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# Fair Process and Fair Play: Professionally Responsible Cross-Examination

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## FAIR PROCESS AND FAIR PLAY: PROFESSIONALLY RESPONSIBLE CROSS-EXAMINATION

JOHN NIVALA\*

Whether or not Wigmore was correct in characterizing cross-examination as beyond any doubt the “greatest legal engine ever invented for the discovery of truth,”<sup>1</sup> as this symposium asks, cross-examination remains an essential characteristic of a fair trial process and a criterion for measuring a lawyer’s conduct. It is used to elicit information helpful to the cross-examining party and is used to test, in a professionally responsible manner, both the testimonial capacity and the testimonial reliability of the witness.<sup>2</sup>

In *Crawford v. Washington*, a landmark if not a watershed decision, the Supreme Court explained that the ultimate goal of the Sixth Amendment’s confrontation protection “is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee.”<sup>3</sup> The key is not that testimony is credible, for that is for the jury’s consideration, but that the

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1. See *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1367 (3d ed. 1940)). See also Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk,”* 14 WIDENER L. REV. 429 (2009); Jules Epstein, *The Great Engine That Couldn’t: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727 (2007). For a recent remembrance of Wigmore, see Robert P. Burns, *A Wistful Retrospective on Wigmore and His Prescriptions for Illinois Evidence Law*, 100 NW. U. L. REV. 131 (2006).

2. See *State v. Yang*, 712 N.W.2d 400, 405 (Wis. Ct. App. 2006); *People v. Urena*, No. G034261, 2006 WL 391879, at \*3 (Cal. Ct. App. Feb. 21, 2006).

3. 541 U.S. 36, 61 (2004). See Susanne C. Walther, *Pipe-Dreams of Truth and Fairness: Is Crawford v. Washington a Breakthrough for Sixth Amendment Confrontation Rights?*, 9 BUFF. CRIM. L. REV. 453, 467 (2006):

If it were true that cross-examination is so important for truth-finding, it would be logical not to conceive it as a (subjective) right but to define it as an (objective) indispensable stage of the proceedings at trial. The defense, in other words, would not only have to be given the opportunity to cross-examine—which it could use efficiently or not. Cross-examination of the witness would have to take place, if necessary, by the judge conducting the hearing.

The author later said that American lawyers:

hold this to be true: Cross-examination may factually serve truth finding, but it would be wrong to consider it indispensable, as far as that goal is concerned. Cross-examination may be “useful, but not indispensable”: From this perspective, there is no reason to consider it a “must” at all criminal trials; and it appears to be misleading to speak of a truth finding function of cross-examination.

*Id.* at 472 (emphasis omitted).

testimony is reliable enough for the jury to consider whether it is credible and, if so, to what extent. The Sixth Amendment commands that testimonial reliability “be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>4</sup> That crucible is where “reliability can best be determined.”<sup>5</sup> If a witness’s statement is testimonial, “the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation,”<sup>6</sup> and confrontation necessarily implicates cross-examination.<sup>7</sup>

*Crawford* ducked the question of when a witness’s statement is testimonial.<sup>8</sup> The Supreme Court began to address that question in *Davis v. Washington*.<sup>9</sup> Although not “attempting to produce an exhaustive classification of all conceivable statements . . . as either testimonial or nontestimonial,” the Court, under the circumstances of the cases before it, found it sufficient to say the following:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>10</sup>

The Court then noted it did not intend to imply “that statements made in the absence of any interrogation are necessarily nontestimonial.”<sup>11</sup> It felt the Constitution’s “[f]ramers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.”<sup>12</sup>

4. *Id.*

5. *Id.*

6. *Id.* at 69.

7. See *Commonwealth v. Brazie*, 847 N.E.2d 1100, 1102 (Mass. App. Ct. 2006): “There are few subjects, perhaps, upon which . . . courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.” See also *Henriquez v. McGinnis*, No. 05 Civ. 10893 (DLC), 2007 WL 844672 (S.D.N.Y. Mar. 19, 2007) and Jules Epstein, *True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions*, 24 QUINNIPAC L. REV. 609, 626-37 (2006).

8. “We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Crawford*, 541 U.S. at 68. In an accompanying footnote, the Court acknowledged an objection that “our refusal to articulate a comprehensive definition in this case will cause interim uncertainty,” but that result “can hardly be any worse than the status quo.” *Id.* at n.10.

9. 547 U.S. 813 (2006).

10. *Id.* at 821-22.

11. *Id.* at 822 n.1.

12. *Id.*

A unanimous Supreme Court made clear in *Whorton v. Bockting*<sup>13</sup> that *Crawford* and *Davis* did not focus on cross-examination as the great engine of truth; instead these cases focused on cross-examination as an element of a fair process. The issue in *Whorton* was whether *Crawford* “should be applied retroactively to judgments in criminal cases that are already final on direct review.”<sup>14</sup> Since *Crawford* was a “new rule,” it could apply retroactively only “if (1) the rule is substantive or (2) the rule is a ‘watershed rul[e] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.”<sup>15</sup>

The Court said that the rule announced in *Crawford* was clearly procedural, not substantive. Therefore, to qualify as a watershed rule, it had to meet two requirements: “First, the rule must be necessary to prevent ‘an impermissibly large risk’ of an inaccurate conviction. Second, the rule must ‘alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.’”<sup>16</sup>

As to the first requirement, *Crawford* did not qualify. Although *Crawford* reflected “the Framers’ preferred mechanism (cross-examination) for ensuring that inaccurate out-of-court testimonial statements are not used to convict an accused,” that was not enough.<sup>17</sup> According to the Court, “the question is whether the new rule remedied ‘an impermissibly large risk’ of an inaccurate conviction.”<sup>18</sup> Citing *Gideon v. Wainwright* as the touchstone, the Court said the *Crawford* rule was “in no way comparable to the *Gideon* rule.”<sup>19</sup> Although *Crawford* overruled precedent that the Court considered “inconsistent with the original understanding of the meaning of the Confrontation Clause,” that overruling did not reflect the Court’s conclusion that “the overall effect of the *Crawford* rule would be to improve the accuracy of fact finding in criminal trials.”<sup>20</sup>

The Supreme Court was “unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials.”<sup>21</sup> *Crawford* also “did not ‘alter [the Court’s] understanding of the bedrock procedural elements essential to the fairness of a proceeding.’”<sup>22</sup> To be retroactive, “a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding.”<sup>23</sup> Unlike *Gideon*, the *Crawford* rule simply lacked the necessary primacy and centrality, and did not qualify as a rule which altered the

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13. 549 U.S. 406 (2007).

14. *Id.* at 416.

15. *Id.* (internal citation omitted).

16. *Id.* at 418 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004)).

17. *Id.*

18. *Id.* (quoting *Schriro*, 542 U.S. at 366).

19. *Bockting*, 549 U.S. at 419.

20. *Id.*

21. *Id.* at 420.

22. *Id.* (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)) (emphasis omitted).

23. *Id.*

Court's "understanding of the bedrock procedural elements essential to the fairness of a proceeding."<sup>24</sup>

However, even if not a bedrock procedure, the opportunity to cross-examine and the adequacy of the cross-examination undertaken remain essential benchmarks of professionally responsible representation. For example, in *State v. Kent*, a New Jersey court considered the question of whether Crawford required "the exclusion of a laboratory report prepared by a State Police chemist and a blood test certification prepared . . . by a hospital employee who had extracted blood from the defendant driver at the request of a police officer."<sup>25</sup> The court concluded that both the report and the certification were testimonial and thus inadmissible unless the defendant was afforded an opportunity to test them by cross-examination of the preparers. Although "the information on those records is technical in many, but not all, respects," the court could not say "that their certified contents are beyond the scope of testimonial assertions that a defendant is entitled to test through cross-examination in a courtroom."<sup>26</sup> Because the declarant's out-of-court statements were testimonial, each "appear in court for cross-examination by defense counsel in order for the State to make use of his or her statement for its truth."<sup>27</sup> As the court acknowledged, requiring that appearance was "no minor consequence."<sup>28</sup>

However, it is a fair consequence: if, in a criminal trial, the prosecution intends to present testimonial evidence, then the defense should have an opportunity to cross-examine the testifier. Our system regards that opportunity as essential to a fair trial. Further, any cross-examination must also be done fairly. This paper will focus on cross-examination not just as an aspect of a fair process, but also as an attribute of professionally responsible representation. What do we expect the lawyer to do and to be when conducting cross-examination? How does one play fair in undertaking a fair cross-examination?

## I. COMPETENCE

The defining characteristic for any lawyer is competence. It is mandatory: "A lawyer shall provide competent representation to a client."<sup>29</sup> The lawyer's competent representation "requires the legal knowledge, skill, thoroughness

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24. *Id.* at 421 (quoting *Snyder*, 497 U.S. 227 at 242).

