1: Introduction

1.1 Introduction to Professional Responsibility

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,

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

[2] Wisconsin 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.

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 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 regu-

lating 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 of 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 ordinarily 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]

> *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:

1. After the terrorist attacks of September 11, 2001, President Bush asked the Office of Legal Coun-

[3]Robert T. Swaine, The Cravath Firm and Its Predecessors, 1819-1947, at 667 (1946) (quoting Elihu Root).
[4]Charles Manson, If I Had a Million Dollars, The Family Jams (1970/1997)

sel 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 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).

- Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Human Rights 1 (1975).

- William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29 (1978).

- 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).

- Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation , 85 Yale L.J. 1060 (1976).

- Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966).

- Judith Andre, Role Morality as a Complex Instance of Ordinary Morality, 28 Am. Phil. Q. 73 (1991).

- 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).

1.2 Law as a Profession

Defining Professions

> *[P]rofessions are exclusive occupational groups applying somewhat abstract knowledge to particular cases.*
>
> Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (1988:8)

Professions are organized around jurisdictions, i.e. areas of work within which professions assert the exclusive right to practice

> *In claiming jurisdiction, a profession asks society to recognize its cognitive structure through exclusive rights; jurisdiction has not only a culture, but also a social structure. These claimed rights may include absolute monopoly of practice and of public payments, rights of self-discipline and of unconstrained employment, control of professional training, of recruitment, and of licensing, to mention only a few.*
>
> Abbott (1988:59)

Jurisdictional boundaries and claims are subject to contest by other (established or aspiring) professions.

Professional Culture

Knowledge-Based Practice

Abbott (1988:8) distinguishes two "ways occupational groups control knowledge and skill":

> *One emphasizes technique per se, and occupations using it are commonly called crafts. To control such an occupation, a group directly controls its technique. The other form of control involves abstract knowledge. Here, practical skill grows out of an abstract system of knowledge, and control of the occupation lies in control of the abstractions that generate the practical techniques. The techniques themselves may in fact be delegated to other workers. For me this characteristic of abstraction is the one that best identifies the professions.*

"Diagnosis, treatment, inference, and academic work provide the cultural machinery of jurisdiction." (Abbott, 1988:59)

Formal educational requirements are common but not universal.

Orientation Toward Work

> *Today the term "professional" refers more to a prescribed attitude toward any work than the status of some work. To act like a professional—to be professional in one's work—calls for subjective investment in and identification with work, but also a kind of affective distancing from it. A professional invests his or her person in the job but does not "take it personally" when dealing with difficult co-workers, clients, patients, students, passengers, or customers. As an ideal of worker subjectivity, this requires not just the performance of a role, but a deeper commitment of the self, an immersion in and identification not just with work, but with work discipline. The popular injunction to "be professional," to cultivate a professional attitude, style, and persona, serves as one way that the autonomy, especially of immaterial workers, can be managerially constituted up and down the post-Fordist labor hierarchy.*
>
> Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, & Postwork Imaginaries* (2011:74)

Professional Structure

> *[T]he social organization of professions affects the kinds of jurisdictional claims they make and their success in achieving those claims.*
>
> Abbott (1988:82)

The social organization of professions includes:

- Groups
  - Professional associations
- Controls
  - Schools, Examinations, Licenses, Codes
- Worksites
  - Firms
  - Professional-cultural bodies ("not involved in practice, but only in the purely professional work of maintaining and furthering professional knowledge." Abbott, 1988:80)

The Legal Profession

Relevant Institutions

American Bar Association

- Model Rules of Professional Conduct
- Standards for Lawyer Discipline

State Bar

- "State Bar": licensing and disciplinary authority
- "State Bar Association": professional association
  - membership is voluntary, except in an "unit" or "integrated" bar, e.g. California
  - NC is an "integrated bar" (State Bar of North Carolina). But there is also a voluntary association (NCBA)

Courts

- Inherent authority to regulate proceedings (*Creasy*)

Sources of Law

Disciplinary Rules

Disciplinary rules are part of the profession's self-regulatory apparatus, ideological self-definition, and boundary maintenance.

> Most states have adopted a version of the ABA Model Rules of Professional Conduct
>
> State rules are what actually govern

- State rules may vary from Model Rules in particular respects
  - *Riehlman* (interpreting and applying Louisiana Rule 8.3(a) on duty to report misconduct by another lawyer)

Normative foundation of the ABA Model Rules:

- "An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them." *Lane*, 544 NW2d at 374 (quoting Nebraska RPC Rule 3)
- "[T]he efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court [or] opposing counsel.... Such tactics seriously lower the public respect for ... the Bar." *Lane*, 544 NW2d at 375
- "An attorney who exhibits a lack of civility, good manners and common courtesty ... tarnishes the ... image of ... the bar ...." *Lane*, 544 NW2d at 375
- "Attorneys who routinely exhibit abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior toward others involved in the legal system are not worthy of such trust and confidence." *Lane*, 544 NW2d at 375
- "Belief unrelated to reason is a hallmark of fanaticism, zealotry, or paranoia rather than reasoned advocacy. The practice of law requires the ability to discriminate between fact and faith, evidence and imagination, reality and hallucination." *Lane*, 544 NW2d at 375

Earlier versions of ABA standards

- Canons of Legal Ethics (1908)
- Model Code of Professional Responsibility (1970)

The Canons reflected and embodied the values and culture of elites (predominantly male, white, Protestant) who dominated the legal profession at the time.

