The Rules Of Professional Conduct And the In-House Counsel

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I. Rules of Professional Conduct Applicable to In House Counsel

The following Rules Of Professional Conduct ("RPCs") have particular significance for in house counsel ("IHC").

A. New Jersey's and New York's RPCs apply to attorneys employed as IHC for an organization. N.J. Advisory Comm. on Prof. Ethics, No. 708 2006 WL 2038726, at *3 (2006); N.Y. City Ethics Op. 2008-2, 2008 WL 4642247 at *1.

1. IHCs are bound by RPC 1.6 which governs attorney's disclosure of confidential client information. See, e.g., Parker v. M&T Chems., Inc., 236 N.J. Super. 451, 463, n. 2 (App. Div. 1989); see also Wise v. Consolidated Edison, Co. of N.Y., Inc., 723 N.Y.S.2d 462, 463 (App. Div. 2001).

a. Only information learned in the IHC's professional capacity as an attorney is considered confidential under RPC 1.6.

b. Any confidential information or trade secrets the IHC learns of while performing nonlegal duties are not confidential under RPC 1.6 or the attorney-client privilege.

c. IHC employment agreements may further restrict the IHC's disclosures during and after the employment. N.J. Ethics, No. 708, 2006 WL 2038726, at *5 (2006); N.Y. State Ethics Op. No. 858.

2. For IHCs who are admitted in states other than New Jersey but work for organizations based in New Jersey, the IHC may hold a "limited license" pursuant to N.J. Court Rule 1:27-2 and may perform legal work solely for his/her designated employer in New Jersey. See RPC 5.5.

a. IHCs must abide by the NJ RPCs regardless of whether they are a member of the New Jersey bar.

b. An IHC who is based in New Jersey but is neither admitted in New Jersey nor holds a N.J. Court Rule 1:27 limited license is engaged in the unauthorized practice of law. RPC 5.5(b)(2); see, e.g., In re Jackman, 165 N.J. 580 (2000).

c. Registered IHCs may not appear in court on behalf of the organization or perform any other activity that requires *pro hac vice* admission.

B. NJ/NY RPC 1.13(a): An IHC's client is the organization, not the organization's constituents.

1. IHC may perform legal services for his/her employer, the organization, but not on behalf of the organization's clients. N.J. Comm. on Unauth. Pract. Op. No. 22 (Mar. 22, 1976); 22 NYCRR § 522.4(c).

2. When interacting with an organization's employees, officers and directors ("O/D"), or shareholders ("S/H"), the IHC must be clear that the individual is not the IHC's client.

a. NJ RPC 1.13(d) and NY RPC 1.13(a) require this explanation whenever the IHC knows or reasonably should know that the individual's interests are adverse to those of the organization, but it is better to make that clear.

b. The individual must understand that the IHC cannot provide legal advice to the individual and that their conversation may not be privileged.

3. However, certain employees are considered to be represented by the organization's attorney in the context of *ex parte* communications by adverse counsel. NJ RPC 1.13(a); compare Niesig v. Team I, 76 N.Y.2d 363, 371-76 (1990) with Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 90-93 (App. Div. 2001).

a. In New Jersey, the "litigation control group" includes agents and employees responsible for/ significantly involved in determination of the organization's legal position in a matter, even if not involved in the litigation. Same rule applies to control group in non-litigation matters.

i. Includes former agents and employees within the litigation control group as well. See Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 90 (App. Div. 2001)..

ii. If a former employee becomes a party adverse to the organization, the rule governing *ex parte* contacts with represented parties does not restrict contact with the former, now adverse employee. See In re Prudential Ins. Co. of Am. Sales Practices Litig., 911 F. Supp. 148, 154 (D.N.J. 1995).

iii. Before speaking with an employee without the organization's attorney present, adverse counsel must verify that the employee: 1) is not within the control group; 2) does not have a right to request representation by the organization's attorney under NJ RPC 1.7, and 3) the employee does not want to seek such representation.

b. The employee, O/D, or S/H is not a client of the IHC for other purposes unless an attorney-client relationship is otherwise undertaken.

C. IHC may not represent the organization and a constituent if there is a conflict of interest between the two

1. NJ RPC 1.13(e) and NY RPC 1.13(d) allow IHC to represent anyone within the organization, but only in accordance with RPC 1.7.

2. RPC 1.7 forbids dual representation if there is a concurrent conflict.

a. Representation of an individual cannot be undertaken if those interests are directly adverse to the organization.

b. Representation cannot materially limit the IHC's ability to represent the organization or vice versa.

3. Dual representation is allowed despite concurrent conflict if all parties consent in writing, IHC believes he can represent all fairly, it is not prohibited by law, and it does not involve claims made by the constituent against the organization, or vice versa, in the same litigation/proceeding.

a. When the organization's consent is required by RPC 1.7, consent must be given by an appropriate O/D of the organization, other than the constituent being represented, or by the S/Hs.

b. Even if there is no concurrent conflict, it is good practice to put in writing that constituent and IHC agree that there is no conflict and organization and constituent waive any future/unknown conflicts before beginning the dual representation. NYC Eth. Op. 2004-02 (June 2004).

4. Dual representation of the organization and constituent carries risk.

5. Dual representation of constituents may include organization's affiliates. NY RPC 1.7, Cmt. 34A-B.

D. An IHC must maintain the confidentiality of privileged information, RPC 1.6, but IHC may (or shall depending on the circumstances) disclose privileged information in only very specific circumstances.

1. NJ RPC 1.6 requires that attorneys maintain the confidentiality of their client's privileged information except to prevent a client's future commission of a crime or illegal or fraudulent act if substantial financial injury or bodily harm is likely to result, or if the client committed a past crime or fraudulent or illegal act by using the attorney's services.

a. Mandatory disclosure to prevent future crime, etc.

b. Permissive disclosure is disclosure is to rectify consequences of a prior crime, etc. where attorney's services were used in furtherance of the crime, etc.

c. Attorney may not otherwise disclose confidential information regarding past improper conduct.

E. IHC must act in best interests of the organization, NY/NJ RPC 1.13(b), (c), and may disclose confidential information in certain circumstances to protect the organization's best interests.