25. *State v. Kent*, 918 A.2d 626, 628 (N.J. Super. Ct. App. Div. 2007).

26. *Id.* at 640.

27. *Id.* at 642.

28. *Id.*

29. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006). For a particularly detailed article confronting the professional responsibility dilemmas, which arise for a lawyer in representing a criminal defendant, see Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39 (2004-5).

and preparation reasonably necessary for the representation.”<sup>30</sup> The lawyer must make “use of methods and procedures meeting the standards of competent practitioners.”<sup>31</sup>

How do we measure whether the lawyer has provided competent representation? The Supreme Court has addressed that in *Strickland v. Washington*, one of its most frequently referenced opinions.<sup>32</sup> There the Court had “to consider the proper standards for judging a criminal defendant’s argument that his first lawyer’s “assistance at the trial or sentencing was ineffective.”<sup>33</sup> The Court stated that a defendant is entitled to a fair trial, “one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.”<sup>34</sup> A defendant’s right to a fair trial is supported by “access to counsel’s skill and knowledge” which “is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”<sup>35</sup>

So, how are we to determine whether a defendant has received the professional assistance to which he or she is entitled? The benchmark is “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>36</sup> How is the lawyer’s conduct to be evaluated? *Strickland* provides a two-prong test:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.<sup>37</sup>

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30. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2003).

31. *Id.* at cmt. 5.

32. *Strickland v. Washington*, 466 U.S. 668 (1984). See Linda Greenhouse, “Bad” *Legal Advice and the Death Penalty*, N.Y. TIMES, Nov. 6, 2007, at A22 (reviewing the *Strickland* test and its application to capital cases). See also Whitney Cawley, *Raising the Bar: How Rompilla v. Beard Represents the Court’s Increasing Efforts to Impose Stricter Standards For Defense Lawyering in Capital Cases*, 34 PEPP. L. REV. 1139 (2007).

33. *Strickland*, 466 U.S. at 671.

34. *Id.* at 685.

35. *Id.* (quoting *Adams v. United States*, 317 U.S. 269, 275-76 (1942)).

36. *Id.* at 686. See also *Haymon v. State*, No. W2005-01303-CCA-R3-PC, 2006 WL 2040434, at \*10 (Tenn. Crim. App. July 20, 2006) (“[A] defendant is only entitled to constitutionally adequate representation, not perfect or error-free representation.”); *United States v. Collins*, 430 F.3d 1260, 1264-65 (10th Cir. 2005) (stating that the defendant in a criminal case is entitled to be represented by a lawyer appearing on his behalf).

37. *Strickland*, 466 U.S. at 687. See *Robertson v. State*, 187 S.W.3d 475, 486 (Tex. Crim. App. 2006) (affirming that the second prong must be satisfied only after the first is considered met).

Ultimately, a defendant complaining that the lawyer was ineffective “must show that counsel’s representation fell below an objective standard of reasonableness.”<sup>38</sup> “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”<sup>39</sup>

Those norms are basic. A lawyer must: provide competent assistance, be loyal to his client, avoid conflicts of interests, be candid with the client, and he must, overall, “bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.”<sup>40</sup> However, the *Strickland* Court

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38. *Strickland*, 466 U.S. at 688. In *United States ex rel. Raygoza v. Bobler*, 361 F. Supp. 2d 779, 795 (N.D. Ill. 2005) the court acknowledged that:

[defendant’s trial lawyer’s] examination was not particularly meaningful and thorough, but it did not render his performance so unreasonable as to constitute ineffective assistance. The failure of counsel to develop every bit of testimony through all available inconsistent statements to impeach witnesses is not necessarily unprofessional or ineffective assistance of counsel, particularly where a [defendant] was not prejudiced as a result of the alleged errors. [Defendant] does not explain how a more rigorous cross-examination . . . would have had any effect on the outcome of the proceedings.

*See also* *Hooks v. Greene*, No. 04 Civ. 297 (SAS), 2005 WL 2254663, at \*6 (S.D.N.Y. Sept. 16, 2005) (stating that the defendant’s lawyer’s “overall cross-examination . . . cannot be characterized as objectively unreasonable under prevailing professional norms”).

39. *Strickland*, 466 U.S. at 688. *See also* *Gonzales v. Warren*, No. 03-CV-74266-DT, 2005 WL 1348701, at \*13 (E.D. Mich. Apr. 14, 2005):

Petitioner also contends that counsel failed to properly cross-examine several witnesses by abandoning certain lines of questioning. ‘[C]ourts generally entrust cross-examination techniques...to the professional discretion of counsel.’ ‘Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available.’ Here the record shows that counsel ably presented extensive evidence on petitioner’s behalf, and thoroughly cross-examined the prosecution’s witnesses. That some unidentified questions may have been inartfully phrased, or some particular avenues not fully explored, does not support a finding that counsel’s performance was deficient.

*Id.* (internal citations omitted).

40. *Strickland*, 466 U.S. at 688. In *Spry v. United States*, No. CIV A. 2:03-2317, 2006 WL 2061134, at \*12 (S.D. W. Va. July 21, 2006), the Court held:

[defendant’s lawyer’s] cross-examination of government witnesses was well within the wide range of what is considered reasonable professional assistance. [The lawyer] attacked the witnesses’ credibility and motives for testifying, eliciting admissions that the witnesses were drug users and dealers during the period in question, and hoped to receive more lenient sentences for testifying. He gained admissions of untruthfulness. His

declined to create a “particular set of detailed rules” for measuring a lawyer’s conduct since such rules could not “satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.”<sup>41</sup>

Perhaps most significantly, the Court held that courts reviewing a lawyer’s performance “must be highly deferential.”<sup>42</sup> A reviewing court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”<sup>43</sup> A complaining defendant “must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”<sup>44</sup> A reviewing court “deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.”<sup>45</sup> A complaining defendant is entitled only to “the assistance necessary to justify reliance on the outcome of the proceeding.”<sup>46</sup> Claimed deficiencies in that assistance “must be prejudicial to

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questions avoided repetition of damaging testimony against his client and focused on the reasons to question the credibility of the witnesses against [d]efendant.

*See also* J. Mark Cooney, *Benching the Monday-Morning Quarterback: The “Attorney Judgment” Defense to Legal-Malpractice Claims*, 52 WAYNE L. REV. 1051, 1054 (2006):

Lawyers owe their clients a duty to exercise ‘that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer.’ But this duty is not without limits. ‘An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill and ability ordinarily possessed by members of the legal profession.’ Likewise, an attorney has no duty to insure or guarantee a favorable result for a client.

41. *Strickland*, 466 U.S. at 688-89.

42. *Id.* at 689. A reviewing court will normally defer to the trial lawyer’s discretion in reviewing questions challenging cross-examination performance. *See Hudson v. Lafler*, No. 04-CV-74001-DT, 2006 WL 1662541, at \*3 (E.D. Mich. June 8, 2006).

43. *Strickland*, 466 U.S. at 689.

44. *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

45. *Id.* at 690.

46. *Id.* at 692. In *Yarbrough v. Johnson*, 490 F. Supp. 2d 694, 714 (E.D. Va. 2007), the reviewing court said that the complaining defendant’s strongest claim was that his trial lawyer “was ineffective for unreasonably failing to subject the Commonwealth’s DNA evidence to virtually any scrutiny.” Although the trial lawyer failed to become familiar with the DNA testing done by the state, the court upheld the defendant’s conviction, stating:

Although defense counsel’s cross-examination of the prosecution’s expert indicates that trial counsel misunderstood the DNA testing procedures utilized in this case, such questioning, albeit flawed, fails to establish that trial counsel was ineffective for his ‘complete lack of an investigation’ into DNA evidence and failure to subject that evidence to any adversarial testing . . . Although defense counsel could certainly have done more, counsel’s lack of understanding . . . is insufficient grounds for the appointment of a defense expert. Without the benefit of such expert,

the defense in order to constitute ineffective assistance under the Constitution.”<sup>47</sup>

A lawyer’s courtroom performance “is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”<sup>48</sup> Even if the lawyer’s conduct is unreasonable, the complaining defendant must show that the conduct “actually had an adverse effect on the defense.”<sup>49</sup> The defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>50</sup> That reasonable probability is one “sufficient to undermine confidence in the outcome.”<sup>51</sup>

Although the *Strickland* test appears demanding, the Supreme Court stated that lower courts reviewing a trial lawyer’s conduct:

should keep in mind that the principles [set forth in *Strickland*] do not establish mechanical rules. Although those principles should guide the process of

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counsel must conduct his own research and do his best to challenge the evidence; based on the transcript, . . . trial counsel appears to have done just that, and thus, his performance is not constitutionally deficient.

*Id.* at 733 n.41 (internal citations omitted); *see also* Gregory v. Warden, No. TSRCV000003147S, 2007 WL 1470593, at \*11 (Conn. Super. Ct. Apr. 23, 2007) (applying *Strickland*, the court dismissed a defendant’s claims that his trial lawyer failed to adequately cross-examine the state’s witnesses).

