

i: Introduction

*Our band could be your life. Real names'd be proof.*¹

Welcome to professional responsibility. Contrary to conventional wisdom among law students, this is one of the most important classes you will take in law school. It is not only the only class explicitly required by the American Bar Association (“ABA”), but also the subject of the [Multistate Professional Responsibility Examination](#) (“MPRE”), a test that the overwhelming majority of law school graduates must pass in order to become a member of their state bar association.²

But that is the least of it. This class on professional responsibility will enable you to practice law consistent with the law governing lawyers and other professional obligations. And it will help you ensure that you are never the subject of a disciplinary action or sanction from the bar or the courts. In other words, this class could be your life, or at least your livelihood. Take it seriously, because the rules, principles, and obligations you learn about in this class will govern everything you do as an attorney.

What is “Professional Responsibility”?

Professional responsibility is the only class that the ABA explicitly requires law schools to provide in order to qualify for accreditation. Under the [ABA's 2018-2019 Standards and Rules of Procedure for Approval of Law Schools](#), “A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” Standard 301(a). Accordingly, “A law school shall establish learning outcomes that shall, at a minimum, include competency in the exercise of proper professional and ethical responsibilities to clients and the legal system, and other professional skills needed for competent and ethical participation as a member of the legal profession.” Standard 302(c)&(d). And in order to satisfy that requirement, “A law school shall offer a curriculum that requires each student to satisfactorily complete at least one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members.” Standard 303(a)(1).

However, law schools and law professors retain considerable discretion in how they teach professional responsibility. While the ABA accreditation standards provide that law schools must require a professional responsibility class, they do not specify what subjects the class must cover or how it should be taught. Unsurprisingly, law schools typically delegate those decisions to law professors, who have adopted a wide range of different approaches. Some classes focus on the ABA's [Model Rules of Professional Conduct](#) and how courts use them to regulate attorneys. Other classes focus on the concept of legal ethics and the justification of the legal profession. And still other classes focus on how attorneys actually comply with rules of professional conduct in practice.

This casebook is designed for a class focused on the Model Rules of Professional Conduct and their practical application. Each chapter of the book addresses a different issue, in the following format. First, it clearly and concisely explains the relevant law governing that issue. Then provides the relevant text of any statutes, Model Rules, sections of the Restatement of the Law Governing Lawyers, or other sources, with a link to an open-source versions of the full text, when available. It provides one or more heavily

¹Minutemen, History Lesson - Part II, Double Nickels on the Dime (1984).

²Wisconsin and Puerto Rico currently do not require the MPRE for bar membership. Connecticut and New Jersey currently accept successful completion of a law school course on professional responsibility in lieu of the MPRE.

edited cases intended to illustrate the application of the law at issue, with a link to an open-source version of the full text of the case. Each case is preceded by a brief summary of its facts, reasoning, and holding, and followed by questions intended to indicate subjects for further investigation or discussion. And finally, it includes citations to law review articles and other materials relevant to the law at issue, with links to open-source versions of those materials, when available.

Legal Ethics v. The Regulation of Legal Practice

Different lawyers think about professional responsibility in different ways, different law professors teach professional responsibility in different ways, and different legal scholars conceptualize professional responsibility in different ways. Some attorneys, professors, and scholars see professional responsibility as the practice of legal ethics. In other words, they believe that the rules of professional responsibility are expressions of ethical principles, and the legitimacy of those rules depends on the legitimacy of the ethical principles they express. But other attorneys, professors, and scholars see professional responsibility as merely the regulation of legal practice. In other words, they believe that the rules of professional responsibility are just the positive law governing attorneys.

Legal Ethics

Legal ethics can be either descriptive or normative. While both descriptive and normative legal ethics investigate the ethical values motivating the law of professional responsibility, they do so in very different ways, with fundamentally different goals. Descriptive legal ethics asks what the ethical values of law of professional responsibility are; normative legal ethics asks what they should be.