1. IHC must take action if employee, O/D, or S/H acts or says he/she is going to act in a way that will violate a law or some other legal obligation to the organization that can be imputed to the organization, if such conduct is likely to result in substantial injury to the organization. RPC 1.13(b).

a. Failure to take action may result in discipline (see, e.g., In re DeMers, 198 N.J. 376 (2009)), or expose the IHC to civil or criminal RICO liability if the failure to act ensures the other conspirators' scheme remains undetected (see, e.g., Mayo, Lynch v. Pollack, 351 N.J. Super. 486, 497-99 (App. Div. 2002)), obstruction charges (see, e.g., U.S. v. Klein, 247 F.2d 908 (2d Cir. 1957)), or liability under Sarbanes-Oxley, 15 U.S.C. § 7245.

2. Any act the IHC takes should minimize disruption to the organization and minimize risk of revealing privileged information to third parties.

a. IHC generally should first ask the person to reconsider, then get a second legal opinion, or refer the matter to a higher authority within the organization but none of these steps is necessarily mandatory. RPC 1.13(b).

i. IHC must report unlawful activity to CEO/president if it could substantially injure the organization. N.J. Ethics Op. No. 664, 1992 WL 257823, at *1 (1992).

3. In New Jersey, if highest authority within organization refuses to remedy or insists on the injurious action, IHC may disclose confidential information protected by RPC 1.6, IF: 1) attorney reasonably believes highest authority acted to further personal or financial interests of members of the authority that conflict with the best interests of the organization AND 2) revealing the confidential information is necessary to protect the best interests of the organization. NJ RPC 1.13.

a. Rule does not specify to whom disclosure may be made, however possibilities include: 1) independent directors of the organization; 2) S/Hs able to commence a derivative action; or 3) a regulatory agency with jurisdiction over the organization. See also, NY RPC 1.13, Cmt. 5.

b. In New Jersey, IHC may disclose confidential information to stop the injurious act rather than maintaining the confidence and resigning, as provided for under the American Bar Association Model RPCs.

c. IHC must resign only if he/she knows that the organization is using his/her services for criminal, unlawful or fraudulent activities. N.J. Pro Ethics Op. No. 664, 1992 WL 257823, at *2 (1992).

4. As long as the organization's O/Ds are not causing the organization substantial injury, IHC must accept senior management's decisions concerning policy and operations, regardless of the degree of risk. NY RPC 1.13, Cmt. 3.

II. The Attorney-Client Privilege and IHCs

A. "[P]rivilege unquestionably extends to corporations which must act through agents, including its officers and employees." Macey v. Rollins Env. Serv., 179 N.J. Super. 535, 540 (App. Div. 1981) (citing to Upjohn Co v. U.S., 449 U.S. 383, 389 (1981)); see Rossi v. Blue Cross & Blue Shield of Greater N.Y., 73 N.Y.2d 588, 592 (1989).

1. Attorney-Client privilege extends to communications with the IHC. Allied Artists Picture Corp. v. Raab Prods., 38 A.D.2d 537 (App. Div., 1st Dep't, 1971); Macey v. Rollins Env. Serv., 179 N.J. Super. 535, 540 (App. Div. 1981); United Jersey Bank v. Wolosoff, 196 N.J. Super. 553, 562-63 (App. Div. 1984); Spiniello Cos. V. Hartford Fire Ins. Co., No. 07-2689, 2008 WL 2775643, at *1 (D.N.J. Jul. 14, 2008) (applying NJ state law).

2. Current organization constituents *only* may exercise the privilege on behalf of organization.

a. Can only be exercised or waived by those who currently control the organization. Matter of Bevill, 805 F.2d 120, 125 (3d Cir. 1986); Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 134 (1996) (control of privilege with respect to confidential communications with corporate actors of predecessor corporation passed to management of successor corporation).

b. New management can waive the privilege as to communications between former management and the organization's attorneys, regardless of subject matter and former management's desires. U.S. v. DeLillo, 448 F. Supp. 840, 842 (E.D.N.Y. 1978); In re Fedor, 356 N.J. Super. 218, 220 (Ch. Div. 2001).

B. There are two tests for determining the scope of the privilege.

1. The Second Circuit follows the Supreme Court's "subject matter" test to determine which employee's communications with the IHC are privileged. See Upjohn, 449 U.S. at 392; see, e.g., In re Rivastigmine Patent Litig., 237 F.R.D. 69, 80 (S.D.N.Y. 2006) (generally applying the "subject matter test) abrogated by In re Queen's Univ. at Kingston, 820 F.3d 1287 (Fed. Cir. 2016) (abrogating In re Rivastigmine Patent Litig. and holding

that the patent-agent privilege protects certain communication between patent-agent and client).

a. Any conversation with any employee is privileged as long as it is related to the legal advice the attorney is giving the organization.

b. Rationale: "it may be necessary to glean information relevant to a legal problem from middle management, or non-management personnel as well as from top executives." Upjohn, 449 U.S. at 391.

c. Whether a subject matter test, or some other test, should apply will be decided on a case by case basis.

2. The Third Circuit generally applies the "control group" test when applying the federal attorney-client privilege. See, e.g., U.S. v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980); In re Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979).

a. Only communications between organization's attorney and members of control group are privileged.

b. Privilege protects "at a minimum, communications made by a person who has the authority to take part in a decision about any action to be taken in response to the solicited advice. Whether the privilege should be enlarged beyond that point should depend upon whether a broader rule would serve the policy of full communication underlying the privilege itself." In re Grand Jury Investigation, 599 F.2d at 1235.

c. Problems with control group test: it ignores lower level employees who may have necessary information; inhibits internal investigations; and there is no consistency as those in a position to control may vary from issue to issue.

d. The Third Circuit rules do not provide a bright line test as to when privilege applies outside the control group.

C. New Jersey and New York apply the subject matter test.

1. Privilege is limited to communications made to the attorney in his professional capacity.

a. Privilege applies *only* to communications made in typical context of any attorney giving advice, as an attorney. Rossi, 73 N.Y.2d at 593; Wolosoff, 196 N.J. Super. at 562; Metalsalts Corp. v. Weiss, 76 N.J. Super. 291, 297 (Ch. Div. 1962).

b. Communications that relate to business rather than legal matters do not fall within the protection of the privilege. Rossi, 73 N.Y.2d at 593; Metalsalts, 76 N.J. Super. at 297-99.

c. Communication must be predominantly or primarily of a legal nature. If communication also refers to non-legal matters, this does not alone destroy privilege. Rossi, 73 N.Y.2d at 594.

