. 26(e)(1)[109] before there would have been any consideration of their confidentiality obligations under Model Rule 1.6. And even if they could have somehow avoided their obligations under F.R.Civ.P. 26(g), the duty of candor under Model Rule 3.3 applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6." Model Rule 3.3, comment [10]. In other words, the duty of candor to a tribunal trumps the duty of confidentiality.[110]

Whatever the magistrate judge in *Qualcomm* concludes on remand, no lawyer should ever permit the lawyer's candor or honesty to be questioned, and certainly no lawyer should ever be associated with

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[107] I assume in this analysis that in-house counsel have not appeared as counsel of record or as signatories to any discovery responses.

[108] F.R.Civ.P. 26(g)(1) addresses initial disclosures under F.R.Civ.P. 26(a) and states: "Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name…. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: (A) with respect to a disclosure, it is complete and correct as of the time it is made; and (B) with respect to a discovery request, response, or objection, it is: (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." The district court in *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc. et al.*, 2007 U.S. Dist. LEXIS 15277, *40-41 (D. Colo. Mar. 2, 2007) explained that an attorney is entitled to rely on the assertions of the client under F.R.Civ.P. 26(g) provided that "'the investigation undertaken by the attorney *and the conclusions drawn therefrom* are reasonable under the circumstances.' Advisory Committee Notes to the 1983 Amendments to Fed.R.Civ.P. 26(g). *But [see] also Metropolitan Opera Ass'n, Inc. v. Local 100 Hotel Employees and Restaurant Employees International Union,* 212 F.R.D. 178, 221-224 (S.D.N.Y. 2003) (holding that defense counsel failed to comply with F.R.Civ.P. 26(g) by, *inter alia,* never adequately instructing defendant as to its overall discovery obligations, by failing to inquire about the client's document storage procedures and capabilities, by failing to implement a systematic procedure for document production or retention, and by failing to ask important witnesses for documents), *adhered to on reconsideration,* 2004 U.S. Dist. LEXIS 17093, 2004 WL 1943099."

[109] F.R.Civ.P. 26(e)(1)(A) provides that a party who has made an initial disclosure under F.R.Civ.P. 26(a) or responded to a request for production "must supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

[110] Cf. Ohio's Rule 1.6(c) ("A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary to comply with Rule 3.3 or 4.1.") *See Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1067 (7th Cir. 2000) ("The duty to protect confidentiality does not come before the duty to be honest with the court.") and cases cited therein. *See also* ABA Formal Opinion 93-376 (August 6, 1993) (duty of candor applies where a witness lied in a deposition taken during discovery: "The Committee is therefore of the view that, in the pretrial situation described above, the lawyer's duty of candor toward the tribunal under Rule 3.3 qualifies her duty to keep client confidences under Rule 1.6"). See also Opinion 2007-6, Rhode Island's Ethics Advisory Panel issued (March 26, 2007). A lawyer had successfully represented a Social Security beneficiary before an administrative law judge (ALJ) on a claim for additional benefits. The client received a lump sum payment from the Social Security Administration for $12,000 more than the client was entitled to receive. The lawyer advised the client to return the money but it had already been spent, the lawyer was told. As a fee, the lawyer is entitled to 25 percent of the additional benefits. This amount is withheld from the benefit payment by the SSA until the lawyer files a fee request. Before filing the request, the lawyer sought ethical guidance since the fee being withheld was based on 25 percent of the incorrectly calculated benefits. The panel determined that the proceeding had not yet concluded since a fee petition still had to be made and thus the attorney's duty of candor required the attorney to advise the ALJ of the error if the client refuses to notify the SSA of the error. "Insofar as the inquiring attorney must file a fee petition with the ALJ in order to receive his/her fee, the proceeding in this inquiry is not concluded. Therefore Rule 3.3, and not Rule 1.6, governs the conduct of the inquiring attorney." The attorney must also file a fee petition based on the correctly calculated benefit, the panel said. http://www.courts.state.ri.us/supreme/ethics/ethicsopinions2007.htm.

the presentation of false information to a court. One should not need rules of professional conduct to understand these facts.

But what of in-house counsel who have not appeared as counsel of record? Do they have disclosure obligations? This intersection between e-discovery and ethics requires a lengthier explanation.