Descriptive legal ethics assumes that the statutes and rules governing the practice of law, as well as the cases interpreting and applying those statutes and rules, effectively express the ethical values of the legal profession. Accordingly, by studying the law of professional responsibility in action, one can identify the ethical values inherent in the law that motivate its articulation, interpretation, and application.

Normative legal ethics asks whether the law of professional responsibility expresses a true moral theory. In other words, it starts with a moral theory, and asks whether the law of professional responsibility produces results consistent with that theory. Of course, different normative theories of legal ethics may adopt different moral theories. But they all assume that the purpose of the law of professional responsibility is to produce moral outcomes. Accordingly, the law of professional responsibility is justified if it expresses a true moral theory, and unjustified if it does not.

The Regulation of Legal Practice

This casebook focuses on the regulation of legal practice, not legal ethics. The primary purpose of this casebook is to help you better understand how the bar and the courts actually apply the statutes and rules governing the practice of law. While this casebook is not a study guide for the MPRE, it should help you better understand the questions on the MPRE and how to answer them correctly.

The various bar associations, often in conjunction with the courts, adopt disciplinary rules regulating legal practice. Some of those rules are mandatory, and define what attorneys must and must not do. Other rules are discretionary, and describe what attorneys may and may not do. And still other rules are aspirational, and explain what attorneys should and should not do.

When the courts consider a complaint against an attorney, they typically apply the disciplinary rules adopted by the bar association, in light of generally applicable legal principles. In other words, they ask not only whether the attorney violated the letter or spirit of the disciplinary rules, but also whether the rules at issue are valid and enforceable. However, a court may find that an attorney who has not violated the disciplinary rules has still violated some other legal duty.

Accordingly, this casebook focuses on describing the law of professional responsibility, explaining how it has been applied, and asking whether it was applied correctly. However, the law of professional responsibility differs from jurisdiction to jurisdiction. Sometimes those differences are minor, but other times they are fundamental. This casebook focuses on describing, explaining, and reflecting on the application of the most paradigmatic rules, as exemplified by the Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers.

Of course, studying an area of law inevitably provokes reflections on its purpose and justification. Even a casebook devoted to the study of the regulation of legal practice cannot avoid implicating questions of legal ethics. What values does the law of professional responsibility express? Are those values justified? What makes a rule of professional conduct justified or unjustified? What is the purpose of the law of professional responsibility? All of these ethical issues are implicit in the subject matter of this class. But they are not the subject matter of this casebook. Or at the very least, while this casebook may directly or indirectly raise those questions, it does not purport to answer them or take a position on how they should be answered.

Model Rules of Professional Conduct: Preamble & Scope

Preamble: A Lawyer's Responsibilities

1. A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
2. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
3. In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as thirdparty neutrals. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.
4. In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.
5. A lawyer's conduct should conform to the requirements of the law, both in professional service to

clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

6. As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.
7. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.
8. A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.
9. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.
10. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.
11. To the extent that lawyers meet the obligations of their professional calling, the occasion for

government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

12. The legal profession's relative autonomy carries with it special responsibilities of selfgovernment. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.
13. Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

14. The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.
15. The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.
16. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.
17. Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.
18. Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinar-

ily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

19. Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.
20. Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.
21. The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Questions:

1. What are these two sections of the Model Rules intended to accomplish?
2. Does the Preamble seem to describe disciplinary rules, ethical rules, or both? What about the section on the scope of the Model Rules?
3. Does the Preamble suggest that the Model Rules provide ethical guidance for attorneys? What about the section on scope?

The Duty of Zealous Representation

The client never wants to be told he can't do what he wants to do; he wants to be told how to do it, and it is the lawyer's business to tell him how.³

³Robert T. Swaine, *The Cravath Firm and Its Predecessors, 1819-1947*, at 667 (1946) (quoting Elihu Root).

