UNIVERSITY CASEBOOK SERIES®

LEGAL ETHICS

CASE STUDIES

EIGHTH EDITION

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Preface

In real-life law practice, ethical issues do not always come neatly boxed and labeled. Often, a representation will raise multiple ethical issues, and as it unfolds over time, additional, perhaps unexpected, concerns may surface. These issues may be easy to spot or difficult to spot; they may be independent of each other, but they may interact. Facts are often messy and hard to interpret.

By its nature, our textbook treats particular ethical issues in their own chapters—on confidentiality, on conflicts of interest, on client-lawyer relationships, and so forth. A complex multi-issue case study may straddle several chapters, and for that reason we have assembled these extended case studies separately from the main text.

The four case studies presented here are all drawn from actual events. Each presents multiple ethical issues. Case 1 is a 1982 case, reproduced here with permission of its original authors. The other case studies are written by the authors of this textbook, and are drawn from recent high profile cases. In each, we provide extended factual background and questions for thought and discussion.

At the beginning of each case study, we provide a brief list of the ethics themes that the case raises. This will help instructors decide where each case belongs in their syllabus, and it will help students spot the issues as they read the case study. These lists make it easy to cue the case studies to the appropriate chapters of the textbook, as we do in this Preface. Some of the cases appear in the textbook itself, in much-abbreviated form.

We do not expect that instructors will wish to use all four case studies; each takes at least half a classroom hour to discuss properly. At the same time, we think they enhance learning, and using one or more of them in the semester will diversify the course, and hopefully make it more interesting. We believe that the best way to use these case studies is to divide students into small groups to work through their approach to the cases together, either in advance of class or during class.

The four case studies are as follows:

Case Study 1 (Rita's Case), appeared in the textbook in earlier editions. It involves legal aid lawyers in Philadelphia whose client is a grandmother raising her somewhat troubled granddaughter "Rita," as social services try to place Rita with foster parents. It raises issues about the lawyers' appropriate role and style of lawyering, and thus it pairs with themes in Chapter 4. But it also contains difficult issues of client-

lawyer relationships (Chapter 5), confidentiality (Chapter 6), conflicts of interest (Chapter 9), and public interest law practice (Chapter 14).

Case Study 2 (David Boies's Work for Harvey Weinstein in #MeToo) is a well-known case in which "superlawyer" David Boies, representing movie mogul and sexual predator Weinstein, hired a private espionage firm to find out from reporters the names of women who intended to go public with accusations against him. This included reporters for the *New York Times*, which Boies's firm was representing in unrelated matters. The espionage firm used "pretexting" (impersonation) as a technique for engaging with reporters. After the Weinstein scandal and the beginnings of the #MeToo movement, Boies made public comments critical of his client. The case raises questions about choice of clients (Chapter 4), client loyalty and allocation of decision-making (Chapter 5), the no-contact rule and attorney-client privilege (Chapter 6), conflicts of interest and advance waivers of conflicts (Chapter 9), the duties of supervisory lawyers (Chapter 11), and issues of honesty and deceit.

Case Study 3 (ACLU Counsel Representing an Undocumented Minor Seeking an Abortion) is based on the facts underlying the Supreme Court's 2018 case *Azar v. Garza*. Here, the Solicitor General asked the Supreme Court to impose disciplinary sanctions against ACLU counsel for allegedly deceiving the government in a dramatic and contentious case involving an undocumented minor seeking an abortion. Her counsel did not inform DOJ lawyers that their client would receive an abortion sooner than the two sides originally anticipated; as a result, the government failed to file a timely motion for a stay. The SG claimed that this conduct constituted fraud by omission. However, the Supreme Court chose to duck the issue. The case study is document-based: it includes excerpts from the dueling briefs, along with relevant legal standards, and it asks readers to address the issue the Court failed to resolve. Here, the principal question is whether, in highly contentious litigation, true but incomplete statements to the adversary constitute fraud by omission. This requires analyzing Model Rule 4.1, but it also raises issues of confidentiality and its exceptions (Chapter 6). On the other side, the study raises the question of whether government lawyers were drawing out the litigation process until it was too late for the abortion, and whether, if it is true, this is proper.