The Duty of Disclosure Imposed on In-House Counsel Under Model Rule 1.13

Model Rule 1.13(b)[111] addresses the "Organization" as a client. It provides that if a lawyer "for an organization":[112]

> *knows facts from which a reasonable lawyer, under the circumstances, would conclude that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization as determined by applicable law.*

Three aspects of the Rule quickly attract a reader's attention. First, the standard is an objective one ("facts from which a reasonable lawyer, under the circumstances, would conclude…"), not a subjective one. Second, the operative language describes present or future conduct ("is engaged," "intends to act," "refuses to act") and not past conduct. Hence, immediately the applicability of this Rule to a past act is questionable.[113] Third, Rule 1.13(b) is prescriptive ("shall proceed" and "shall refer") although this requirement is mildly limited by the phrases "as is reasonably necessary in the best interest of the organization," or "Unless the lawyer reasonably believes it is not necessary in the best interest of the organization to do so."

What is a violation of a legal obligation to the organization? Presumably it covers acts that would be characterized as not in the best interests of the organization. One should conclude that the failure to honor the corporation's discovery obligations in litigation falls into this category.

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[111] California does not follow the Model Rules (one of two states that does not once New York adopts the Model Rules). Hence, this analysis may not be applicable under California's ethics rules.

[112] Rule 1.13(a) refers to a "lawyer employed or retained by an organization." Hence, Rule 1.13(b) covers both in-house and outside counsel. But in this e-discovery context, I address only in-house counsel.

[113] Comment [4] may be contemplating past acts, when it says: "Even in circumstances where a lawyer is not obligated to proceed by Rule 1.13, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization." For past acts, Rule 1.6(b)(3) may be applicable but only if the lawyer's services were used in furtherance of a client's commission of a crime or fraud. If this threshold is met, it would seem logical for a lawyer "for an organization" then to follow Rule 1.13 to make a Rule 1.6(b)(3) disclosure.

There is also a need for "substantial injury" to the organization. An intentional misstatement of expenses on an expense voucher would represent a violation of a legal obligation to the organization, but it might not result in "substantial injury." On the other hand, one must assume that violation of discovery obligations in litigation is "likely to result in substantial injury to the organization."[114] And a criminal law violation imputed to the organization would comfortably fall into this category.

Assuming a legal obligation to the organization is being violated and the "likely to result in substantial injury" standard is met, a lawyer for an organization then knows that he or she has to proceed "as is reasonably necessary in the best interest of the organization." What does that mean? Comment [3] to Rule 1.1.3 provides guidance:

> *As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious. The lawyer's obligation to proceed as is reasonably necessary in the best interest of the organization is determined by the conclusions that a reasonable lawyer would, under the circumstances, draw from the facts known. The terms "reasonable" and "reasonably" imply a range within which the lawyer's conduct will satisfy the requirements of Rule 1.13. In determining what is reasonable in the best interest of the organization the circumstances at the time of determination are relevant. Such circumstances may include, among others, the lawyer's area of expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience and familiarity with the client. For example, the facts suggesting a violation may be part of a large volume of information that the lawyer has insufficient time fully to comprehend. Or the facts known to the lawyer may be sufficient to signal the likely existence of a violation to an expert in a particular field of law but not to a lawyer who works in another specialty. Under such circumstances the lawyer would not have an obligation to proceed under Paragraph (b).*

Comment [4] contains additional guidance:

> *In determining how to proceed under Paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.*

And what is an organization's lawyer armed with "knowledge" under Model Rule 1.13(b) then supposed to do? Rule 1.13(b) says the lawyer should refer the matter up the authority ladder:

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[114] A failure to produce 46,000 documents representing 300,000 pages of responsive information that contradicts positions taken before the district court and jury would unquestionably fall into the category of "likely to result in substantial injury to the organization." However, not every e-discovery search or production failure will fall into this category. Each situation would have to be judged on its unique facts.

> *Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization as determined by applicable law.*

With respect to an in-house counsel in a Model Rule 1.13 analysis, the less senior the in-house lawyer, the more likely it is that the general counsel or assistant general counsel would be the recipient of the referral of the matter. The more senior the in-house lawyer, the more likely it is that the referral would be made to a senior officer or, depending upon the facts, one or more members of the board of directors.[115]

Referral is Rule 1.13's preference. Comment [4] explains, "Ordinarily, referral to a higher authority would be necessary." However, comment [4] also suggests giving the offending "constituent"[116] the opportunity to cure:

> *In some circumstances, it may be appropriate for the lawyer to ask the constituent to reconsider the matter, for example if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority.*[117]

In other words, if a junior lawyer on an in-house e-discovery team believes there have been e-discovery failures, the junior lawyer can first go to the person responsible on the team to "cure" the failures. The graver the failures, however, the more likely it is that communication with the offending constituent(s) will be preempted by a direct contact with a higher authority. Comment [4] to Rule 1.13 agrees:

> *If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent.*

Suppose that the reporting lawyer has referred the matter to the general counsel and nothing happens. Should the lawyer go higher up the chain of command? Depending upon the circumstances, it appears that the lawyer may have the obligation to go over the general counsel, since 1.13(b) provides for

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[115] Philadelphia Bar Association, Ethics Opinion 2006-7 (January 2007) addressed reporting under Rule 1.13 by outside counsel. The lawyer making the inquiry was former counsel to an organization that had applied for tax exempt status and then later decided to convert to a for-profit venture, without disclosing this fact to members and volunteers. The inquirer sought to determine whether the inquirer could disclose this fact to the members and volunteers but was told that, under Pa. RPC 1.13(a) and (b), disclosure should be made in writing to the Board of Directors that the inquirer was no longer counsel and the organization was at risk of being in violation of substantive law. The ethics committee appeared to assume the inquirer was still counsel to the organization even though the inquirer had advised the Internal Revenue Service of her disassociation as counsel. http://www.philadelphiabar.org/page/EthicsOpinion2006-7?appNum=1&wosid=9rloAixh2jjM9dSVil9zA0

[116] A "constituent" would be an officer, director, employee or shareholder. Rule 1.13, comment [1].

[117] If the constituent rejects this opportunity to cure, "it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization."

referral to a "higher" authority (say, the general counsel) but also allows for referral to the "highest" authority if "warranted by the circumstances."

However, in an in-house setting, another way to read Model Rule 1.13(b)(3) is to say that the less senior lawyer has satisfied his or her obligations by referral to a more senior lawyer who then has to consider his or her ethical obligations under Model Rule 1.13(b). Only when the highest ranking in-house lawyer in the chain of command gets the problem does it then go to management, including, depending upon the seriousness of the matter, the board of directors, and perhaps even outside directors on the board.[118]

Whether it is the first reporting lawyer or a reporting lawyer with higher authority, Rule 1.13(b) requires that the "matter" ultimately reach the "highest authority" that can act on behalf of the organization "as determined by applicable law."[119]

What is the remedy should the highest authority fail to act? Model Rule 1.13(c) provides that "except as provided in Paragraph (d),"[120] if

> *(1) despite the lawyer's efforts in accordance with Paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate fashion action, or a refusal to act, that is clearly a violation of law, and*
>
> *(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,*
>
> *then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.*

To go outside the organization with a disclosure under Model Rule 1.13(c) there are different thresholds than to make an up-the-ladder report within the organization under Rule 1.13(b). To make a Rule 1.13(b) report, a mixed standard is applied. A lawyer who knows "facts from which a reasonable lawyer, under the circumstances, would conclude" that an action is likely to result in substantial injury to the organization (an objective standard) is supposed to proceed "as is reasonably necessary in the best interest of the organization" and only if the lawyer reasonably believes it is not

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[118] Comment [4] cautions the reporting lawyer to seek to maintain confidentiality within the organization: "Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization."

[119] Presumably, that will, in most cases, be the board of directors, as comment [5] to Rule 1.13 states. Comment [5] recognizes that in certain circumstances, the independent directors of the corporation may be the appropriate recipient of a disclosure.

[120] Paragraph (d) provides: "Paragraph (c) shall not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law."

necessary (a subjective standard),[121] the lawyer is supposed to refer the matter to higher authority in the organization. In contrast, to go outside the organization under Rule 1.13(c), there is a subjective standard ("the lawyer reasonably believes…").

Whereas Rule 1.13(b) requires a "violation of a legal obligation to the organization, or a violation of law which reasonably may be imputed to the organization," to go up the ladder, to go outside the organization Rule 1.13(c) ups the ante by requiring that the action or refusal to act is "clearly a violation of law."

In addition, to justify an up-the-ladder report, Rule 1.13(b) characterizes the act in question as one that "is *likely* to result in substantial injury to the organization." Under Rule 1.13(c), if the highest authority continues the conduct or fails to address the conduct in a timely and appropriate fashion, disclosure then requires that the "violation"—presumably referring to the violation of law in Rule 113(c)(1)—is "*reasonably certain* to result in substantial injury to the organization." The objective standard is tied to a likely result while the subjective standard is tied to a reasonably certain result.

Finally, Rule 1.13(b) uses prescriptive language ("shall proceed" and "shall refer") while Rule 1.13(c) uses permissive language ("may reveal").