2. Privilege extends to applicable communications with *any employee*.

a. "communications between an [IHC] and the corporation's employees, including lower level employees, will be afforded the protections of the privilege where doing so would give effect to the purpose of the privilege. Leonen v. Johns-Manville, 135 F.R.D. 94, 98 (D.N.J. 1990) (applying NJ state law); see also In re John Doe Corp., 675 F.2d 482, 488 (2d Cir. 1982).

b. "attorney-client privilege is not limited to managerial employees of a corporation." Hanntz v. Shiley, Inc., 766 F. Supp. 258, 270 (D.N.J. 1991) (applying NJ state law) abrogated on other grounds by In re Prudential Ins. Co. of Am. Sales Practices Litig., 911 F. Supp. 148, 151 (D.N.J. 1995).

c. "In some situations[,] every employee can be the client for purposes of confidential communication with an attorney," Amatuzio v. Gandalf Sys., Corp., 932 F. Supp. 113, 117 (D.N.J. 1996) (citing to Upjohn and applying NJ state law); see also In re John Doe Corp., 675 F.2d at 488.

3. Not all communication with an IHC are necessarily privileged. ABB Kent-Taylor, Inc. v. Stallings & Co., Inc., 172 F.R.D. 53, 55 (W.D.N.Y. 1996); Wolosoff, 196 N.J. Super. at 563.

a. Privilege focuses on relationship between the IHC and the employee and the type of information or communication involved

b. Privilege does not extend to activities that could have been performed by any corporate agent who is not an attorney. Metalsalts, 76 N.J. Super. at 299.

c. Similarly, merely including an IHC in an email is insufficient to render the email privileged. See, e.g. Cuno, Inc. v. Pall Corp., 121 F.R.D. 198, 204 (E.D.N.Y. 1988); Spiniello, 2008 WL 2775643, at *2.

i. Emails to IHCs are privileged only if they are directed to the IHC to seek legal advice or sent by the IHC to provide legal advice. See, e.g., U.S. Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994).

ii. Just because the email is privileged, does not mean the attachments are. Must review the attachments separately for privilege status.

4. IHC cannot order organization to "blanket label" all documents as privileged.

a. IHC cannot hide documents under the privilege. See, e.g., Reich v. Hercules, Inc., 857 F. Supp. 367, 372 (D.N.J. 1994); Cuno, Inc., 121 F.R.D. at 204; Rossi, 73 N.Y.2d at 593.

b. "A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such an act." RPC 3.4(a).

c. All documents/communications must legitimately meet the test of privilege.

i. "For a communication to be privileged it must initially be expressed by an individual in his capacity as a client in conjunction with seeking or receiving legal advice from the attorney in his capacity as such, with the expectation that its content remain confidential." Fellerman v. Bradley, 99 N.J. 493, 499

(1985); see, e.g., Colton v. U.S., 306 F.2d 633, 637 (2d Cir. 1962).

5. Attorney-client privilege is qualified in New York and New Jersey. Priest v. Hennessy, 51 N.Y.2d 62, 69 (1980); In re Kozlov, 79 N.J. 232, 243-44 (1979).

6. Federal attorney-client privilege not qualified.

a. If a communication is found to be privileged, it is not discoverable, even if otherwise unavailable. Upjohn, 449 U.S. at 393; see also, In re Grand Jury Subpoena, 599 F.2d 504, 510 (2d Cir. 1979); Admiral Ins. Co. v. U.S. District Court for Dist. of Arizona, 881 F.2d 1486, 1494 (9th Cir. 1989); U.S. v. Ernstoff, 183 F.R.D. 148, 154 (D.N.J. 1998).

III. Communications with a Person Represented by Counsel in the Corporate Counseling Context

A. RPC 4.2.

1. Under RPC 4.2, in representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter (including members of an organization's litigation control group as defined by RPC 1.13), unless the lawyer has the consent of the other lawyer.

a. Keep in mind that the purpose of this rule is to prevent a client from making uninformed decisions as a result of undue pressure from opposing counsel.

B. How does this apply in the non-litigation/corporate counseling context?

1. Have you ever walked into a meeting with your client and the other side or joined a conference call with your client and the other side only to realize the other side's attorney is not in the room or is not joining the call?

2. Have you ever suggested to a client to have a meeting with the other side without lawyers? Have you ever coached a client on how to conduct such a meeting - what to cover, what needs to be discussed?

3. Have you ever reached out to IHC on the other side even though you knew the other side was represented by outside counsel on the matter?

4. Have you ever pressed "Reply to All" on an e-mail knowing that your response will go to the other side's client at the same time it will go to the other side's attorney?

C. You arrive at a meeting or join a conference call and the attorney for the other side is not there.

1. Obviously, you will ask the other side when their attorney will be joining.

a. It is not unusual for the other side's business people to say, their attorney cannot make the meeting, but "Do not worry

about it." "Our attorney knows we are meeting with the other side and their attorney."

b. This is not good enough. The rule is very clear that you need the consent of the other attorney – not the other side's client.

2. You should excuse yourself from the meeting until you can reach the other side's attorney to obtain consent. If you unknowingly participated in a meeting without the other side's attorney, you should contact the other side's attorney and explain the circumstances as soon as you figure out what happened.

D. Clients meeting without their attorneys.

1. In addition to the RPC 4.2 prohibition on contacting the other side directly without their attorney, RPC 8.4(a) prohibits an attorney from using an agent to violate the rules of professional conduct

E. Contacting IHC represented by outside counsel.

1. The ABA Ethics Committee also has an opinion on this scenario. ABA Formal Op. 06-443.

2. It found that the protections of RPC 4.2 were not needed when the client on the other side contacted by the attorney is an IHC who is acting as a lawyer for the organization. It is not likely that such IHC will inadvertently make a harmful disclosure or be vulnerable to undue pressure.

F. "Reply to all" e-mails.

1. New York has a formal ethics opinion on this. N.Y. City Ethics Op. 2009-1.

2. It found that simultaneously sending a letter or e-mail to a represented person and their counsel does not satisfy the rule. New York's form of the rule at the time required "prior" consent in the plain language of the rule. Simultaneous communication to an adversary and his client does not elevate the risks of "improvident settlements, ill-advised disclosures and unwarranted concessions" and undermines the role of the attorney as a buffer and spokesperson. In New Jersey, the rule

does not use the word "prior" but the context implies consent will be obtained before contacting the represented party.

a. However, the New York City opinion went on to take a more practical approach, indicating that a lawyer can provide "implied consent" by a course of dealing. Particularly in the non-adversarial setting, the opinion thought it could be appropriate to find consent to a "reply to all" e-mail that included the represented party and their counsel.