- Effort to maintain professional boundaries in the face of entry by those from non-elite class, race, and ethnic backgrounds
- Bordertown (1935)

Despite the more technocratic framing of the Model Rules, they continue to embody and reproduce elite values and culture.

- Influence of class, race, gender, and other social positions on interpretation and application of the rules. See *Lane*, 544 N.W. 2d 367 (1996)

Common Law & Statutes

Common Law

- Contract
- Torts
- Agency & Fiduciary Duties

Statutes

- e.g., Sarbanes-Oxley

- See *Milavetz* (federal statute regulating "debt relief agency" applies to lawyers providing "bankruptcy assistance")

1.3 A Brief History of the American Legal Profession

The Profession before the 1908 Ethics Rules

The American legal profession was significantly unregulated for most of the eighteenth and nineteenth centuries. In fact, applying contemporary definitions in which a profession is selfregulating, it is not clear lawyers' work during this time was part of a unified legal profession at all. That's not to say lawyers did not play an important role in American society. Lawyers fulfilled not just one, but two equally important roles: as advocates for their clients and agents of the court. Before the organized American legal profession with formal rules, this dual-role model of lawyering shaped how lawyers thought about their professional responsibilities and standards for their conduct.

Many lawyers' everyday work primarily concerned advocating for the private interests of clients. Eighteenth and nineteenth century clients sought out lawyers for many of the same reasons people obtain lawyers today, including settling disputes over personal property, navigating commercial matters, and resolving all sorts of other conflicts between people. Although some of the events leading people to seek lawyer's assistance may seem familiar, the social, economic, and political conditions of the nineteenth century meant even this familiar role was anything but routine.

The time period between the American Revolution and the twentieth century was full of dramatic changes in the law, the work of lawyering, and the legal profession. The law itself became more voluminous and complex, beginning with post-Revolution efforts to create orderly state and federal governments. As the country rapidly grew and and industrialized, new types of activity and disputes emerged, creating new demands for legal intervention.

Lawrence Friedman's A History of American Law summarizes:

> *What happened to American law in the nineteenth century, basically, was that it changed dramatically, fundamentally, to conform to the needs, wants, and pressures coming from the vast increase in the numbers of consumers of law. It is dangerous to sum up long periods and great movements in a sentence. But if colonial law had been, in the first place, colonial, and in the second place, paternal, emphasizing community, order, and the struggle against sin, then, gradually, a new set of attitudes developed, in which the primary function of law was not suppression and uniformity, but economic growth and services to its users.*

Instrumentalist theories about law combined with a rapidly changing industrial society contributed to the idea that practicing judges, lawyers, and scholars could actively shape the world they worked in. Often this was in response to their work for the private interests of clients, although records of conversations among lawyers show continued concern for and attention to their public responsibilities as well.

Question:

- Is the dual-role model of lawyers' responsibilities useful for navigating professional ethical dilemmas? Based on what you know about lawyers' work, try to think of at least one scenario in which it would be helpful and one in which it might not be.

American Bar Association's Ethics Rules

The American Bar Association, founded in 1878, advanced its first attempt at a uniform standard of conduct for lawyers in 1908. The Canons of Professional Ethics were intended to be a general guide for

lawyers, based on existing professional norms expressed in legal ethics scholarship and some state bar association literature. The ABA acknowledged the idealistic nature of the Canons, and did not intend for them to be enforceable. For an overview of the Canons, see the Preamble and the list of Canons, below, from the Final Committee Report on 1908 ABA Ethics Rules.

Canons of Ethics

Preamble

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

The Canons of Ethics

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned:

1. The Duty of the Lawyer to the Courts.
2. The Selection of Judges.
3. Attempts to Exert Personal Influence on the Courts.
4. When Counsel for an Indigent Prisoner.
5. The Defense or Prosecution of Those Accused of Crime.
6. Adverse Influences and Conflicting Interests.
7. Professional Colleagues and Conflicts of Opinion.
8. Advising Upon the Merits of a Client's Cause.
9. Negotiations with Opposite Party.
10. Acquiring Interest in Litigation.
11. Dealing with Trust Property.
12. Fixing the Amount of the Fee.

13. Contingent Fees.

14. Suing a Client for a Fee.

15. How Far a Lawyer May Go in Supporting a Client's Cause.

16. Restraining Clients from Improprieties.

17. Ill Feeling and Personalities Between Advocates.

18. Treatment of Witnesses and Litigants.

19. Appearance of Lawyer as Witness for His Client.

20. Newspaper Discussion of Pending Litigation.

21. Punctuality and Expedition.

22. Candor and Fairness.

23. Attitude Toward Jury.

24. Right of Lawyers to Control the Incidents of the Trial.

25. Taking Technical Advantage of Opposite Counsel; Agreements with Him.

26. Professional Advocacy Other Than Before Courts.

27. Advertising, Direct or Indirect.

28. Stirring Up Litigation, Directly or Through Agents.

29. Upholding the Honor of the Profession.

30. Justifiable and Unjustifiable Litigations.

31. Responsibility for Litigation.

32. The Lawyer's Duty in Its Last Analysis.

Questions:

- Do you see evidence of dual-role model of lawyers' responsibilities in the Canons? Where?