47. *Strickland*, 466 U.S. at 692.

48. *Id.* at 693. *See also* Mooney v. Trombley, No. 05-71329-DT, 2007 WL 496470, at \*10-11 (E.D. Mich. Feb. 12, 2007):

The Supreme Court [has explained that] for an ineffective assistance of counsel claim to come within [*Strickland*] ‘the attorney’s failure must be complete.’ The difference is between ‘bad lawyering’ and ‘no lawyering,’ and the difference is not one of degree, but one of kind. The complaining defendant here has not demonstrated that counsel completely failed to subject the prosecution’s case to meaningful adversarial testing.

*Id.* (internal citations omitted). *See also* United States v. Keys, 469 F. Supp. 2d 742, 746 (D. Minn. 2007) (“In reviewing counsel’s performance the court does not ask whether counsel’s decisions were ‘correct or wise,’ but determines whether the decision ‘was an unreasonable one which only an incompetent attorney would adopt.’” (citation omitted)).

49. *Strickland*, 466 U.S. at 693.

50. *Id.* at 694. *See also* Thatcher v. Romanowski, No. Civ. 03-74585-DT, 2005 WL 2033534, at \*10 (E.D. Mich. Aug. 19, 2005) (“[Defendant’s] ineffective assistance of counsel claim must fail, because even if counsel was deficient in failing to cross-examine [the prosecution’s witness] more extensively, [defendant] has failed to demonstrate any reasonable probability that a more extended cross-examination of this witness by defense counsel would have affected the result of the proceeding.”).

51. *Strickland*, 466 U.S. at 694. *See also* Bolar v. Luna, No. C05-2029-TSZ-JPD, 2007 WL 1103933, at \*14 (W.D. Wash. Apr. 10, 2007) (noting that the defendant’s argument “attacks a tactical decision by his trial counsel that is accorded great deference on habeas review and cannot, as a general matter, form the basis of an ineffective assistance of counsel claim.”).

decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.<sup>52</sup>

Thus, the reviewing court should ask whether the lawyer's conduct was within the accepted range of competent professional assistance and, if not, did it make a difference?<sup>53</sup>

However demanding it may appear, the *Strickland* test can be met. In *Harris v. Artuz*,<sup>54</sup> the complaining defendant claimed that his trial lawyer failed to adequately cross-examine an eyewitness who identified the defendant as the perpetrator.<sup>54</sup> The court said cross-examination "is generally viewed as a matter of trial strategy, and, as such, is virtually unchallengeable 'unless there is no . . . tactical justification for the course taken.'"<sup>55</sup> A reviewing court must be reluctant "to second guess counsel's cross-examination tactics, mindful that counsel must often rely on trial instinct and human insight in making on-the-spot decisions about the course of attack most likely to unnerve the witness and plant doubt in the mind of the jurors."<sup>56</sup>

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52. *Strickland*, 466 U.S. at 696. See, e.g., *Barth v. United States*, 488 F. Supp. 2d 874, 883 (D.N.D. 2007) ("cross-examination may, in some instances, be so unreasonable that it may constitute ineffective assistance of counsel[.]") but the defendant's "unsupported allegations are insufficient to demonstrate deficient performance and to overcome the presumption that counsel acted competently."); see also *Minner v. Vasbinder*, No. 2:06 CV 10178, 2007 WL 1469419, at \*5 (E.D. Mich. May 21, 2007) (stating that reviewing courts "generally entrust cross-examination techniques . . . to the professional discretion of counsel," and cross-examination strategy "is a matter of trial tactics and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available." (internal citations omitted)). In an earlier decision, the court stated that "even if counsel was deficient in failing to cross-examine the witness," the defendant "has failed to demonstrate any reasonable probability that the proposed cross-examination would have affected the result of the proceeding, in light of the overwhelming evidence against him in this case." *Paredes v. Vasbinder*, No. 03-74826-DT, 2006 WL 1851253, at \*5 (E.D. Mich. June 30, 2006).

53. See *Palmer v. McDonough*, No. 3:04CV1305-12HT5, 2006 WL 1382094, at \*4 (M.D. Fla. May 19, 2006).

54. *Harris v. Artuz*, 100 Fed. Appx. 56 (2d Cir. 2004).

55. *Id.* at 57 (quoting *United States v. Luciano*, 158 F.3d 655, 660 (2d Cir. 1998)); see *Madrigal v. Dretke*, No. 3:04-CV-2535-B ECF, 2006 WL 1391428, at \*6 (N.D. Tex. Mar. 28, 2006) (noting that a defense lawyer's decisions on cross-examination are very difficult for a defendant to challenge and, in any event, the defendant could not show "that the outcome of the trial probably was altered by counsel's failure to cross-examine [two officers] about inconsistencies in their testimony").

56. *Harris*, 100 Fed. Appx. at 58. See *Harris v. State*, 627 S.E.2d 562, 565 (Ga. 2006):

The standard regarding ineffective assistance of counsel is "not errorless counsel and not counsel judged ineffective by hindsight, but counsel . . . rendering reasonably effective assistance." . . . While hindsight made clear to trial counsel that he could have taken a different approach to the issue of credibility, the record of the trial and the testimony at the motion for new trial hearing support the trial court's holding that trial counsel's representation of [defendant] fell within the wide range of reasonable professional assistance.

However, the *Harris* court concluded that the case before it was “one of those rare cases where no objectively reasonable strategic or tactical justification for counsel’s omission can be conceived.”<sup>57</sup> Because no such justification could explain the lawyer’s failure to adequately cross-examine the witness, the lawyer’s in-trial conduct indicated either “an impermissible failure to investigate pertinent materials or ‘a significant dereliction by the defense.’”<sup>58</sup> Whatever the explanation, the court felt *Strickland* compelled “a finding of objectively unreasonable representation.”<sup>59</sup>

The complaining defendant in *Reynoso v. Giurbinò*<sup>60</sup> claimed that the trial lawyer’s representation was ineffective in part because the lawyer failed to conduct an effective cross-examination of prosecution witnesses to demonstrate that “they knew about . . . and expected to receive reward money in exchange for their testimony.” The trial lawyer’s “performance was constitutionally ineffective” because she both “[failed] to investigate the [reward] matter more fully” and failed at trial to cross-examine the prosecution witnesses about the reward.<sup>61</sup>

The latter conduct could not “under any theory be deemed a ‘sound trial strategy.’”<sup>62</sup> Had the trial lawyer undertaken that cross-examination, it would have provided a strong motive for witness bias on the part of the only two eyewitnesses.<sup>63</sup> The court concluded that the defendant had shown the prejudice required by *Strickland*, that there was a reasonable probability that but for the trial lawyer’s deficient conduct, the trial would have turned out differently:

[D]efense counsel’s deficient performance was extremely prejudicial to [defendant]. Counsel’s failure to elicit essential impeachment evidence at trial through cross-examination was critical to the outcome. The credibility of the eyewitnesses was determinative . . . We do not find the question before us to be a close one. Upon an independent review of the record, we conclude that given so ineffective a performance with so adverse a consequence, it would constitute an unreasonable application of *Strickland* to hold that [the defendant] received effective assistance of counsel.<sup>64</sup>

Thus *Strickland*, although announcing a test deferential to a trial lawyer’s cross-examination conduct, did not put that conduct beyond discretionary competence review by either a trial or an appellate court.

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*Id.* (internal citations omitted).

57. *Harris*, 100 Fed. Appx. at 58.

58. *Id.* at 59 (quoting *Harris v. Artuz*, 288 F. Supp. 2d 247, 260 (E.D.N.Y. 2003)).

59. *Id.*

60. 462 F.3d 1099, 1110 (9th Cir. 2006).

61. *Id.* at 1112.

62. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

63. *Id.* at 1113.

64. *Id.* at 1120.

## II. CONFLICT AND CONFIDENTIALITY

If the lawyer is considered (pre-performance) to be competent, a court usually will defer to the client's choice of who will represent him or her. The Supreme Court in *United States v. Gonzalez-Lopez* held that an element of the Sixth Amendment's assistance of counsel right "is the right of a defendant who does not require appointed counsel to choose who will represent him."<sup>65</sup> The "right at stake . . . is the right to counsel of choice, not the right to a fair trial."<sup>66</sup> If a defendant is wrongly denied the right to a lawyer of choice, "it is unnecessary to conduct an ineffectiveness or prejudicial inquiry to establish a Sixth Amendment violation."<sup>67</sup> The denial "is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of representation he received."<sup>68</sup>

The *Gonzalez-Lopez* majority acknowledged that this "right to counsel of choice does not extend to defendants who require counsel to be appointed for them," nor did it extend to "representation by a person who is not a member of the bar," nor to a defendant's demand that "a court honor his waiver of conflict-free representation."<sup>69</sup> That latter point, which often involves cross-examination issues, is what is at issue in this section.