3. If you do not want to imply consent to such communication, "bcc" your client instead of "ccing" them.

IV. IHC Ethical Issues in the Context of Litigation

A. Testifying Employees.

1. IHC may request employees to not volunteer certain information.

a. In New Jersey, "[a] lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless … the person is a relative or an employee or other agent of a client." N.J. RPC 3.4(f).

i. Note: the New York RPCs do not include the language of N.J. RPC 3.4(f).

b. Otherwise, IHC may not instruct employees to not answer interrogatories, attend depositions, or answer certain questions.

c. Responding to discovery tools is not voluntary.

d. Employee may not refuse to answer based on organization's attorney-client privilege if the organization has already waived it. U.S. v. Int'l Bhd. Of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997); Matter of Bevill, 805 F.2d at 125.

2. Employee decides what to volunteer in context of government interviews.

a. Employees, unlike organizations, may assert their Fifth Amendment privilege, even if the organization is already cooperating with the government agency.

b. Could be a problem for the organization as a fact finder may infer in civil litigation that the testimony of an employee who pleads the Fifth would have been adverse to the organization.

3. While IHC may represent both organization and testifying employee in certain circumstances, there are risks:

a. There is a risk that a conflict of interest could develop between the organization and the employee at a later time.

b. In that case, the IHC can be disqualified from representing the organization.

c. If the IHC is not disqualified, still run the risk of a subsequent ineffective assistance of counsel claim in criminal case.

d. Dual representation may also inadvertently waive the attorney-client privilege.

i. The joint defense privilege allows an attorney to disclose confidential information to more than one client without waiving the privilege, but it requires a common interest between the clients.

ii. There is a risk that the organization and employee are actually adverse, and thus no common interest exists to protect disclosures under attorney-client privilege and joint defense privilege.

iii. Even within a joint representation, disclosure of one client's confidential information to the other client, may violate RPC 1.6 without prior written consent of both parties.

iv. Privilege also does not extend to communications IHC had with an employee who is now adverse if (a) the litigation involves claims by the employee that the organization breached a duty owed to the employee, (b) the communication involved the subject matter of the current litigation, and (c) the employee was not responsible for managing the litigation or making corporate decisions that led to the litigation.

4. Alternatively, organization may pay employee's fees for separate counsel without waiving privilege.

a. Could be less costly than providing the IHC as employee's counsel at a deposition, government interview or hearing, as this will avoid the possibility that the IHC will be disqualified after litigation has progressed substantially.

b. State corporate law empowers corporations to pay employees' fees for separate counsel.

i. New Jersey and New York allow indemnification of the fees of O/Ds, employees or agents of the organization in certain circumstances and require indemnification of fees for corporate agents who are successful. N.J.S.A. 14A:3-5; N.Y. Bus. Corp. Law. §§ 722, 723.

c. There is no per se conflict just because the organization pays for an employee's counsel fees. See U.S. v. Smith, 186 F.3d 290, 295 (3d Cir. 1999), abrogation on other grounds rec'd, U.S. v. Diaz, 245 F.3d 294 (3d Cir. 2001); see also RPC 1.8(f), 5.4(c).

d. However, advising an employee to seek individual counsel may also work against the organization in that the IHC will now have to go through the employee's attorney for all interviews. NYC Eth. Op. 2004-02 (June 2004).

B. Document Retention.

1. For proper document retention, IHC must: issue litigation hold communication; identify key players within organization who may have documents; stop the deletion of all potentially discoverable emails and other electronic records; preserve back-up tapes; and ensure careful coordination with any outside counsel and vendors. RPC 3.4.

2. IHC should ensure organization has an effective and sufficient document retention policy in place.

a. Organization should preserve what is necessary to comply with statutory, regulatory, contractual and business requirements and may destroy what is not, *except when subject to a litigation hold*.

b. "[d]estruction is an acceptable stage in the information life cycle; an organization may destroy or delete electronic information when there is no continuing value or need to retain it." The Sedona Conference, Best Practices Guidelines and Commentary for Managing Information & Records in the Electronic Age, at 8 (Nov. 2007); see also Arthur Anderson LLP v. U.S., 544 U.S. 696, 704 (2005) ("It is, of course, not wrongful for a manager to instruct his

employees to comply with a valid document retention policy under normal circumstances.").

i. When evaluating document retention policies, courts consider: 1) whether the policy was reasonable considering the particular document at issue; 2) whether other related lawsuits have been filed and how frequently; and 3) whether the policy was implemented in bad faith. See Swindell Dressler Int'l v. Travelers Cas. & Surety Co., 827 F. Supp. 2d 498, 508 (W.D. Pa. Oct. 31, 2011) (quoting Lewy v. Remington Arms Co., 836 F.2d 1104, 1112 (8th Cir. 1988)).

ii. "A three year retention policy may be sufficient for documents such as appointment books or telephone messages, but inadequate for documents such as customer complaints." Lewy, 836 F.2d at 1112.

c. However, purpose of organization's document destruction policy cannot be the elimination of potentially inculpatory evidence. See, e.g., Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 96 (3d Cir. 1983).

d. No bright line test for record retention time period.

3. RPC 3.4 requires IHC to take steps to provide for proper document retention:

a. Attorneys cannot obstruct opposing party's access to evidence or alter/destroy any document or other material that is potentially discoverable, and must make reasonably diligent efforts to comply with proper discovery requests by opposing party.

b. A pattern, as opposed to a single incident, of failing to comply with discovery requests can result in discipline.

c. In egregious cases of discovery abuse, such as stealing opposing party's privileged documents, court may disqualify attorney as a sanction.

i. More commonly, courts apply discovery sanctions, rather than disqualification, for less egregious

discovery abuses, such as removing documents from a file prior to production.

ii. If an attorney breaches a RPC, courts are reluctant to issue sanctions that affect the client's claim for "we have never endorsed the use of a sanction to be visited on the client as a means to discipline that client's attorney."