Case Study 4 (Guantánamo Defense Counsel) concerns efforts by death penalty lawyers in the Guantánamo military commissions to withdraw from their case, without judicial approval, because they believed the government was listening in on privileged and confidential conversations (Chapter 6). A second issue is whether, after the judge threatened to arrest them if they did not return to the job, they were

conflicted out of the representation because of their personal interest (Chapter 9). The case also raises issues of judicial ethics (Chapter 3), because of misconduct by the judge.

Case Study 1:
Rita's Case

This case study raises fundamental issues about the nature of a lawyer's role, as well as specific issues under the Model Rules of Professional Conduct. Issues include:

- The lawyer's role: is it partisan advocacy, or "lawyer for the situation"?
- paternalism toward clients: when, if ever, can lawyers make decisions that they believe to be in the client's best interests even if the client does not necessarily agree?
- legal aid representation: is it different from representation of paying clients, because the legal aid client lacks resources to switch lawyers?
- cases involving children;
- confidentiality and its exceptions;
- conflicts of interest;
- ex parte contact with represented parties

In reading the case study, keep several questions in mind:

(1) What ethical issues do the lawyers face?

(2) How much guidance do the Rules of Professional Conduct provide for the lawyers confronting these issues?

(3) What other resources—in terms of background, law, cultural norms, or professional and philosophical traditions—would assist you in addressing the dilemmas of Rita's case?

Harvard Program on the Legal Profession, Philadelphia Legal Aid:

Rita's Case*

(1982)

Joan Kiladis sat down in her office to draft a letter to her client, Gladys A., which would close the file dealing with the custody dispute over Gladys's granddaughter Rita. It was April 14, 1982, and the case had been opened over three years ago, in March, 1979. It had been a long and drawn out process, but the closing letter would indicate that Joan Kiladis and Keith Maynard, the two Philadelphia Legal Aid attorneys who had worked on the case, had obtained their objective—Gladys A. had been able to adopt her granddaughter over the initial objection of the Department of Public Welfare. Nonetheless, Kiladis wondered if there was another issue that should be pursued before this case was put to rest. That issue was the allegation of sexual abuse which had precipitated Rita's custody dispute. Although Kiladis was convinced that the alleged sex abuse suffered by the child had been real, she was less sure whether or not the matter should be pursued. She decided to discuss it with Maynard, a poverty lawyer of many years' experience. Kiladis herself, although 40 years old and experienced as a draft counselor and mother of two, was just two years out of law school—more recently than the origin of the case itself—and had never encountered an issue as complex as this one.

At Maynard's office, Kiladis broached the problem with him. It was not the first time. In fact, Kiladis and Maynard had had a running argument for over a year about whether or not to sue the Children's Home, in which Rita had resided for many years, for sexual abuse. Kiladis went in to argue her position one more time. As she had known he would, Maynard refused to turn to the specifics of the allegation until he had reminded both of them of the way the whole system worked when the custody of a child was at stake.

"No one in the system wants to take responsibility for the final decision about the placement of a child, so there is always a shifting of that responsibility, and in the final analysis there is no independent adjudication on any issue," said Maynard. He had learned, over the years, to use that aspect of the system to his clients' advantage. In essence, Maynard believed that attorneys created the history of a case

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* This case was prepared by Leila R. Kern under the supervision of Professor Martha Minow and Penny Pitman Merliss for use at the Harvard Law School. Names are disguised.

for presentation to a judge by selectively emphasizing and investigating certain events and injuries and letting others fade. They manipulated the other professionals (such as social workers and physicians) involved in the case, and utilized their strengths and weaknesses to the client's advantage. Often, whether knowingly or unknowingly, they steered clients' choices to take advantage of these very efforts. Maynard reminded Kiladis that she had come into the case one and one half years after he did and was therefore reacting in part to the scenario that he had created in the file and in the case. Additionally, he pointed out, Kiladis had become very personally involved with Gladys, the child, and many other members of the family. Although this interest had helped to win the case for Gladys, both of these factors, in Maynard's opinion, affected Kiladis's judgment and objectivity. The two attorneys agreed to look over the files together, one more time, before deciding how to proceed.