*If I had a million dollars, would you work for me? Well, I don't know my friend, I guess we'll have to wait and see. Would you do anything that I asked you to do? Yes, I would, if the money came through.*⁴

Perhaps the most fundamental duty of an attorney is the duty of “zealous representation.” Attorneys must represent the interests of their clients to the best of their ability and to the extent permitted by the law. And attorneys must always advocate for their client’s interests, to the exclusion of anyone else’s interests, including their own. Specifically, attorneys must zealously represent their client’s interests, even at their own expense.

But the duty of zealous representation can conflict with an attorney’s other duties, especially an attorney’s duties to the court. As members of the bar, attorneys are also officers of the court. Among other things, they owe the court a duty of candor. But sometimes an attorney’s duty of zealous representation can conflict with the duty of candor. For example, the duty of zealous representation may require attorneys to avoid or minimize evidence that is detrimental to their clients. But the duty of candor may require attorneys to disclose that same evidence to the court.

Canon 7 of the [ABA Model Code of Professional Responsibility \(1980\)](#) stated that “a lawyer should represent a client zealously within the bounds of the law.” Ethical Consideration 7-1 provided, “The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.” Among other things, Disciplinary Rule 7-101 (A) provided, “A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.”

When the ABA adopted the [Model Rules of Professional Conduct](#) in 1983, it did not use the term “zealous representation.” Instead, Model Rule 1.3 provided, “A lawyer shall act with reasonable diligence and promptness in representing a client.” However, Comment 11 observed:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.

The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Today, courts and scholars continue to refer to an attorney’s “duty of zealous representation.” What is the scope of that duty? What should it be? How should attorneys and courts balance the duty of zealous representation against an attorney’s duties to the court and to society as a whole?

Questions:

- I. After the terrorist attacks of September 11, 2001, President Bush asked the Office of Legal Counsel for its opinion on the legality of certain interrogation techniques. OLC produced several memoranda arguing that the techniques were legal under domestic and international law, which ultimately became known as the “torture memos.” The torture memos were almost universally condemned by policymakers and legal scholars as both immoral and incorrect statements of the governing law. Should OLC have produced the memos? Was it a violation of the rules of professional conduct for OLC to make arguments based on inaccurate interpretations of the law. Was

⁴Charles Manson, *If I Had a Million Dollars, The Family Jams* (1970/1997)

it a violation of legal ethics for OLC to make arguments in favor of the interrogation techniques? Would it have been a violation of legal ethics if those techniques were in fact legal? Would it have been a violation of the rules of professional conduct for OLC to produce memos presenting arguments both for and against the legality of the interrogation techniques?

Torres v. Donnelly , 554 F. 3d 322 (2d Cir. 2009)

Summary: Torres was charged with armed robbery. Anna Rodriguez, one of the victims, identified Torres when the police showed her a photo array and again when Torres's attorney Keefe showed her a photo array. In her trial testimony, Rodriguez stated that she did not identify Torres the "second time" the police showed her a photo array. Keefe realized that she was referring to the photo array he showed her, and informed the court that she had identified Torres. Torres was convicted, and filed a habeas petition, alleging ineffective assistance of counsel for failure to provide zealous representation. The court denied the petition, holding that Keefe's duty to correct false testimony did not conflict with his duty to provide zealous representation.

HALL, Circuit Judge:

Petitioner-Appellant Jesus Torres appeals from a judgment of the United States District Court for the Western District of New York denying his petition for a writ of habeas corpus. Following a jury trial, Torres was convicted of two counts of robbery in the first degree. On direct appeal, Torres raised an ineffective assistance of counsel claim. The Appellate Division dismissed his claim and unanimously affirmed his conviction. Here, Torres argues that he was denied effective assistance of counsel.