4. The duty to preserve evidence.

a. "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents. However, a party's discovery obligations do not end with the implementation of a litigation hold. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce relevant documents." Major Tours, Inc. v. Colorel, 2009 U.S. Dist. LEXIS 68128. *9, 2009 WL 2413631 (D.N.J. Aug. 4, 2009) (unreported) (internal citation omitted).

b. "While a litigant is under no duty keep or retain every document in its possession, even in advance of litigation it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation." Scott v. IBM Corp., 196 F.R.D. 233, 249 (D.N.J. 2000), as amended (Nov. 29, 2000).

c. "Although in general hold letters are privileged, the prevailing view, which the Court adopts, is that when spoliation occurs the letters are discoverable." Major Tours, Inc., 2009 WL 2413631 at *2.

d. In Williams v. Basf Catalysts LLC, No. CV111754JLLJAD, 2016 WL 1367375, at *7 (D.N.J. Apr. 5, 2016), the New Jersey District Court found that the duty to preserve can even arise when plaintiffs are unknown. In Williams, the District Court found that the defendant's clear duty to preserve that ran to a specific plaintiff was also owed to potential similarly situated individuals (though unknown) in reasonably foreseeable litigation, involving substantially the same subject matter and issues.

e. Questions to ask when considering what evidence should be saved:

i. Does client have a document retention policy and what does the document retention policy require?

ii. Does the client have IT personnel with whom counsel should meet?

iii. When did the client have reasonable notice that a claim was likely, triggering the duty to preserve?

iv. Who are the "key players" and the "peripheral players" and have any of these individuals deleted, altered, or destroyed any of their documents?

v. What non-parties have evidence and is it within the client's control or not?

vi. Where are the documents stored that must be preserved? Desktop computers? Laptops? Home computers?

vii. Whether the client has potentially relevant evidence on any social media websites?

viii. Are the documents to be preserved archived or backed up?

See The Honorable Paul W. Grimm, Joel P. Williams, Ethical Issues Associated with Preserving, Accessing, Discovering, and Using Electronically Stored Information, 14 FIDELITY L.J. 57, 66 (2008); see also Scott R. Grubman & Robert H. Snyder, Web 2.0 Crashes Through the Courthouse Door: Legal and Ethical Issues Related to the Discoverability and Admissibility of Social Networking Evidence, 37 RUTGERS COMPUTER & TECH. L.J. 156 (2011); Document Retention In The Digital Age: How Long Is Long Enough?, WWW.CORPORATE.FINDLAW.COM *available at* http://corporate.findlaw.com/litigation-disputes/document-retention-in-the-digital-age-how-long-is-long-enough.html.

5. Failing to preserve relevant evidence can have serious consequences.

a. Failing to preserve relevant evidence can be negligence. A party who is grossly negligent in its failure to preserve evidence may be subject to an adverse inference and monetary sanctions.

b. Spoliation – intentionally destroying evidence after the duty to preserve attaches – can lead to discovery sanctions, an adverse inference on substantive issues, dismissal of claims or striking of Answer, and/or paying all reasonable expenses and attorneys' fees of opposing party. See, e.g., Mosaid Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 337-38 (D.N.J. 2004)(finding Samsung's failure to place a litigation hold on its document retention policy warranted sanctions); N.V.E., Inc. v. Palmeroni, No. CIV.A. 06-5455 ES, 2011 WL 4407428, at *6-7 (D.N.J. Sept. 21, 2011)(unreported) (sanction of adverse inference appropriate where plaintiff failed to issue litigation hold, had no retention policy, and destroyed documents without counsel first reviewing the documents).

c. While New Jersey courts disfavor dismissal, they will consider it appropriate where a party's failure to comply with a court order was egregious, longstanding, willful and deliberate. See id.

d. Courts have broad discretion in fashioning the appropriate sanction, (see Ortega v. City of New York, 9 N.Y.3d 69, 76 (2007) and Conrad v. Robbi, 341 N.J. Super. 424, 441-42 (App. Div. 2001)) and considers the willfulness of the violation, the ability of the party to produce the discovery, the proximity to trial, and prejudice to the adversary (see Casinelli v. Manglapus, 181 N.J. 354, 365 (2004)).

e. While claims of negligence and spoliation are generally filed against the party to the litigation, claims could also be filed against an IHC as these are tort claims.

C. Metadata: Update To New Jersey's Court Rules Governing Discovery And RPC 4.4.

1. "'Metadata' is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins. It may also reflect information necessary to access, understand, search, and display the contents of documents created in spreadsheet, database, and similar applications." Official Comment to N.J. Court Rule 4:10-2(f)(1) (August 1, 2016).

2. N.J. Court Rule 4:10-2 was amended to address metadata in discovery.

a. Court Rule 4:10-2(f) permits a party to request metadata in electronic documents:

i. (1) Metadata in Electronic Documents. A party may request metadata in discovery. When parties request metadata in discovery, they should consult and seek agreement regarding the scope of the request and the format of electronic documents to be produced. Absent an agreement between the parties, on a motion to compel discovery or for a protective order, the party from whom discovery is sought shall demonstrate that the request presents undue burden or costs. Judges should consider the limitations of R. 4:10-2(g) when reviewing such motions.

ii. (2) Claims that Electronically Stored Information is not Reasonably Accessible. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought shall demonstrate that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court nevertheless may order discovery from such sources if the requesting party establishes good cause, considering the limitations of R. 4:10-2(g). The court may specify conditions for the discovery.

3. In addition, an Official Comment was added to N.J. Court Rule 4:18-1 to address metadata. See Official Comments to N.J. Court Rule 4:18-1 (August 1, 2016).

a. Parties may request metadata in electronic documents. Id.

b. There are various considerations such as the amount to be produced, which can significantly affect the cost of discovery. Id.

c. Parties should meet and confer about format to produce electronic documents/metadata issues. Id.

d. Lawyers receiving electronic documents must consider their obligations under the RPC 4.4(b) before reviewing metadata. Id.