Rita's Background

Rita was born in Bellevue Hospital in New York City in December of 1971. Her mother, Carlota, had entered the hospital, in labor, just four hours after taking a shot of heroin. Rita's father, who had been living with Carlota for a number of years and who had fathered her two other children, was not present, nor was his name entered on Rita's birth certificate. Carlota abandoned Rita in the hospital, where the infant remained for three months, being treated for both heroin addiction and syphilis. Her maternal grandmother, Gladys, obtained legal guardianship and took Rita home in March of 1972.

Rita lived with her grandmother for the next two and one half years. First they resided in New York City; then, with the New York court's approval, they moved to West Philadelphia where they lived in a house next door to a low-income public housing project. Although many members of the family—aunts, uncles, cousins—also lived with Gladys at various times during this period, two others were more permanent members of the household, both in New York and in Philadelphia. One was Manuel, Rita's first cousin. Three years older than Rita, Manuel had also been born out-of-wedlock, to Rita's aunt, Maria, and had been raised by Gladys from birth. Maria, like her sister Carlota, was addicted to heroin. The second semi-permanent member of the household, Juan, was to become Rita's step-grandfather. Born in 1950, Juan had been brought up by Gladys since he was 15. He became her third husband in 1977, when he was 27 and Gladys was about 51.

In August 1974 Gladys turned to the Department of Public Welfare (DPW) in Philadelphia for help with Rita. The child, although only two and one half years old, was very difficult to handle; according to Gladys, she had become manipulative, aggressive and generally

unmanageable. Gladys was scheduled for gall bladder surgery and needed help caring for Rita. The department suggested that Gladys place Rita in the Catholic Home for Children where the child could be evaluated and receive appropriate therapy, if needed. The Home requested that St. Christopher's Hospital evaluate Rita, and then the Home began therapy while Rita resided there.

During the period from August 1974 until June 1976 Rita seemed to thrive in this placement. She visited her family frequently on weekends, and her grandmother was often at the Home during the week as well. Gladys viewed the Catholic Home as a temporary residential facility where children could receive help. The DPW, however, often used the Home as a clearinghouse for children needing foster care. In fact, in June 1976 the Home decided to place Rita with a foster family in Germantown, a lower-middle-class Philadelphia suburb. Gladys continued to visit Rita and take her home on weekends, during the next seven months that Rita lived in Germantown. Relations between Gladys and Rita's foster family quickly became strained. The foster parents complained to the Home that Gladys was not sticking to the visitation schedule, and Gladys complained to DPW that Rita's foster parents were abusing her. Acting on these latter reports, DPW removed Rita from the foster family and returned her to her grandmother. By this time, February 1977, Juan and Gladys had married.

Four months later, Gladys turned once again to DPW. Gladys had been receiving counseling from a social worker, Elizabeth Reilly, who had encouraged her to seek help with Rita. Gladys was depressed, and the child was still aggressive and difficult, biting other children and throwing temper tantrums. Again DPW placed Rita in the Catholic Home for Children. During the following 18 months, Rita again settled into the routine at the Home, and again the Home moved toward a foster placement. Although there were still many home visits, Gladys was having more difficulty maintaining the visiting schedule. She often did not arrive when she had promised to do so, and she often left early. Occasionally, Rita's mother, who had also moved to Philadelphia, visited her at the Home. Home personnel noted that Rita often returned from visits to Gladys appearing distressed.