The basis of Torres's habeas claim stems from his defense counsel's line of questioning during cross-examination of an identification witness, Anna Rodriguez, which inadvertently elicited testimony counsel personally knew to be inaccurate. Subsequently, to avoid becoming a witness himself and to comply with his ethical obligations to the court to correct false testimony, counsel agreed to stipulate that, contrary to Anna's testimony during cross-examination, Anna had identified Torres when counsel had shown her a photographic array prior to trial. Torres asserts that defense counsel Thomas Keefe's actions gave rise to an actual conflict of interest that so adversely affected his performance that it was unnecessary to demonstrate resulting prejudice. Torres also asserts that there is a reasonable possibility that, but for the errors of defense counsel, the outcome of his trial would have been different.

BACKGROUND

Torres was tried for the November 6, 1997 robberies of two grocery stores in Buffalo, New York. Torres does not contest his conviction for the first robbery of a store on Vermont Street. His habeas claim extends only to his conviction on the second robbery, which occurred on Hampshire Avenue. The robbery on Hampshire Avenue was witnessed by Olga Rodriguez, who was behind the counter, Olga's sister, Anna, and her niece, Lisalotte Rodriguez. Lisalotte was not called to testify as a trial witness.

At trial, Olga identified Torres as the robber and testified that she saw him clearly during the robbery. Olga also testified that her sister Anna had been unable to identify the defendant when shown a photo array by detectives. Defense counsel asked Olga, "In your presence, while you were in the store, did a detective with the Buffalo Police Department show a photo to your sister at any time?" Olga responded, "She did not identify. She was not paying too much attention that night of the robbery."

On cross-examination of Anna, defense counsel sought to build on Olga's testimony and elicit from Anna that she had been unable to identify the defendant in at least one photo array shown to her by police. In response to questioning from defense counsel and the trial court, Anna testified that

she had identified the robber in the first photo array she was shown, but that she “couldn’t identify the robber the second time around.” Defense counsel then sought to determine the dates that the police had shown Anna the two photo arrays. Although Anna initially stated that the second photo array had been shown to her in January 1998, upon further questioning she indicated that it had occurred in June 1998, a fact which was clarified and confirmed by the trial court. According to Anna, she did not identify the robber when presented with this second array because she was “so nervous.” When the date of the second photo array was confirmed by the court’s questioning, however, Attorney Keefe realized that the photo array to which Anna was referring was the one that he had shown her in June or July 1998 as part of his preparation for trial and not one shown to her by police. He interjected and clarified to the court that he in fact had been in the store in June or July 1998 and presented a photo array to Anna. On redirect examination, Anna repeated that she did not identify Torres when Attorney Keefe showed her an array because she was nervous. Contrary to Anna’s testimony, however, Attorney Keefe knew that Anna had identified Torres when he had shown her the photo array.

Later, in a colloquy outside the presence of the jury, the prosecutor argued that it was important to clarify to the jurors what Anna had told Attorney Keefe about the photo array. He asserted that by showing her the photo array, Keefe had essentially made himself a witness in the case. Upon questioning by the trial court, and because of Attorney Keefe’s ethical obligation not to “knowingly use false evidence,” Keefe ultimately informed the court that Anna had identified Torres when Keefe showed her the photo array in June or July 1998. Keefe explained that he had pursued his line of questioning under the mistaken belief that the police had shown Anna two sets of photo arrays on separate occasions.

To avoid the complications of defense counsel being called to the stand and possibly obtaining different counsel for Torres, the trial court suggested, and Attorney Keefe agreed to, the following stipulation, which the court then read to the jury:

Both parties are concerned that there may be confusion over Anna Rodriguez’s testimony with regard to photo arrays. To clarify this issue over what photo array was shown to her, we, the attorneys, stipulate that on or about June or July of 1998, attorney Thomas Keefe showed her a photocopy of one of the arrays, and asked her if she could identify the robber. The witness did identify the robber as number 3.

After deliberations, the jury convicted Torres on both counts of robbery.