4. RPC 4.4(b) was also amended to address the issue of metadata.

a. RPC 4.4(b) states that "A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the sender (2) return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible. A lawyer who receives a document or electronic information that contains privileged lawyer-client communications involving an adverse or third party and who has reasonable cause to believe that the document or information was wrongfully obtained shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the lawyer whose communications are contained in the document or information (2) return the document to the other lawyer and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible. A lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document."

b. Thus, if an attorney receives an electronic document that contains unrequested metadata, that attorney is under a duty to determine whether the disclosure of unrequested

metadata was inadvertent or not. Official Comment to RPC 4.4(b) (August 1, 2016).

c. When making this determination, an attorney should consider the nature and purpose of the document. Id.

d. For example, the metadata in mediation statements or correspondence from another attorney is likely to reveal attorney-client or work product information. Id.

e. Use of forensic "mining" software on electronic discovery when metadata was not specifically requested is likely to reveal inadvertently disclosed information. Id.

V. IHC Ethical Issues in the Context of Internal Investigations

A. Internal investigation records and reports may be protected by the attorney-client privilege.

1. "[T]he attorney-client privilege encompasses factual investigations by counsel." U.S. v. Davis, 131 F.R.D. 391, 398 (S.D.N.Y. 1990).

2. IHC's communications with employees, secretaries, paralegals, experts, etc., can all be covered by the privilege.

a. IHCs should document that nonlegal assistance of others is being rendered at the request of and under the direction of counsel

b. The communications are privileged, not the underlying facts that the IHC becomes aware of as a result of privileged communications.

3. But there is no blanket rule that says entire investigation is covered by the privilege just because the IHC or outside counsel were involved in the investigation.

a. Similar analysis as to which communications with IHC are covered by the privilege.

b. "[W]hen an attorney conducts an investigation not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable . . . even where litigation may eventually arise from the subject of the attorney's activities."

c. If IHC's involvement is just to help enforce the company's policies or comply with the company's legal duty to investigate and remedy, the investigation is not privileged.

d. Documents related to an investigation conducted by IHC for business purposes are not privileged or protected by work product doctrine.

e. On the other hand, if an organization requests its IHC investigate allegations of wrongdoing for purposes of providing legal advice to the company, interviews between IHC and employees are then covered by RPC 1.6, although

not necessarily by the attorney-client privilege. N.Y. RPC 1.13, Cmt. 2.

4. In Upjohn, 449 U.S. at 394, Supreme Court protected employees' answers to questionnaires distributed by IHC as part of an investigation as privileged.

a. Questionnaire answers were privileged because employees provided the answers to the IHC, who was acting in his professional capacity as an attorney, at the direction of corporate superiors in order to provide legal advice for the organization. Upjohn, 449 U.S. at 394.

b. They concerned matters within scope of employees' duties and employees were sufficiently aware that they were being questioned to provide legal advice to the organization. Upjohn, 449 U.S. at 394.

5. *Voluntarily* disclosing investigation results to government agency can waive the attorney client privilege.

a. There is a waiver even if disclosed pursuant to confidentiality agreements between the organization and government agency- still a "voluntary disclosure to a third party of purportedly privileged communications."

b. However, the Eight Circuit recognized an exception to the traditional waiver doctrine and held that when an organization voluntarily made disclosures in cooperation with a SEC investigation, it did not waive its privilege.

i. The Third and Second Circuits have rejected the Eighth Circuit's departure and instead follow the D.C. Circuit decision in Permian Corp. v. U.S., 665 F.2d 1214, 1221 (D.C. Cir. 1981). See Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1423, 1425 (3d Cir. 1991); In re John Doe Corp., 675 F.2d at 489.

c. Organization supplying information to an agency cannot request that the agency withhold the material if requested by a third party.

d. The Fourth and D.C. Circuits have held that when a corporation voluntarily discloses internal investigation

reports to a government agency, the privilege is waived as to the underlying documentation as well.

6. Information collected and turned over by the IHC in response to a *formal government investigation*, and thus involuntarily, remains privileged as to third parties in subsequent litigation. Leonen, 135 F.R.D. at 99.

a. Court compelled disclosures are held as involuntary, and thus do not operate as a waiver, where holder of privilege initially objects to the request on the grounds of privilege.

7. IHCs also must be conscious of their own potential liability when responding to both formal and informal investigations.

a. Lauren Stevens, former IHC at GlaxoSmithKline, was indicted on six counts of making false statements, one count of obstruction of justice and one count of falsifying and concealing documents, all in connection with a response to a FDA informal letter inquiry. See United States v. Stevens, 771 F. Supp. 2d 556, 559 (D. Md. 2011).

b. Stevens failed to disclose pertinent information of which she was aware and denied accusations while knowing they were true. Id.

c. A Maryland federal court ultimately dismissed the indictment against Stevens, in part, under a safe harbor provision of the federal obstruction statute exempting "lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. §1515(c). Additionally, the court found Stevens' disclosures to the FDA were made in good faith as she had obtained advice from outside counsel as how to respond to the FDA. Id. at 568-69.

d. While the outcome was ultimately favorable, this case highlights the risks associated with responding to a government inquiry or even litigation discovery requests.

B. Internal employee interviews.

1. Interview may be for litigation, internal purposes, or related to a government investigation.

a. See earlier discussion for privilege status of interviews.

b. The purpose of the interview determines which privilege may protect the employee's statements from disclosure.

i. Interview in anticipation of litigation may be protected by the attorney-client and attorney work product privileges.

ii. Interview pursuant to an internal investigation may be protected by the attorney-client privilege and possibly the privilege of self-critical analysis in the Second Circuit. The privilege of self-critical analysis is not recognized in the Third Circuit or under New Jersey or New York state law.

iii. Interview pursuant to government investigation may be protected by the attorney-client and attorney work product privileges.

2. To maintain privilege over the interview, make sure employee understands that the purpose of the interview is to obtain facts necessary to provide legal advice to the organization or to defend against litigation or a government investigation.

a. Make sure employee understands that IHC represents the organization in this context, not the employee.

b. Employee must understand that the conversation with the IHC may be shared with others within the organization and that only the organization can waive the privilege.

3. Generally, employees have no right to be represented at an internal interview.

a. Sixth Amendment right to counsel not implicated without state action.

i. Employee may have the right to have a union representative present at the interview, depending on the applicable collective bargaining agreement.

ii. If employee is involved in litigation with the organization, IHC is restrained, under RPC 4.2, from interviewing the employee without his/her counsel

present if the litigation involves the same subject matter as the transaction under investigation and necessitating the interview, unless the employee's counsel consents. See NYC Eth. Op. 2004-02 (June 2004).

b. Otherwise, whether employee has the right to have counsel present is discretionary.

i. Third Circuit implicitly recognized employee's right to delay an internally conducted deposition/interview ordered in response to another employee's EEOC complaint until after he consulted with counsel.

ii. Although New Jersey and New York have apparently not addressed the issue, RPC 4.2 seems to bar an IHC from interviewing an employee where employee advises that he/she is represented by counsel and wants counsel present.