This point was also at issue in *Wheat v. United States*.<sup>70</sup> The question was the extent to which a criminal defendant's Sixth Amendment right "to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy."<sup>71</sup> Although multiple representation "is not *per se* violative of constitutional guarantees of effective assistance of counsel," a trial court "confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel."<sup>72</sup> The trial court has "an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."<sup>73</sup> If the trial court "justifiably finds an actual conflict of interest, there can be no doubt that it may decline [a defendant's] proffer of waiver, and insist that defendants be separately represented."<sup>74</sup>

The trial court's problem is that it must decide the question "not with the wisdom of hindsight . . . but in the murkier pretrial context when relationships between the parties are seen through a glass, darkly."<sup>75</sup> Questions of "nascent

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65. *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557, 2561 (2006); see Paul Alessio Mezzina, *Elevating Choice Over Quality of Representation: United States v. Gonzalez-Lopez*, 126 S.Ct. 2557 (2006), 30 HARV. J.L. & PUB. POL'Y 451 (2006).

66. *Gonzalez-Lopez*, 126 S.Ct. at 2562.

67. *Id.* at 2563.

68. *Id.*

69. *Id.* at 2565.

70. 486 U.S. 153 (1988).

71. *Id.* at 159.

72. *Id.* at 160 (citations omitted).

73. *Id.*

74. *Id.* at 162.

75. *Id.*

conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials.<sup>76</sup> Given this, the Supreme Court held that a trial court “must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.”<sup>77</sup>

The trial court in *Wheat* “was confronted not simply with an attorney who wished to represent two coequal defendants in a straightforward criminal prosecution” but “proposed to defend three conspirators of varying stature in a complex drug distribution scheme.”<sup>78</sup> Key to the lawyer’s disqualification was that his representation would have made him “unable ethically” to provide the cross-examination necessary to be a competent lawyer for all the clients.<sup>79</sup> Although a trial court “must recognize a presumption in favor of [a defendant’s] counsel of choice . . . that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.”<sup>80</sup> Whether that showing has been made “must be left primarily to the informed judgment of the trial court.”<sup>81</sup>

The conflict-of-interest problem was a central focus in *Strickland*’s analysis of what is or is not effective assistance of counsel. This conflict problem presented a “type of actual ineffectiveness claim” which warranted a limited presumption of prejudice.<sup>82</sup> A trial lawyer “burdened by an actual conflict of interest . . . breaches the duty of loyalty, perhaps the most basic of counsel’s duties.”<sup>83</sup> It is “difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.”<sup>84</sup> A complaining defendant

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76. *Wheat*, 486 U.S. at 162-63.

77. *Id.* at 163.

78. *Id.* at 163-64.

79. *Id.* at 164.

80. *Id.* Compare *United States v. Morrell-Corrada*, 343 F. Supp. 2d 80, 90 (D.P.R. 2004) where the trial court found, “the hypothetical [cross-examination] conflict presented here does not meet the ‘serious potential for conflict’ standard announced by the Supreme Court in *Wheat* and cannot serve as a basis for denying a criminal defendant his Sixth Amendment right to counsel of choice.” *Id.* (internal citation omitted). Since the government had demonstrated “neither an actual conflict nor the serious potential for one,” if the defendant’s choice of counsel “potentially conflicts with his right to an attorney of undivided loyalty, the choice as to which right shall have precedence should be left to defendant and not dictated by the government.” *Id.* at 91.

81. *Wheat*, 486 U.S. at 164. See also *United States v. Armaza*, 280 F. Supp. 2d 174 (S.D.N.Y. 2003) (describing in detail the process and the principles involved in analyzing and deciding the prosecution’s motion to disqualify defendant’s chosen lawyer because of a potential conflict-of-interest related to the cross-examination of a former client).

82. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). See also *United States v. Santiago*, No. 01-379, 2007 WL 518589 (E.D. Pa. Feb. 9, 2007); *Miller v. State*, No. 04-2823, 2005 WL 1270652 (D. Minn. May 3, 2005).

83. *Strickland*, 466 U.S. at 692.

84. *Id.*

must demonstrate that the lawyer “actively represented conflicting interests’ and that an ‘actual conflict of interest adversely affected his lawyer’s performance.”<sup>85</sup> In every case, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding,” and the reviewing court’s concern must be whether, “despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.”<sup>86</sup>

There are at least four situations where a conflict of interest claim could produce a challenge to a lawyer’s trial conduct: conflicts involving current clients,<sup>87</sup> conflicts involving current and former clients,<sup>88</sup> conflicts involving current clients and third parties,<sup>89</sup> and conflicts involving the client and the lawyer,<sup>90</sup> all of which can include the lawyer’s responsibility to maintain confidential information conveyed by the client or clients.<sup>91</sup>

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85. *Id.* (internal citation omitted); see *United States v. Vargas*, 469 F. Supp. 2d 752, 764 (D.N.D. 2007) (where defendant “failed to establish that defense counsel’s decision not to cross-examine . . . was linked to the alleged conflict;” the reviewing court found that it was “not unreasonable for an attorney to forego cross-examining a witness if the witness does not implicate his client”); see also *Zavoda v. Lafler*, No. 04-CV-70811-DT, 2005 WL 3008590, at \*9 (E.D. Mich. Nov. 8, 2005).

86. *Strickland*, 466 U.S. at 696; see also *United States v. Martin*, 454 F. Supp. 2d 278, 283 (E.D. Pa. 2006) (noting “that in cases involving an alleged conflict of interest based on the prior representation of a prosecution witness by defense counsel, the courts have generally examined the particular circumstances to determine if counsel’s ‘undivided loyalties’ lie with his current client.” (internal citation omitted)).

87. See MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(1)(2006) (“Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest” which “exists if . . . the representation of one client will be directly adverse to another client”); see also *id.* at cmt. 6 (noting that: “a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit”).

88. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) & 1.9(a) (Comment 1 to the latter rule says that once the lawyer-client relationship has ended, “a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this [rule].”).

89. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (stating a concurrent conflict of interest exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”). See also R.1.7 cmt.1.

90. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2). Resolving such conflicts:

requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interests exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected . . . and obtain their informed consent, confirmed in writing. R.1.7(a)(2) cmt.2.

91. See MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)”). The rule:

*Abernathy v. State* provides an example of the conflicts which can arise when a lawyer represents co-defendants even when the defendants are tried separately.<sup>92</sup> The lawyer repeatedly counseled the clients about the benefits of having separate counsel and repeated this to the court when the prosecution filed a motion to disqualify the lawyer.<sup>93</sup> After questioning by the court, both defendants reaffirmed their decision to be represented by the one lawyer.<sup>94</sup>

The appellate court said joint representation did not raise a “per se presumption of conflict of interest or prejudice” especially when neither client raised a pre-trial objection.<sup>95</sup> Post-trial, a defendant “must show a substantial factual basis to support his claim of an actual conflict of interest; merely a theoretical or speculative conflict is not enough.”<sup>96</sup> The test “is whether the representation deprived either defendant of the undivided loyalty of counsel.”<sup>97</sup> The defendant in *Abernathy* “failed to show a substantial basis in fact to support his claim of an actual conflict of interest that adversely affected his counsel’s representation.”<sup>98</sup>

A deprivation of undivided loyalty can occur in joint representation situations when the representation impairs cross-examination. In *United States v. Moscony*,<sup>99</sup> the prosecution moved to disqualify defendant’s lawyer because of a conflict-of-interest which would have limited the lawyer’s ability to cross-examine government witnesses who the lawyer had also represented. The trial court found that the witnesses’ testimony was “central to the government’s case, and that vigorous cross-examination of these witnesses would be necessary.”<sup>100</sup> That cross-examination, “if foregone . . . would have deprived [the defendant] of his Sixth Amendment right to effective assistance of counsel . . . and if pursued would have violated ethical standards regarding privileged communications.”<sup>101</sup>

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governs the disclosure by the lawyer of information relating to the representation of a client during the lawyer’s representation of the client. See Rule 1.18 for the lawyer’s duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer’s duty not to reveal information relating to the lawyer’s prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer’s duties with respect to the use of such information to the disadvantage of clients and former clients. R.1.6 cmt. 1.

See also Kevin Brown, *Stop, That’s My Attorney!: Successive Representation and Prior Consultation*, 20 GEO. J. LEGAL ETHICS 447 (2007).

92. *Abernathy v. State*, 630 S.E.2d 421 (Ga. Ct. App. 2006).

93. *Id.* at 430-431.

94. *Id.* at 431.

95. *Id.* at 432 (citing *Curry v. State*, 519 S.E.2d 269 (Ga. Ct. App. 1999)).

96. *Id.* at 432.

97. *Id.* (citing *Jackson v. State*, 578 S.E.2d 181 (Ga. Ct. App. 2003)).