On direct appeal from the conviction, the Appellate Division affirmed Torres’s conviction. As to counsel’s cross-examination of Anna and resulting stipulation, it found that:

Defense counsel’s stipulation advising the jury that a witness identified defendant in a photo array shown to her by defense counsel was not an egregious error that denied defendant effective assistance of counsel. Defense counsel reasonably believed that the witness had been shown two photo arrays by police; during cross examination the witness testified that she identified defendant in the first photo array but not in the second photo array. During the course of the witness’s testimony, defense counsel realized the “second” photo array to which the witness referred was the photo array that he had shown the witness, and therefore the testimony of the witness that she did not identify defendant in that photo array was not true. Defense counsel could not “knowingly use false evidence” and thus was required to report the incorrect testimony to the court. Defense counsel’s alternative to the stipulation was to testify as a witness, which would have required new counsel for defendant.

DISCUSSION

To establish that counsel’s performance was constitutionally defective, a defendant must show that “the lawyer’s performance ‘fell below an objective standard of reasonableness’ and that

‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the

proceedings would have been different.” Even if counsel’s performance is found professionally unreasonable, “any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.” Therefore, the question becomes “whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” In certain circumstances, however, prejudice may be presumed, and an individual inquiry regarding this factor is unnecessary. Similarly, the Supreme Court has recognized that when a criminal defendant claims that defense counsel was “burdened by an actual conflict of interest,” this warrants a “limited presumption of prejudice.” In these instances, the presumption of prejudice attaches “only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’”

Torres argues that the limited presumption is applicable to his case such that he is not required to demonstrate he was prejudiced by his counsel’s performance. We disagree. Although Keefe had parallel duties to zealously represent his client and not to use false evidence, this did not create an actual conflict of interest. Though the presumption has been “unblinkingly” applied to “all kinds of alleged attorney ethical conflicts,” it does not support this expansive application.

The presumption was created to account for the “high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice.” However, “not all attorney conflicts present comparable difficulties. Here, defense counsel’s ethical obligation to correct the testimony he knew to be inaccurate does not present the difficulties and high probability of prejudice engendered by joint representation. At most, in this case defense counsel’s earnest representation of his client was constrained by ethical guidelines applicable to every attorney appearing as trial counsel, to wit, that “in the representation of a client, a lawyer shall not knowingly use perjured or false evidence.”

Accordingly, we hold that the tension between Keefe’s parallel duties of (1) zealous representation and (2) candor to the court, which gives rise to his obligation to correct the record, did not create a conflict of interest of the sort identified in Sullivan. This holding “is consistent with the governance of trial conduct in what we have long called ‘a search for truth.’” Indeed, “an attorney’s ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence.”

We further find no actual conflict of interest inherent in counsel’s decision to enter into the stipulation to correct the record. It is clear that several methods, such as calling as a witness the interpreter who was present when Attorney Keefe showed Anna the photo array, were available to accomplish this necessary task. Each of them, in order to correct the misstatement, would have yielded the same result.

Questions:

1. Could Keefe have relied on Rodriguez’s testimony without violating his duty of candor to the court? What if the prosecutor did not notice the mistake? Would Keefe have a duty to disclose? Would it be a violation of the Model Rules if he did not disclose?
2. What are Keefe’s ethical obligations under the circumstances? How should he balance his duty to Torres against his duty to the court?

Further Reading:

- David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 *Geo. J.L. Ethics* (2017).
- Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. Rev.* 1 (1988).

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 - Gerald J. Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L. Rev. 63 (1980).
 - Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589 (1985).
 - Thomas L. Shaffer, On Being a Christian and a Lawyer: Law for the Innocent (1981).
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 - Monroe H. Freedman, A Critique of Philosophizing About Lawyers' Ethics, 25 Geo. J. Legal Ethics 91 (2012).
 - Alice Woolley, The Lawyer as Advisor and the Practice of the Rule of Law, 47 UBC L. Rev. 743 (2014).
 - Rebecca Roiphe, The Decline of Professionalism, 29 Geo. J. Legal Ethics 649 (2016).