4. Organization may discipline uncooperative employees.

a. Most companies have policies that require employees to provide information concerning matters within the scope of employment.

b. Policy should explicitly state that a failure to cooperate is grounds for discipline and must be applied uniformly and consistently.

i. Not all failures to cooperate may be proper grounds for discipline, even when in accordance with company policy.

ii. The Third Circuit held that an employee who requested time to consult with an attorney before being deposed showed no disloyalty and thus her dismissal was pretext to mask a retaliatory motive.

c. Organization should always be careful to avoid CEPA liability when disciplining employees for conduct during an investigation of wrongdoing.

i. If witness discloses illegal or questionable misconduct on the part of others, organization may not discipline employee for such disclosure.

ii. Generally, refusing to participate in an investigation is not protected activity. Thus, an employee may be disciplined or terminated unless the refusal is based on the employee's refusal to perjure him or herself.

iii. Additionally, in the Third Circuit, participation in an internal investigation conducted by counsel hired by the company, before the filing of any formal complaint, is not statutorily protected activity.

5. Generally, employees may not invoke Fifth Amendment rights in an interview conducted by IHC or the corporate representative.

a. Violation of Fifth Amendment requires showing that incriminating statements were a product of state action and government coercion.

b. Where state action is involved, employee may assert Fifth Amendment and no disciplinary action may be taken.

i. Police officer may *not* be terminated for refusing to waive his/her Fifth Amendment right, but may be terminated for refusing to answer questions regarding his/her official duties, but only if his/her answers would have been immune from use in subsequent criminal prosecution.

ii. Similarly, attorney could not be disciplined for refusing to testify on Fifth Amendment grounds at a judicial inquiry, as disbarment in this context was discipline by a state actor.

c. Private sector employers may terminate employees who assert their Fifth Amendment rights in refusing to cooperate with an investigation.

d. Confessions compelled by a private sector employer, however, may violate the Fifth Amendment if achieved through indirect government coercion.

e. State law also may extend Fifth Amendment protections to private sector employees.

f. Will a court extend Fifth Amendment privilege to private employers through some common law theory, e.g., public policy?

VI. Negotiations and the Attorney Ethics Rules

A. Applicable Rules.

We need to keep the following RPCs in mind when discussing the ethics of attorney negotiations.

1. On the one hand, the attorney must:

a. Not reveal information relating to her representation unless the client consents after consultation. RPC 1.6. This rule is intended to encourage clients to trust their lawyers and be candid with them.

b. Act with reasonable diligence in representing a client. RPC 1.3.

2. On the other hand:

a. The attorney must not knowingly (i) make a false statement of material fact or law to a 3rd party, or (ii) fail to disclose a material fact to a 3rd party when disclosure is necessary to avoid assisting in a criminal or fraudulent act. RPC 4.1.

i. In New Jersey, the duties stated in this rule apply even if compliance with RPC 4.1 requires disclosure of information otherwise protected by RPC 1.6 (a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation).

ii. However, the ABA in its "Ethical Guidelines for Settlement Negotiations," ("Guidelines") § 4.1.2, p. 37 (Aug. 2002) clarifies that, unlike in New Jersey, "the disclosure duty under *Model Rule* 4.1(b) is severely limited by the prohibition against revealing information without client consent covered by *Model Rule* 1.6."

b. It is professional misconduct for the attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. RPC 8.4(c).

c. A lawyer shall withdraw from representing a client if the representation will result in a violation of the RPCs. RPC 1.16(a)(i).

3. What does it mean for an IHC to withdraw from representing his client for violation of the RPCs? How is this done?

a. Potentially means the IHC must send it up the ladder of authority as provided in RPC 1.13(b).

b. IHC should 1) ask for reconsideration of the matter; 2) advise that a separate legal opinion on the matter be sought; and 3) refer the matter to a higher authority in the organization, including, if warranted, the highest authority that can act on behalf of the organization.

B. How do we reconcile these rules for negotiations?

1. A lawyer's duty to keep client confidences can be very important to her client's ability to negotiate favorable terms.

a. How can an attorney zealously represent her client in negotiations and not bend the truth or fail to make misrepresentations to the other side?

2. First, we need to look at what constitutes a "fact" in the context of negotiations.

a. Under generally accepted conventions of negotiations, certain types of statements are ordinarily not taken as statements of material fact:

i. Estimates of price or value placed on the subject of the negotiation;

ii. A party's intentions as to an acceptable price or outcome;

iii. A party's willingness to compromise;

iv. A party's goals; or

v. An undisclosed principal (except when nondisclosure constitutes a fraud.

3. With respect to these types of statements, in most contexts, the attorney can be untruthful and it will not be an ethical violation under RPC 4.1 – because these are not "factual" statements.

C. ABA Ethics Committee Opinion.

1. In 2006, the ABA ethics committee issued an opinion under RPC 4.1 on a lawyer's obligation of truthfulness when representing a client in negotiations. ABA Formal Op. No. 06-439. This opinion recognizes that lawyers should be permitted to posture during negotiations, exaggerate their client's strengths and minimize their client's weaknesses and supports the position that the types of statements listed above are not "facts".

a. "Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of fact." NY RPC 4.1, Cmt. 2; see also ABA Model RPC 4.1; N.Y. County Ethics Op. 731 ("Puffery and exaggeration, which have long been prevalent in settlement negotiations, is not prohibited conduct *per se*.").

2. However, the ABA opinion distinguishes allowed posturing and other statements that the other side will not take as "facts" from false statements of material fact.

a. The examples it uses are: a lawyer in labor negotiations telling a union that a particular benefit will cost an additional $100/employee, when she knows the actual cost is only $20/employee, or in litigation claiming to have evidence that the lawyer knows does not exist.

b. What to do? If the other side asks a question on a material fact, you do not have to answer.