98. *Abernathy*, 630 S.E.2d at 433.

99. 927 F.2d 742 (3d Cir. 1991).

100. *Id.* at 747-48.

101. *Id.* at 748.

In affirming the trial court's disqualification of the defendant's lawyer, the court of appeals said the Sixth Amendment "includes two correlative rights, the right to adequate representation by an attorney of reasonable competence and the right to an attorney's undivided loyalty free of conflicts of interest."<sup>102</sup> The latter "is required because the type of effective 'assistance of counsel' the Sixth Amendment guarantees a criminal defendant is that which puts the government to its proofs in an adversarial manner, and for this counsel free of conflicts of interest is necessary."<sup>103</sup> A trial court has the "unenviable duty of reconciling these various rights and duties," ensuring that the defendant has a right to counsel of choice while also ensuring that the choice does not produce an unwaivable conflict of interest:

[T]he trial court has an institutional interest in protecting the truth-seeking function of the proceedings over which it is presiding by considering whether the defendant has effective assistance of counsel, regardless of any proffered waiver. Moreover, to protect the critically important candor that must exist between client and attorney, and to engender respect for the court in general, the trial court may enforce the ethical rules governing the legal profession with respect to both client-attorney communications and to conflict-free representation, again regardless of any purported waiver. Finally, the court has an independent interest in protecting a fairly-tendered verdict from trial tactics that may be designed to generate issues on appeal.<sup>104</sup>

The trial court need not find an actual conflict of interest. If "there is 'a showing of a serious potential for conflict' . . . the presumption in favor of a defendant's counsel of choice is overcome and the trial court may disqualify counsel and reject the defendant's waiver of conflict-free representation."<sup>105</sup>

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102. *Id.* at 748.

103. *Id.*; see *Jennings v. State*, 413 So.2d 24, 26 (Fla. 1982) (where Defendant's trial lawyer refused to cross-examine a key prosecution witness who the lawyer had previously represented, arguing that to do so would violate the applicable rules of professional responsibility). The court concluded that the defendant:

was deprived of the benefit of cross-examination of a vital and material witness. The opportunity for full and complete cross-examination of critical witnesses is fundamental to a fair trial, which [the defendant] did not receive. We do not, in this proceeding, determine the correctness of the [defendant's lawyer's] position because such resolution does not affect the fact that [the defendant] did not receive a fair trial.

*Id.* (internal citations omitted).

104. *Moscony*, 927 F.2d at 749. In *United States v. RMI Company*, 467 F. Supp. 915, 919 (W.D. Pa. 1979) the trial court was "convinced that the prohibition against an attorney representing parties where a clear conflict of interest is apparent" applied to the case before it; "[r]epresentation free from conflicting interests is an essential part of the Sixth Amendment right to effective assistance of counsel." The court later said that in addition "to its duty to protect the constitutional right to effective assistance of counsel, this Court also has a responsibility 'to supervise the conduct of the members of its bar' and 'to maintain public confidence in the legal profession.'" *Id.* at 922 (citation omitted).

105. *Moscony*, 927 F.2d at 750 (internal citations omitted).

In *Moscony*, the defendant “did not attempt to cure the conflict of interest problem by offering to forego cross-examination” of the co-represented parties.<sup>106</sup> The court found it obvious that an actual conflict of interest existed. The conflict arose because the lawyer’s loyalties were divided; a lawyer “who cross-examines former clients inherently encounters divided loyalties” which implicate the rules of professional responsibility.<sup>107</sup> The lawyer and his firm were disqualified.<sup>108</sup>

The conflict-of-interest problem in cross-examination can raise significant questions about a lawyer’s obligation to maintain a client’s confidences. A lawyer “shall not reveal information relating to the representation . . . unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation.”<sup>109</sup> This rule “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”<sup>110</sup>

*Holloway v. Arkansas*<sup>111</sup> is an example of how the lawyer’s confidentiality obligation can create problems in cross-examination. The petitioners, who were co-defendants in a criminal trial, asked for separate counsel when their appointed lawyer said he could not provide effective assistance of counsel to each of them because, based on confidential information he had received, he could not effectively conduct cross-examination.<sup>112</sup> The trial court denied the request and the defendants were convicted.<sup>113</sup>

The Supreme Court, in reversing the convictions, focused on the conflict-of-interests question, noting that the conflict “is suspect because of what it tends to prevent the attorney from doing.”<sup>114</sup> The conflict could, as the defendants argued, “prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another . . . .”<sup>115</sup> In particular, the defendants’ lawyer said that “one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them.”<sup>116</sup> As the Court concluded, the evil in joint representation of conflicting interests “is in what the advocate finds himself compelled to refrain from doing” which was to conduct effective cross-examination.<sup>117</sup>

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106. *Id.*

107. *Id.*

108. *Id.* at 756.

109. MODEL RULES OF PROF’L CONDUCT R. 1.6(a).

110. R. 1.6 cmt. 3.

111. 435 U.S. 475 (1978).

112. *Id.* at 475.

113. *Id.*

114. *Id.* at 489-90.

115. *Id.* at 490.

116. *Id.* at 478.

117. *Holloway*, 435 U.S. at 490 (emphasis omitted).

That was also the problem in *United States v. Gomez*.<sup>118</sup> The government raised a question about the defendant's lawyer because the lawyer had previously represented a government witness who was a former United States Marshal.<sup>119</sup> During a hearing, defendant's lawyer said he "could not cross-examine [the former Marshal] and had confidential information about the inner workings of the U.S. Marshal Service."<sup>120</sup> Although the lawyer volunteered to assist a substitute lawyer, the trial court found "it impossible . . . for [the lawyer] to assist his replacement without triggering a conflict."<sup>121</sup> The defendant offered to proceed if another lawyer was appointed "for the limited purpose of cross-examining" the former Marshal.<sup>122</sup> The trial court found, and the court of appeals agreed, that the confidential information received by defendant's lawyer "might taint other aspects of" the lawyer's representation, the main focus of which was the lawyer's ability to conduct effective cross-examination.<sup>123</sup>

Another example of the conflict which confidentiality can present in cross-examination is *United States v. Siegner*.<sup>124</sup> The prosecution moved to disqualify defendant's lawyer because the lawyer, in satisfying his professional duty to the defendant, would be forced to reveal confidential information received in a prior representation of the defendant (and his company and business associates) in matters relating to the current prosecution.<sup>125</sup> In particular, the court noted that an effective cross-examination of government witnesses "might reasonably be expected to involve the use of any information and knowledge possessed by [the lawyer] as a result of his prior representation."<sup>126</sup> But that information, "garnered through an attorney-client association, may well prove in fact to be of a confidential nature;" the use of such information "to the disadvantage of the former client or to the advantage of another is clearly unethical."<sup>127</sup>

### III. CHARACTER

If, as it seems clear that it is, competent, conflict-free, cross-examination is an essential component of a fair process, what is fair cross-examination? Or, to ask a question that this Professional Responsibility teacher asks, when does a lawyer's conduct in cross-examination cross from professionally responsible to professionally irresponsible?

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118. 120 Fed. Appx. 930, 2005 WL 271459 (3d Cir. 2005).

119. *Id.* at 931.

120. *Id.*

121. *Id.*

122. *Id.* at 934.

123. *Id.*

124. 498 F. Supp. 282 (E.D. Pa. 1980).

125. *Id.* at 284.

126. *Id.* at 285.

127. *Id.* Cf. *Gilson v. Sirmons*, No. 01-1311-C, slip op. at 30-31 (W.D. Okla. Aug. 9, 2006).

Under the rules of evidence, a trial court judge is obliged to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”<sup>128</sup> But how is the lawyer to know where these evidentiary lines have been drawn? Further, if the lines drawn have been crossed, has the lawyer acted irresponsibly as a professional?

The model rules offer a lawyer little rule-specific guidance.<sup>129</sup> In the preamble, the rules say that the lawyer, as advocate, will “zealously” assert “the client’s position under the rules of the adversary system.”<sup>130</sup> That lawyer, however, “should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.”<sup>131</sup> That lawyer’s conduct is “guided by personal conscience and the approbation of professional peers.”<sup>132</sup> The difficult problems are those which raise conflicts “between a lawyer’s

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128. Fed. R. Evid. 611(a). See *Koonce v. Cathel*, No. 05-5068, slip op. at 5 (D.N.J. Sept. 23, 2006), where the court said the following:

[Although] the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination[,] . . . it does not follow . . . that the Confrontation Clause prevents a trial judge from imposing any limits on defense counsel’s inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, . . . prejudice, confusion of the issues, . . . or interrogation that is repetitive or only marginally relevant . . . . [T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

*Id.* (internal citations omitted).