Rule 1.13(c) does not identify the recipient of the information to be revealed. In a litigation context, one would presume that the in-house counsel would tell outside counsel there was a problem with the production thereby triggering outside counsel's obligations to examine the discovery responses to ensure compliance with F.R.Civ.P. 26(e) and (g) and the duty of candor under Model Rule 3.3.

Note that under Rule 1.13, Rule 1.6 is not controlling.[122] The "lawyer employed or retained by an organization" under Rule 1.13(a) who gives the organization the opportunity to act through its highest authority may ignore Rule 1.6 but is limited to a disclosure that the lawyer reasonably believes – a subjective standard again – "necessary to prevent substantial injury to the organization." Unlike Rule 1.6 which requires that the lawyer's services be used in furtherance of the crime or fraud, Rule 1.13 is more expansive; it refers to "information relating to the representation" or "that the matter be related to the lawyer's representation of an organization." Rule 1.13(c) and comment [6].[123]

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[121] I call this a subjective standard because the lawyer decides what is a reasonable belief, in contrast to the earlier language in Model Rule 1.13(b which makes reference to "facts from which a reasonable lawyer, under the circumstances, would conclude…."

[122] Comment [6] explains that Paragraph (c) "supplements" Rule 1.6 but does "not modify, restrict, or limit" Rule 1.6's provisions.

[123] If the services of a lawyer for an organization are also being used in furtherance of a crime or fraud, Rule 1.6(b)(2) and (3) "may permit the lawyer to disclose confidential information." Rule 1.13, comment [6]. If Rule 1.2(d) is applicable, "withdrawal from the representation under Rule 1.16(a)(1) may be required." *Id.* As discussed above, if the representation results in a violation of the rules of professional conduct, Rule 1.16 triggers mandatory withdrawal. Also as discussed earlier, Rule 1.2(d) provides that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably knows is criminal or fraudulent. For an in-house counsel, presumably that means that the lawyer must resign.

This is not the case in *Qualcomm*, but what happens if a reporting lawyer is discharged or withdraws before the highest authority in the organization learns of the lawyer's concerns?[124] May that lawyer still climb the reporting ladder to the highest authority or inform the highest authority of the discharge or withdrawal? Rule 1.13(e) gives the lawyer discretion on how to proceed:

> *(e) A lawyer who reasonably believes that he or she has been discharged*[125] *because of the lawyer's actions taken pursuant to Paragraphs (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of those Paragraphs,*[126] *shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.*

Let's return to the in-house e-discovery undertaking.[127] Let's assume as is the case in *Qualcomm* that more than one lawyer is involved. Let's further assume that none of the in-house counsel has appeared as counsel of record or signed discovery responses. If other than the senior lawyer on the in-house team decides that the team has not performed an adequate search for documents—say because the team did not identify sufficient numbers of custodians, or it did but it did not adequately search storage media associated with the custodians, or, worse yet, that it did not search at all for certain categories of requested documents—under Model Rule 1.13(a), the lawyer should address the

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[124] Cf. Formal Ethic Opinion 11, North Carolina Bar, January 18, 2001 (http://www.ncbar.com/ethics/ethics.asp?order=0) (Attorney A, employed by Corporation C, was assigned to monitor compliance with a settlement with the United States. Attorney A learns of a separate scheme to defraud the United States of $38 million through improper billings, involving the chief financial officer and chief executive officer of Corporation C. Attorney A informs the general counsel of the fraud scheme and, two weeks later, is fired. Attorney A has documents that reveal the scheme and wishes to approach the U.S. Attorney's office. The opinion provides that Attorney A may reveal confidential information if such information "concerns the intention of Corporation C to commit a crime and the information is necessary to prevent the crime." However, if the information relates to "past conduct, it may not be disclosed to the US Attorney." The opinion next states that confidential information may not be shared and recommended that in a wrongful termination action (permissible in North Carolina under the circumstances), Attorney A should obtain a ruling from the court on the scope of permitted disclosure after an in camera proffer of the confidential information).

[125] "Discharged" here presumably refers to an in-house counsel who has been terminated or an outside counsel that has been discharged.

[126] It is not clear what is meant by the phrase "circumstances that require or permit the lawyer to take action" under Rule 1.13(b) or (c) other than that the conditions of these paragraphs are satisfied.