The move toward placing Rita in a foster home was greatly accelerated in January of 1979. For two months, Rita had been in play therapy with a young psychology student who had become increasingly alarmed by the child's apparent sexual sophistication. Rita was then seven years of age. The student believed that Rita was acting out, in therapy, some experience of sexual seduction or observation of sexual behavior. The student, and her supervisor—who was studying sexually abused children—concurred that Rita had had such experiences and

that they must have occurred in Gladys's home, or at the least when Rita was in Gladys's care. Suspecting Juan, Rita's step-grandfather, the Home filed a Form CY47 report of possible abuse with DPW. Rita was then moved to a foster placement with a middle-class family in Jenkintown, a well-to-do distant suburb of Philadelphia about 20 miles from Gladys's home in West Philadelphia. Gladys was given neither Rita's address nor her phone number.

Gladys turned for help to her social worker, who contacted Philadelphia Legal Aid (PLA) and asked Maynard to intercede on Gladys's behalf. DPW was about to file a motion for protective custody of Rita and a motion to dispense with Rita's mother's consent to Rita's adoption by the foster family in Jenkintown. It was DPW's position that Gladys, as grandmother, had no standing to intervene.

The legal battle began in the spring of 1979 and resulted, first, in establishing a pattern of visitation between Rita and Gladys, agreed to by the parties; next, in the return of Rita to live with Gladys in March 1981; and finally in the adoption of Rita by Gladys and Juan in April 1982. By then Gladys and Juan were living separately. In the interim both Maynard and Kiladis at PLA had become involved with the case; the court had appointed an attorney, David Slade, an associate at a small downtown law firm, to represent Rita; there had been a complete change in DPW personnel dealing with the case and with the family; and St. Christopher's had done two court-ordered psychological evaluations of Rita and her grandparents, to be paid for by the county.

Lawyers' Views

Looking back over their files on Rita, Maynard and Kiladis noted the legal issues that had punctuated the child's short but complex life. There had been prolonged guardianship hearings while Rita was still a patient in the Bellevue nursery in New York, which had continued after Rita went to live with Gladys. Kiladis remarked:

> The result was, when Carlota—Rita's mother—realized that she was going to lose all of her children, she actually got herself on methadone. And, although there were lapses, she was eventually given her older two children back, with enormous supervision. She had also come to Pennsylvania. I'm not sure whether legally or not. But she seemed to be doing a reasonably good job with the older children.

It was not clear why Gladys had been named guardian, since grandparents had no special status in guardianship cases, and certain factors in Gladys's home life seemed to argue against court-ordered

guardianship. Maynard guessed that some social worker had filed the necessary papers and pushed the guardianship through.

When Gladys contacted DPW in August 1974, her feelings toward Rita seemed to Maynard to indicate ambivalence, "Gladys loves Rita, also can't control her, is somewhat older and not feeling well. There is this, 'I want her away, I want her back.' " As soon as her surgery was scheduled, she sought help in coping with the child. Maynard observed:

> The puzzle here is why, between '74 and '76, Gladys, when she finished her gall bladder operation, did not bring Rita home. I think this is where the ambivalence manifests. That is, once Gladys got home, and a period of time passed as she recovered from major surgery, she found she had a situation that was not so bad. So Gladys left things alone; in the same way, I think, that some parents in other class settings who are ambivalent about their children, have their children in boarding school.

But Gladys couldn't adapt to the "boarding school" regime; she couldn't adapt to the rules. "I think the Home found Gladys to be a pain in the ass," added Maynard. She couldn't do anything on time. She came to visit Rita during the week, she baked birthday cakes for other children's birthdays and came with those. She often brought Rita back late after a weekend home visit. Sometimes after such visits Rita's face and clothes were dirty and her hair uncombed, which shocked Home personnel. The Home staff, accordingly, decided that Rita would be better off in foster care and placed her in Germantown. This decision was reinforced by the fact that they didn't get a clear statement from Gladys that she wanted Rita back before they placed her. Afterwards, however, Glady's interest in Rita's return increased enormously. Maynard mused:

> I believe that Gladys intentionally undermined this placement. She was extremely threatened that she had failed as a mother again, and that she was going to lose Rita permanently. Gladys did not have the ability to directly say to the Home, "I want my child back." So, I think she made it very difficult for the foster family. When she talked to Rita about it, Rita picked up signals about what Gladys wanted to hear. So Rita started saying things about what was being done to her. You couldn't really tell whether they were true or not.