129. For a detailed review of some of the difficulties raised, see Bruce A. Green and Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 325 (2006), reaching this conclusion:

On the surface, the permissive ethics rules seem simple: they give lawyers a choice. This [a]rticle has demonstrated that this appearance is deceptive. From the face of most permissive rules, it is not clear how much of a choice the rules mean to accord lawyers or what the effect of that choice should be—on potential discipline and, more importantly, on the judgment of other lawmakers considering the same conduct.

The authors said this “beguiling simplicity of the codes’ permissive provisions creates a significant risk both that lawyers will overemphasize their discretion and that the various regulators will misunderstand the import of the rules.” *Id.*

130. MODEL RULES OF PROF’L CONDUCT Preamble [2].

131. *Id.* at [5].

132. *Id.* at [7].

responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."<sup>133</sup> Many of these difficult problems "must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."<sup>134</sup> Those basic 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."<sup>135</sup>

Those people would include witnesses to be cross-examined. What is the lawyer's responsibility to them? Is there a professional character that we expect from the cross-examining lawyer? We, as a profession, expect the lawyer to act "with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>136</sup> However, we, as a profession, also tell the lawyer that he or she "is not bound . . . to press for every advantage that might be realized for a client."<sup>137</sup> In particular, the lawyer's zeal "does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."<sup>138</sup> Even more particularly, a lawyer who "knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status" and that conduct is found to be "prejudicial to the administration of justice" has acted unprofessionally unless a reviewer considers the conduct to be "[l]egitimate advocacy."<sup>139</sup>

Again, how is the lawyer to know what is legitimate advocacy? And, again, how is the lawyer in a criminal case to know where that line is drawn in cross-examination? The ABA has tried to provide guidance in its standards on the prosecutor's and the defense lawyer's functions, standards "intended to be used as a guide to professional conduct and performance."<sup>140</sup> During trial, the

133. *Id.* at [9].

134. *Id.*

135. *Id.*

136. MODEL RULES OF PROF'L CONDUCT R 1.3, cmt [1].

137. *Id.*

138. *Id.*

139. MODEL RULES OF PROF'L CONDUCT R. 8.4, cmt [3].

140. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, § 3-1.1 (1993). *See also* Commonwealth v. Hernandez, 826 N.E.2d 753, 758-9 (Mass.App. Ct. 2005) (citing the ABA standards), noting:

There are other decisions, however, "often called strategic or tactical matters, [that] rest ultimately in counsel, with the degree of required client consultation and participation dependant on the circumstances." These strategic or tactical decisions, such as "what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make," . . . reflect the unique training and professional experience which are the province of the attorney.

*Id.* (internal citations omitted).

prosecutor and the defendant's lawyer, as officers of the court, "should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom."<sup>141</sup> For both the prosecutor and the defendant's lawyer, these standards require that witness examination "should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily."<sup>142</sup> But when is intimidation or humiliation necessary? Is it ever fair?

The ABA standards regarding the cross-examination of a truthful witness draw a distinction between the prosecutor and the defendant's lawyer. A prosecutor's "belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination," and, in particular, a prosecutor "should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully."<sup>143</sup> The defendant's lawyer is not put to this analysis; his or her "belief or knowledge that the witness is telling the truth does not preclude cross-examination."<sup>144</sup>

Those standards do not, however, address what is a fair cross-examination, that is, fair consistent with the character we, as a profession, expect of a lawyer. In *United States v. Greer*,<sup>145</sup> the defendant's lawyer, after beginning the cross-examination of a key prosecution witness, was cautioned by the trial judge that "if you knowingly . . . take action on behalf of your client when you know, or when it is obvious that such action would serve to merely harass or maliciously injure another, you violate your Canon of Ethics."<sup>146</sup> The defendant's lawyer then dropped his line of inquiry, and, on appeal, the defendant said the court's admonition "intimidated her inexperienced counsel, thus improperly limiting her right to cross-examination."<sup>147</sup>

The court of appeals, acknowledging the constitutional importance of a defendant's right to fully cross-examine the prosecution's witnesses, said "the trial judge did not limit cross-examination . . . but merely advised [defendant's] counsel that the Alabama Code of Professional Responsibility might bear

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The court then noted, this characterization of the decisions "does not 'render the[se] decisions immune from scrutiny . . . however, they will not be considered ineffective assistance unless they were 'manifestly unreasonable.'" *Id.* at 759 (internal citation omitted).

141. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, § 3-5.2 & § 4-7.1 (1993).

142. *Id.* at § 3-5.7(a), § 4-7.6(a).

143. *Id.* at § 3-5.7(b).

144. *Id.* at § 4-7.6(b).

145. 643 F.2d 280 (5th Cir. 1981).

146. *Id.* at 281.

147. *Id.* at 282.

upon counsel's decision as to how to proceed."<sup>148</sup> The trial court's "broad discretion . . . to monitor the conduct" of lawyers appearing before it "encompasses the relatively gentle admonition given by the court to defense counsel to heed" the applicable rules of professional responsibility.<sup>149</sup> Under those rules, the lawyer "was to refrain only from asking questions [on cross-examination] not legally warranted or for the sole purpose of harassment or malicious injury to another."<sup>150</sup>

In *In re Tichenor*,<sup>151</sup> a prosecutor was reprimanded by the state bar for referring to matters in cross-examination of defendant's witnesses which the bar said were not supported by admissible evidence. The Oregon Supreme Court said the case involved "the relationship between two sets of rules—the rules of evidence governing the conduct of trials and the disciplinary rules governing the conduct of lawyers."<sup>152</sup> The defendant, charged with child sexual abuse, presented two witnesses who testified that the defendant's "character for sexual propriety was 'appropriate.'"<sup>153</sup> On cross-examination, the prosecutor asked each witness if she knew about the defendant engaging in certain conduct.<sup>154</sup> When defendant's lawyer objected, the prosecutor said he had a factual basis for asking the questions.<sup>155</sup> After trial, the state bar said the prosecutor lacked such a basis.<sup>156</sup>

The Oregon court said that its rules of evidence permitted the prosecutor to cross-examine character witnesses about relevant "specific instances of conduct," but acknowledged that "the significant potential for prejudice posed by that type of cross-examination" had caused courts to find it improper under the rules of evidence for a lawyer to ask such questions in the absence

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148. *Id.* at 282.

149. *Id.* In a footnote, the Court of Appeals said a trial court's discretion to monitor the conduct of lawyers appearing before it:

is different from the discretion to limit a defendant's right of cross-examination. We are aware that "[the trial judge's] discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment." . . . But we think crucial the distinction between a court's outright limitation of cross-examination and its permission to proceed with a cautionary footnote to beware one's professional responsibilities. Here, counsel was permitted "sufficient cross-examination to satisfy the Sixth Amendment," but the manner in which the court proceeded in permitting such examination was within its general discretion.

*Id.* at n.6 (internal citations omitted).

150. *Id.* at 282.

151. 129 P.3d 690 (Or. 2006).

152. *Id.* at 692.

153. *Id.* at 691.

154. *Id.*

155. *Id.*

156. *Id.*

of a good faith factual basis for doing so.<sup>157</sup> The applicable professional responsibility rules took what appeared to be a similar position.<sup>158</sup>

The court found that the professional responsibility rules did not prohibit anything that the evidence rules permitted; if the prosecutor's questions satisfied the latter, they could not violate the former.<sup>159</sup> However, even if the prosecutor's questions violated "the rules of evidence or trial practice," that would not necessarily "become an ethical violation punishable" under the rules of professional responsibility.<sup>160</sup> The evidence rules required "a reasonable or good-faith basis to believe that conduct occurred as a predicate to mentioning that conduct during cross-examination."<sup>161</sup> The professional responsibility rules authorized discipline only if the bar authorities could show that the prosecutor was "not [ ] able to offer admissible evidence at trial to prove" the conduct.<sup>162</sup> Therefore, even if the prosecutor lacked an evidentiary good-faith basis for his cross-examination questions, the court said the bar authorities failed to show that his questions violated the rules of professional responsibility by being without admissible evidentiary support.<sup>163</sup>

More importantly for the defendant, the prosecutor's improper cross-examination did not affect his conviction.<sup>164</sup> The same result was reached in *State v. Johnson*,<sup>165</sup> where the court was more critical of the prosecutor's conduct. The court said the prosecutor's cross-examinations "couched in question form, but not shown by any previous or subsequent evidence to be true or relevant, were gratuitous interjections that should have been stricken *sua sponte* by the judge and should have elicited a curative instruction to the jury" even though the defendant's attorney did not object.<sup>166</sup> Citing the applicable state rules of professional responsibility, the court said the prosecutor's cross-examination exceeded "the boundary that hard blows but not foul ones may be struck by the state."<sup>167</sup> But even the prosecutor's foul blow was not enough to reverse the conviction:

If the evidence of guilt were not so overwhelming, we would reverse this case because of this conduct. However, we are not inclined to punish the people unnecessarily for this conduct. We assume our admonition will be sufficient to

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157. *Tichenor*, 129 P.3d 690 at 692.