[127] I assume in this analysis that the Sarbanes Oxley Act does not apply. In the case of a public company regulated by the Securities and Exchange Commission (SEC), Section 307 of the Sarbanes Oxley Act, 15 U.S.C. § 7245, required the Securities and Exchange Commission to adopt rules of professional conduct for lawyers "appearing and practicing" before the SEC. To meet the requirements of Section 307, the SEC issued a final rule entitled "Implementation of Standards of Professional Conduct for Attorneys." 17 CFR Part 205 (issued on January 29, 2003, under the authority of Section 307 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. 6296 (February 6, 2003) and adopted as a final rule effective August 5, 2003. http://www.sec.gov/rules/final/33-8185.htm. Section 205.3(b) of the SEC's Standards of Professional Conduct provides for "up-the-ladder" reporting of "evidence of a material violation." A material violation is "a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law." 17 CFR § 205.2(i). "Evidence of a material violation" means "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur. 17 CFR § 205.2(e). A "breach of fiduciary duty" refers to any "breach of fiduciary duty or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions." 17 CFR § 205.2(d). See generally, Barkett, *Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13,* presented at the ABA Annual Meeting (Atlanta, August 7, 2004) and, in an updated version, at the ABA Tort and Insurance Practice Section Spring CLE Meeting, (Phoenix, April 11, 2008).

concern with the senior lawyer on the team or any other person who represents "higher authority in the organization, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization as determined by applicable law." If the recipient of the information is a lawyer, then the recipient must decide how to proceed "as is reasonably necessary in the best interest of the organization" and may also have to refer the matter to higher authority or the highest authority depending upon the circumstances.

I will end the analysis here because I assume that no lawyer will want to be in the sequel to *Qualcomm*; in other words, appropriate remedial action will be taken within the organization working with outside counsel and, as appropriate, the district court.[128] However, if no action is taken to reverse the e-discovery misconduct, the lawyers who reported up the ladder will have to decide what actions to take under Model Rule 1.13(c).

Is there a simple conclusion to draw from this analysis? Taking any potential criminal conduct out of the discussion, it seems clear that an organization's lawyer who learns of civil conduct that has sufficiently large penalties attached to it has to move up the chain of command if the responsible constituent does not end the conduct.[129] Other conduct that represents a violation of a "legal obligation" to the organization or a violation of law that can be imputed to the organization must be likely to result in a "substantial injury" to the organization. If it does, the lawyer must climb the reporting ladder. What happens after this depends upon the reaction of, and reaction time by, the highest authority in the organization, the matter-specific facts, the seriousness of the matter and the pressures created thereby, and how Rule 1.13 reads or will read[130] in the state or states with jurisdiction.

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[128] *See United Medical Supply Co., Inc. v. United States*, 2007 U.S. Claims LEXIS 207 (Ct. Claims June 27, 2007). The United States Department of Justice was responding to discovery requests in a matter involving discovery of documents located at medical treatment facilities (MTFs). DOJ counsel emailed a DOJ paralegal asking: "Peter, can you brief me on where we stand?" The paralegal responded: "Where we stand is that I don't know of anywhere else that has any document or files from the time period in question. I've made several [calls] to hospitals such as Corpus and nobody knows of any. They've been destroyed." On its way to issuing an evidence preclusion sanction against the United States, this exchange prompted the district court to write: "Defendant has not explained why, at this point, it did not immediately notify the court that relevant documents had been destroyed, even if under the MTFs' normal documentation retention procedures." *Id.* at **10.

[129] *Cf.* Final Report of Neal Batson, Court-Appointed Examiner, 2003 WL 22853260 (CORPSCAN) (Bankr. S.D.N.Y. November 4, 2003). In evaluating the viability of claims of legal malpractice against Enron's in-house and outside counsel in the Enron bankruptcy, the examiner cited Texas RPC 1.12 (the equivalent to Model Rule 1.13) saying it "may be considered by a fact-finder in understanding and applying the standard of care for malpractice when that rule is designed for the protection of persons in the position of the plaintiff." The examiner argued that under Texas Rule 1.12 an attorney for an organization "must take reasonable remedial actions" that are in the best interest of the organization under circumstances covered by Texas RPC 1.12. The examiner concluded "that an attorney for Enron who knew that (i) an officer was engaging in wrongful conduct, (ii) substantial injury to Enron was likely to occur as a result of that conduct and (iii) the violation was within the attorney's scope of representation, but failed to take appropriate affirmative steps to cause reconsideration of the matter - including referral of the matter to a higher authority in the company, including, if appropriate, the Enron Board - would not have acted as an attorney of reasonable prudence would have in a similar situation." *Id.* at 14-15.

[130] Lawyers are advised to monitor amendments to Rule 1.13 in the states since a state is not bound to accept Model Rule 1.13 in its current form.