3. In New York, a lawyer generally has no affirmative duty to inform an opposing party of relevant facts. NY RPC 4.1, Cmt. 1; see N.Y. County Ethics Op. 731 ("A lawyer has no duty in the course of settlement negotiations to volunteer factual representations *not required by principle of substantive law or court rule*. . . . However . . . once the topic is introduced the lawyer may not intentionally mislead.") (emphasis added).

D. New York/New Jersey Cases.

1. Notwithstanding the above, courts have found that some material facts are severe enough that an attorney must encourage the client to disclose such facts to the other side. See, e.g., Davin, LLC v. Daham, 329 N.J. Super. 54, 76-77, 78 (App. Div. 2000) ("When the fact to be disclosed goes to the very essence of the transaction, the attorney should recommend disclosure.").

a. If the client refuses to disclose, the attorney may resign from the representation. Id.

2. It is helpful to review specific fact patterns of New Jersey and New York ethics cases.

a. In Davin, the attorney knew that his client, the owner of a strip mall, was likely to lose the property in an imminent foreclosure action. 329 N.J. Super. at 64-65, 77. Despite this knowledge, the attorney negotiated a ten year lease on the client's behalf, including a covenant of quiet enjoyment. Id. Neither the attorney nor the client disclosed the pending foreclosure which would lead to the lessee's ejectment. Id.

i. The court held that the attorney had an obligation to advise his client that they should disclose the foreclosure proceeding and that the lease should not contain the quiet enjoyment covenant. If the client ignored his advice, the attorney had the right, if not the duty to end his representation. Id. at 76-77. Thus, an attorney's "duty of effective and vigorous representation of his client is tempered by his corresponding duty to be fair, candid and forthright." Id. at 78.

b. In In re Forrest, 158 N.J. 428, 431 (1999), in the context of a motion to have the injured party inspected by a physician in a personal injury suit, an attorney advised his client to not voluntarily disclose to the opposing party or the arbitrator that her husband (the injured party who was the basis for the suit) had passed away. The attorney argued that he made no misrepresentation but "merely *withheld* certain information, a negotiation technique he describes as 'bluffing' and 'puffing.'" Id. at 433. Nonetheless, the court found that the attorney had misled the arbitrator in violation of RPC 3.3, obstructed opposing counsel's access

to potentially valuable evidence in violation of RPC 3.4, and engaged in deceitful conduct in violation of RPC 8.4. Id. at 435-36.

i. Subsequently, the New York Court of Appeals suspended the attorney for six months to run prospectively from his suspension in New Jersey. Matter of Forrest, 706 N.Y.S.2d 15 (App. Div., 1st Dep't 2000). The attorney offered no defense to the New York court, but merely asked that his punishment be no more severe. Id.

3. Similarly, the ABA in its Guidelines acknowledged that while "a lawyer generally has no ethical duty to make affirmative disclosures of fact when dealing with a non-client … under certain circumstances a lawyer's silence or failure to speak may be unethical." Again, however, the ABA's position is that disclosure is subject to RPC 1.6, unlike in New Jersey.

4. These types of cases generally fall into two categories: lawyers allegedly lying in negotiations and lawyers allegedly failing to disclose material facts.

a. The cases cited in the ABA ethics committee opinion were cases of lying during negotiations. The two New Jersey cases above are examples of lawyers allegedly failing to disclose material facts.

E. Hypothetical.

1. The following is a hypothetical example of failure to disclose a material fact put forth in a recent law review article. Douglas R. Richmond, *Lawyers' Professional Responsibilities in Negotiations*, 22 Geo. J. Legal Ethics 249 (2009).

2. Assume you have completed difficult negotiations with Lawyer A. The deal includes a critical term your client did not want to agree to, but the other side insisted it be included or agreement could not be reached. After an exchange of draft agreements, you receive from Lawyer A proposed execution form of the agreement, but it omits the critical term the other side insisted upon. It somehow was deleted from the draft, but you know it was a mistake.

3. What do you do? Are you ethically obligated to point out the error to Lawyer A? Are you ethically obligated to tell your client about the omission? Can you permit your client to sign the agreement with the omission and take advantage of the missing term?

a. Two answers: one ethical and one practical.

b. First is the ethics answer. RPC 8.4(c) prohibits conduct "involving dishonesty, fraud, deceit or misrepresentation." The absence of this critical provision is a material fact and concealment of the material fact qualifies as deceit or dishonesty.

c. Practical answer. It is good lawyering to point out the error. The error will be discovered by the other side, and when it is discovered, the other side will demand that the agreement be reformed. If your client does not agree to the reformation of the contract, there will be costly litigation and your client will likely lose. In addition, your client's and your reputations will be tarnished.

4. Conclusion: When does a lawyer have an obligation of disclosure to an opposing party?

a. A lawyer must reveal a client's death.

b. A lawyer has a duty to disclose that a writing does not reflect the parties' agreements.

c. An attorney has a duty to disclose material facts when she knows the opponent is laboring under a clearly mistaken belief, that if uncorrected, will substantially deprive the opponent of the benefit of the bargain.

F. The lying client.

1. What if your client lies? Under RPC 1.2, a lawyer cannot assist a client in conduct the lawyer knows is fraudulent.

2. In my practice, I have had to take my client out of the room and coax them into doing the correct thing. I have also told clients that I cannot participate in their intended course of conduct, because it would violate the ethics rules.

a. For IHC, perhaps in some ways it is worse because you only have one client. How do you deal with these types of issue? Ask yourself, if the person on the other side of the table did what you are contemplating, would you consider it acceptable?

3. Note: lawyers with bad reputations have difficulty negotiating.

a. Lack of trust; every factual statement will have to be verified; all agreements will have to be in a detailed writing.

b. What does an attorney have other than his judgment and reputation? If our reputation is damaged, we will not able to serve our client as well going forward.

G. Conclusion.

1. These are complicated issues with sometimes serious consequences, involving conflicting ethics rules, internal rules, securities laws and company politics. In close cases, these rules will not be determinative. Accordingly, individual attorneys will, in addition to the rules, have to rely on their own moral values.

a. This is recognized in the preamble to the ABA model rules of professional conduct.

b. In addition, no attorney should try to wrestle with close calls alone. These rules are often conflicting and complicated when applied to real world situations. If you are faced with a difficult ethical situation, you should consult with your colleagues.

2. What do attorneys in your organization do when confronted with these situations? Are there procedures in place to make it easy for an attorney in your organization to seek help if they face an ethical issue?