158. *Id.* at 692-93.

159. *Id.* at 693.

160. *Id.*

161. *Id.* at 693-94.

162. *Id.* at 694.

163. *Tichenor*, 129 P.3d 690 at 694.

164. *See State v. Holbrook*, 103 P.3d 1211 (Or. Ct. App. 2004), *review denied*, 115 P.3d 246 (Or. 2005).

165. 1996 WL 526845 (Tenn. Ct. App. Sept. 18, 1996).

166. *Id.* at \*3.

167. *Id.*

show to the state that these types of testimonial interrogations are not permissible under the guise of cross-examination.<sup>168</sup>

The test “applied to any prosecutorial misconduct is ‘whether the improper conduct could have affected the verdict to the prejudice of the defendant.’”<sup>169</sup> The court concluded that the prosecutor’s “cross-examination of which we do not approve, in the face of the evidence of guilt, could not have affected the verdict to the prejudice of the defendant.”<sup>170</sup>

That is not always the case. In *People v. Kim*,<sup>171</sup> the court found that the “[d]efendant was deprived of a fair trial as a result of the prosecutor’s repeated, improper attempts during cross-examination and summation to characterize him as a liar and to compel him to characterize complainant as a liar.”<sup>172</sup> Noting the applicable rule of professional responsibility, the court said that although the prosecutor’s attempts, “if isolated, may have been harmless, their cumulative effect constituted prejudice and ‘violated the prosecutor’s obligation to seek justice, rather than conviction.’”<sup>173</sup> This result was consistent with earlier decisions by this court and others.<sup>174</sup>

However, in no instance was there an indication that the offending lawyer was cited to the appropriate disciplinary authority.<sup>175</sup> Are there standards by which we, as a profession, can evaluate whether a lawyer’s cross-examination conduct crosses the line from responsible to irresponsible even if we assume, as the Oregon Supreme Court seemed to, that violations of the rules of evidence regarding cross-examination do not equate to a violation of the rules

168. *Id.* at \*3.

169. *Id.* at \*5 (quoting *Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965)).

170. *Id.* at \*5. *But see* *State v. Feaster*, 877 A.2d 229, 237 (N.J. 2005), where the court found that a prosecutor’s conduct caused a key witness to invoke a privilege which denied the defendant an opportunity to cross-examine the witness:

When a witness’s direct testimony concerns a matter at the heart of a defendant’s case, the court should strike that testimony if the witness relies on the privilege against self-incrimination to prevent cross-examination. . . . One of the essential purposes of cross-examination is to test the reliability of testimony given on direct-examination. . . . Generally, direct testimony cannot be deemed reliable unless tested in the “crucible of cross-examination.” . . . We recognize the fundamental unfairness of permitting such testimony to be considered by the trier of fact.

*Id.* (internal citations omitted). A similar analysis can apply if a plaintiff’s lawyer in a civil case seeks to shield the client from cross-examination. *See Barnes v. City of New York*, 44 A.D.3d 39, 47-48 (N.Y. App. Div. 2007).

171. 617 N.Y.S.2d 748 (N.Y. App. Div. 1994).

172. *Id.* at 748.

173. *Id.* (citation omitted).

174. *See* *People v. Butler*, 185 A.D.2d 141 (N.Y. App. Div. 1992); *People v. Ellis*, 94 A.D.2d 652 (N.Y. App. Div. 1983); *People v. Dawson*, 397 N.W.2d 277 (Mich. Ct. App. 1986); *Bagnell v. State*, 413 N.E.2d 1072 (Ind. Ct. App. 1980).

175. However, *see* *Committee on Legal Ethics v. Frame*, 433 S.E.2d 579, 583 (W.Va. 1993) where the court noted that the lawyer’s representation of one client which required the cross-examination of another client warranted a public reprimand.

of professional responsibility? Beyond the basics—competence, preservation of confidences, avoidance of conflicts—what do we, as a profession, expect the character of our colleagues to be during cross-examination?

Even if limited to conduct during cross-examination,<sup>176</sup> that question of character would warrant a full article and, indeed, it has.<sup>177</sup> The question of cross-examination and individual professional character is a current, although not new, hot topic.<sup>178</sup> Of particular interest, given the focus of this symposium, is Professor R. Michael Cassidy's article entitled *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice."*<sup>179</sup> One of the questions posed by Professor Cassidy was, "[w]hen, if ever, may a prosecutor impeach a defense witness who the prosecutor believes has testified truthfully, and how should this cross-examination be conducted?"<sup>180</sup>

He began by acknowledging that the model rules and the ABA standards do not "provide meaningful guidance on these questions."<sup>181</sup> Although others have suggested ways to address this, Professor Cassidy's point was "that in a largely discretionary system, none of these suggestions . . . will insulate criminal defendants from the potentially ruinous decisions of overzealous prosecutors."<sup>182</sup> The suggestions missed "an important element—a focus on

176. This leaves for another time a discussion of civility in the profession although that is a topic with a certain currency, which does touch upon the lawyer's conduct in cross-examination. See Josh O'Hara, *Creating Civility: Using Reference Group Theory to Improve Inter-Lawyer Relations*, 31 VT. L. REV. 965 (2007); Bronson D. Bills, *To Be or Not To Be: Civility and the Young Lawyer*, 5 CONN. PUB. INT. L.J. 31 (2005); Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX TECH L. REV. 3 (2002); and Adam Owen Glist, *Enforcing Courtesy: Default Judgments and the Civility Movement*, 69 FORDHAM L. REV. 757 (2000).

177. What follows is just a sampling of recent articles. See Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006); Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J. L. ETHICS & PUB. POL'Y 209 (2006); Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339 (2006); Susan Rutberg, *Conversational Cross-Examination*, 29 AM. J. TRIAL ADVOC. 353 (2005); James Carey, *Charles Laughton, Marlene Dietrich, and the Prior Inconsistent Statement*, 36 LOY. U. CHI. L.J. 433 (2005); Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613 (2005); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353 (2005).

178. See Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055 (2000); Abbe Smith, *Defending: Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000). See also Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83 (2003); Katherine R. Kruse, *Lawyers Should Be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J.L. & POL'Y 49 (2004).

179. R. Michael Cassidy, *Character and Context: What virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635 (2006).

180. *Id.* at 636.

181. *Id.*

182. *Id.* at 639.

the *character* of individual prosecutors making discretionary decisions.”<sup>183</sup> But, “[a]ny attempt to regulate how prosecutors should ‘act’ in certain highly contextualized and nuanced situations by developing more specific normative rules is unworkable.”<sup>184</sup> The discretion afforded prosecutors “would be better constrained . . . by focusing on what type of character traits prosecutors should possess or strive to acquire.”<sup>185</sup>

Although Professor Cassidy’s article addresses other issues, he does spend considerable time on a prosecutor’s character when confronted with the cross-examination of an apparently truthful defense witness:

A lawyer’s duty of candor . . . precludes him from offering testimony that he knows to be false. However, when an advocate impeaches a truthful witness on cross-examination, he is not “offering” false evidence. He is discrediting testimony that has already been offered. Discrediting truthful testimony is not the equivalent of affirmatively presenting a false fact, although it certainly has a similar effect because it points the finder of fact away from truth and toward falsehood. The uneasy tension between two professional obligations—the duty of candor to the tribunal and the duty of vigorous advocacy on behalf of a client—has led to heated debate about when it is ethically appropriate to impeach a truthful witness.<sup>186</sup>

Although most agree “that it is ethically appropriate, if not ethically required, for a criminal defense attorney to impeach a truthful witness,” a prosecutor’s conduct may require a different analysis.<sup>187</sup>

That analysis may explain why cross-examination is such a difficult topic for questions of professional character and professional responsibility. Professor Cassidy notes that the situation where a prosecutor is confronted with cross-examining a truthful witness “may be a situation where rules simply fail us.”<sup>188</sup> We cannot evaluate cross-examination “based on the state of mind of the prosecutor . . . because such subjective knowledge or belief is rarely provable as an objective matter in later professional disciplinary proceedings.”<sup>189</sup> However, the prosecutor’s personal character

is essential to a prosecutor’s nuanced assessment of the facts and circumstances of particular cases in this area. Rather than asking the question, what prosecutors should “do” in this situation, perhaps we should change the focus and inquire into what types of people we want them to be. In particular, the virtues of courage and fairness might help guide prosecutors in discerning an

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183. *Id.*

184. *Id.* at 640.

185. Cassidy, *supra* note 179, at 640.

186. *Id.* at 668.

187. *Id.*

188. *Id.* at 672.