- What does the adoption of the Canons tell us about the state of the profession in 1908?

Although the Canons were general statements of profession norms, they included some explanatory content. For example, see Canons 4, 17, and 29.

Canon 4 - When Counsel for an Indigent Prisoner. A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

Canon 17- III Feeling and Personalities Between Advocates. Clients, not lawyers, are the litigants. Whatever may be the ill feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

Canon 29 - Upholding the Honor of the Profession. Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and citing authorities. The lawyer should aid in guarding the Bar against admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

Questions:

- Are the Canons useful for navigating professional ethical dilemmas?

- How helpful is the explanatory content? Does it answer all your questions about how to apply the Canons? Can you think of a situation in which lawyers might reasonably disagree about what conforming professional conduct might look like?

The ABA Canons of Professional Ethics were an important step towards professionalizing lawyers' work. While no longer in force, the Canons guided lawyers' professional standards for a sixty year period in which the modern profession emerged. Judicial opinions and state bars often referred to the text of and principles in the Canons. Attempts to apply the Canons revealed some challenges with moving from generalized principles to enforceable boundaries, prompting the ABA to work towards the Model Code of Professional Responsibility.

Model Code of Professional Responsibility

The ABA House of Delegates approved the Model Code of Professional Responsibility, a comprehensively revised set of rules, on August 12, 1969. The Model Code marked a significant shift from the Canons in its organization and scope. Where the Canons were idealistic and relied on external judgments to clarify conflicting priorities and refine broad goals, the Model Code contained three distinct but interrelated parts: canons, ethical considerations, and disciplinary rules. The canons stated the general rules which led to the ethical considerations and disciplinary rules. The ethical considerations

were the aspirational principles. The disciplinary rules were mandatory statements about the minimum standards of conduct lawyers must adhere to in order to not face disciplinary action. Each canon might contain a dozen (or more!) ethical considerations and disciplinary rules.

For Example, explanatory content for Canon 6 includes six ethical considerations and two disciplinary rules.

CANON 6: A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC 6-1

Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2

A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3

While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC 6-4

Having undertaken representation, a lawyer should use proper care to safeguard the Interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5

A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6

A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

DISCIPLINARY RULES

DR 6-101-Failing to Act Competently.

A. A lawyer shall not:

1. Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

2. Handle a legal matter without preparation adequate in the circumstances.

3. Neglect a legal matter entrusted to him.

DR 6-102-Limiting Liability to Client.

A. A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

Questions:

- How useful is the Model Code for making decisions about professional conduct? Is the clarification between canons, ethical considerations, and disciplinary rules an improvement on the 1908 Canons?

- Is it necessary to have canons, ethical considerations, and disciplinary rules? Consider each statement's or rule's usefulness in lawyers' various roles and practice settings.

The Model Code, in various forms and versions, was the ABA's central document on professional responsibility from 1970 through 1981. While no longer in use, it's important to know about the Model Code. Many important cases decided during this time and some states' rules still contain references to and evidence of the influence of the Model Code.

Model Rules of Professional Conduct

The shift from idealistic Canons to boundary rules in the Model Code created the need for specificity the Model Code did not always address. To deal with this challenge, the ABA tasked a lawyer named Robert Kutak with chairing a commission to study the problem. The Kutak Commission focused on developing the minimum standards of conduct for lawyers into a series of black-letter rules. The resulting Model Rules, adopted in 1983, are the basis of the current Model Rules of Professional Conduct. The Model Rules have a regulatory structure, with a statement of minimum conduct and explanatory comments. The official comments are similar to other regulatory comments, in that they might content information

about the reasoning behind a rule or examples to guide application. Like other model rules, the Model Rules of Professional Conduct are not themselves binding. They are designed to be examples a state may choose to adopt into law. For an example from the Model Rules, see the Rule 1:1 on Competence, below.

Rule 1.1: Competence

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

Comment:

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for illconsidered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

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

Adoption of the Model Rules

States adopted the structure of the model rules fairly quickly. Today, almost all states' disciplinary rules follow the numbering system of the Model Rules. The content of state rules varies, so it's important to follow the law of your jurisdiction. Since the Model Rules of Professional Conduct have been so influential, lawyers can look to these Model Rules just like they might look to other uniform laws or model acts.

Questions:

- In Rule 1.1 above, do the comments change your understanding of the rule? How? Do you have remaining questions about what the rule means or how it might work in application?

- Compare the usefulness of the Model Rules to the Model Code and the Canons. Consider the regulatory structure of the Model Rules, the distinction between ideals and boundaries, and the content in the examples above.