189. *Id.*

appropriate course of action when faced with the question of whether to cross-examine an apparently truthful witness.<sup>190</sup>

Professor Cassidy suggests that prosecutors (and, I assume, other lawyers), “must be cognizant of the tremendous power of cross-examination, and how it may feel as a witness to have one’s credibility and integrity questioned in a public forum.”<sup>191</sup> This cognition might help the lawyer “shape the scope and content of his cross-examination, if cross-examination is conducted at all.”<sup>192</sup>

Professor Cassidy ultimately acknowledged that the professionally responsible lawyer conduct cannot be fully described by rules:

There is room for both specific rules and general norms in ethics codes, depending on their purpose. Forcing lawyers to act in a particular way and setting forth discipline when they fail to follow that requirement is the goal of specific rules. Causing lawyers to reflect on their roles and internalize duties is more appropriately left for general norms . . . Standards can be amorphous and unenforceable. Rules may cause the regulated community to see minimal compliance as ethical behavior, rather than a floor below which their conduct may not fall.<sup>193</sup>

Yet a disciplinary authority or a court can intercede when a lawyer’s conduct falls below that floor.

Recently the Delaware Supreme Court reprimanded a lawyer for writing briefs which the court found discourteous, disrespectful, and disruptive.<sup>194</sup> The conduct eliciting the reprimand and the court’s language in imposing the reprimand could easily apply to an attorney conducting cross-examination.

The court emphasized the lawyer’s duty to the system as well as to his client:

All members of the Delaware Bar are officers of the Court. Although a lawyer has a duty to his or her client, each Delaware lawyer has sworn an oath to practice “with all good fidelity as well to the Court as to the client.”<sup>195</sup> This

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190. *Id.*

191. Cassidy, *supra* note 179, at 673.

192. *Id.*

193. *Id.* at 691.

194. *In re Abbott*, 925 A.2d 482, 483 (Del. 2007); see MODEL RULES OF PROFESSIONAL CONDUCT 3.5, cmt [4]:

The advocate’s function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of [clients]. . . . An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

195. *Abbott*, 925 A.2d at 487 (quoting Del. Supr. Ct. R. 54).

responsibility to the “Court” takes precedence over the interests of the client because officers of the Court are obligated to represent these clients zealously *within* the bounds of both the positive law and the rules of ethics.<sup>196</sup>

The court said that the obligation to represent a client with zeal “never requires disruptive, disrespectful, degrading or disparaging rhetoric.”<sup>197</sup> A lawyer’s use of such rhetoric “crosses the line from acceptable forceful advocacy into unethical conduct” that violates the professional responsibility rules.<sup>198</sup> Although the disciplinary board “struggled with where to draw the line between conduct that was *merely* unprofessional and conduct that was unethical,” the court said ultimately the decision had to be between “which hits by an advocate are fair and which hard hits by an advocate are foul.”<sup>199</sup> “In this case, the hits in the briefs filed by the [lawyer] were not only foul but were so far beyond the boundaries of propriety that they were unethical.”<sup>200</sup>

One can expect umpires in baseball to call hits fair or foul with a high degree of certainty because the field is clearly marked. But the field is not so clearly marked in professional responsibility. Michigan recently discovered that.

Lawyers there are subject to what the Michigan Supreme Court characterized as courtesy or civility rules.<sup>201</sup> Section 3.5(c) of its Rules of Professional Conduct prescribes that a lawyer “shall not . . . engage in undignified or discourteous conduct toward the tribunal.”<sup>202</sup> The comment to this rule says refraining from such conduct “is a corollary of the advocate’s right to speak on behalf of litigants.”<sup>203</sup> Rule 6.5(a) requires a lawyer to “treat with courtesy and respect all persons involved in the legal process.”<sup>204</sup> As the Delaware Supreme Court has emphasized, the comment to this rule dictates that the lawyer “is an officer of the court who has sworn . . . to proceed only by means that are truthful and honorable, and to avoid offensive

196. *Id.* at 487-88.

197. *Id.* at 489. *See also* *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51-57 (Del. 1993) (adding an addendum to its decision to criticize the conduct of lawyers during a deposition).

198. *Abbott*, 925 A.2d at 489.

199. *Id.* at 488-89. *See* MODEL RULES OF PROF’L CONDUCT 3.1, cmt. [1]:

The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.

200. *Abbott*, 925 A.2d at 489.

201. *Grievance Adm’r v. Fieger*, 719 N.W.2d 123, 128 (Mich. 2006)

202. MICH. R. PROF. CONDUCT 3.5(c) (2004).

203. *Id.*

204. MICH. R. PROF. CONDUCT 6.5(a) (2004).

personality.”<sup>205</sup> However, the comment also reflected the conflict between avoiding offensive personality and zealously representing a client:

A lawyer must pursue a client’s interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer’s right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly rude. A lawyer’s professional judgment must be employed here with care and discretion.<sup>206</sup>

As a lawyer, one might say, that’s no guidance at all.

One Michigan lawyer did say that in federal court. After being reprimanded by the Michigan Supreme Court for public comments found to violate these two rules, the lawyer filed a federal declaratory judgment action challenging the constitutionality of the rules. The United States District Court found the rules “unconstitutional on their face because they are both overly broad and vague,” thus violating both the First Amendment’s right to free speech and the Fourteenth Amendment’s right to due process.<sup>207</sup>

As to the plaintiff’s over-breadth claim, the court said the disciplinary rules, as interpreted by the Michigan Supreme Court,

are unconstitutionally infirm. This general infirmity results first from a failure to incorporate within each provision any consideration of the interests the rules are trying to protect. Second, they include no standard for guidance, whether it be “substantially likely to materially prejudice” for protecting fair adjudication of pending ligation [sic] or the higher standard of “clear and present danger to pending litigation” to preserve the dignity of the judiciary.<sup>208</sup>

The federal court said Michigan’s rules, as interpreted by the Michigan court, established a blanket prohibition on lawyer conduct “whereby even a trivial, truthful and totally innocuous statement, although perhaps ‘discourteous’ and ‘undignified’” would violate the rules.<sup>209</sup> The court said the “First Amendment does not allow this broad sweep.”<sup>210</sup>

As to vagueness, the federal court said the focus was on the imprecise language of the rules which raised dangers of both failing to provide adequate notice to the regulated party and posing the possibility of arbitrary or capricious enforcement:

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205. *Id.*

206. *Id.*

207. *Fieger v. Mich. Supreme Court*, 2007 WL 2571975, at \*1 (E.D. Mich. Sept. 4, 2007).

208. *Id.* at \*10 (internal citations omitted).

209. *Id.*

210. *Id.*

In relation to the terms “discourteous” and “disrespectful,” neither the courtesy provisions, nor their commentary, nor the Michigan Supreme Court’s opinion . . . provides the minimal requisite precision that would allow a person of ordinary intelligence to understand their meaning . . . Although the rules need not define an offense with “mathematical certainty,” the vagueness doctrine requires them to be precise enough so that a person of ordinary intelligence would understand their meaning.<sup>211</sup>

The federal court held that “the Michigan Supreme Court’s failure to define the terms, the inherent contradiction with its own ruling, the conflict with the State’s pretrial publicity rule, and [the lawyer’s] First Amendment rights to speech relating to the judicial process” led it to find that the rules were unconstitutionally vague.<sup>212</sup>

#### IV. CONCLUSION

In all these questions involving cross-examination—whether it has produced a fair process or whether the lawyer’s conduct has met an understanding of fair play—the determination is delivered to the exercise of professional discretion, whether that discretion is exercised by the lawyer, a trial court, an appellate court, or a disciplinary authority. Discretion can be guided but not dictated.

Professor Nathan M. Crystal has long argued that the “most important and most difficult decisions” which lawyers face in practice “require the exercise of sound professional judgment and discretion.”<sup>213</sup> To exercise that judgment, he says “lawyers need to develop . . . a ‘philosophy of lawyering,’ a principle-based approach for making difficult professional decisions.”<sup>214</sup> At the level of practice, “lawyers must decide . . . how to resolve conflicts of interest, when to disclose confidential information to prevent harm to others, and whether their duties to a tribunal override their obligations of loyalty and zealous representation of clients.”<sup>215</sup> He, like others, acknowledges that the Model Rules “do not provide answers to lawyers on how to resolve the discretionary decisions they face related to the practice of law.”<sup>216</sup>

As frustratingly non-specific as they often are, perhaps the Model Rules have it right. We lawyers are, after all, professionals who have been ceded great power and should be expected to exercise that power responsibly. When faced with the tough questions or with the question of what tough questions to ask, we should be guided not only by specific rules, for they can only describe so much, but also by the expectations of the legal culture in which we practice and by our individual conscience and moral judgment. Our cross-

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211. *Id.*

212. *Id.* at \*12.

213. Nathan M. Crystal, *Using the Concept Of “A Philosophy of Lawyering” in Teaching Professional Responsibility*, 51 ST. LOUIS U.L.J. 1235 (2007).

214. *Id.*

215. *Id.* at 1235-36.

216. *Id.* at 1239.

examinations must be sufficient, to not only insure that our clients have received fair process, but also that we as the lawyers conducting the cross-examination have treated the system and the witnesses involved in that system fairly.