Kiladis, however, was more convinced of the truth of Rita's complaints. She recalled that Rita related to her, almost four years after that first placement, an incident in which the foster father had given

her a severe beating for not doing a dance of some kind. Gladys had corroborated this tale with a description of bruises on Rita's buttocks, back and sides. It was at that time that Gladys finally complained to the DPW social worker, and he had Rita returned to Gladys within three days. Kiladis added, "I suspect that that really is the fastest the DPW works."

The PLA lawyers recalled that, at first, everything seemed fine when Rita returned to Gladys. But soon it became clear that Rita was still a very difficult child. Gladys became very depressed. She couldn't handle Rita at all, and something seemed to be wrong with the child. Gladys turned to a social worker therapist, Elizabeth Reilly, and had Rita evaluated at the Learning Disabilities Center where Reilly worked. Reilly not only convinced Gladys to place Rita back at the Home, but she also began a process of convincing Gladys to put Rita up for adoption. According to Maynard:

> It was not very long into therapy that Elizabeth Reilly said to herself, "This is a woman with extreme emotional problems, not sick, but with emotional problems; and she has a very complicated relationship with a young man. She is having some trouble raising one child—Manuel; she is having a lot of difficulty with Rita, who seems to be a disturbed child. Gladys can't cope. This is not good for Rita, this is not good for Gladys, so let's move for adoption."

But Reilly was not totally open with Gladys, who seemed to believe that Rita's placement in the Home was again temporary; that the Home would provide treatment for Rita; that she would visit often and bring Rita home on weekends; and, eventually, perhaps when Rita improved, would bring her home again.

Maynard recalled that now Gladys's visits took on a different kind of irregularity. Gladys would say that she was coming on Sunday and then show up on Monday; she would say "I'm coming at noon" and then show up at 6:00 P.M. During Rita's first stay at the Home, Gladys had been late in bringing her back; now she was often late picking her up. The records from the Home's logs indicated that Rita often returned to the Home upset and even had difficulty sleeping on some occasions after a home visit. Kiladis felt that Rita was being torn between her life with Gladys and her life at the Home. Many of the rules were different, and she speculated that Rita must have struggled with Gladys's disapproval of many of the practices at the Home. An example, recalled by Kiladis, was Gladys's anger and concern that Rita was permitted to sleep in a nightgown without panties, and to sleep in the same room as the boys in her cottage. At the same time, a nun at the Home had expressed

concern that Rita was allowed to get into bed with Gladys to watch television.

Within a year of Rita's return to the Home, plans were again made to move Rita to a foster family. Maynard remarked:

> The planning came from the judgments of the people at the Home that Rita really ought to be permanently placed somewhere, and that Grandma should remain Grandma. There should be visits, but Rita should slowly be weaned away from her Grandmother. This was a judgment that was concurred in by Elizabeth Reilly, Gladys's therapist. And there was something in writing, some document from the Home that indicated consent by Gladys to an adoption. Interestingly enough, when we got discovery that document was missing; but I had seen it.

But the plans to move Rita into a foster placement were greatly accelerated when the young, inexperienced psychology student, after six play-therapy sessions with Rita, concluded that Rita had been sexually abused. Kiladis commented:

> The student was being supervised by someone whose "thing" was sexual abuse. What wasn't so clear to us and took us a while to find out was that half of the children in the Home had been placed there as a result of being sexually abused. This student felt that Rita was acting out various sexual behaviors. What was somewhat unfair about it, was that—apparently—this went on all the time. Kids, often, playacted partly as a way of working through some of what they've been through, and obviously it rubbed off on some of the other kids. But this student really freaked out about what was going on.

Although it was quite possible that Rita had been exposed to some sexual behavior, it was not clear exactly what had occurred or where. The Home immediately directed suspicion at Juan and decided to place Rita out of Gladys's reach. Although formally the reason for cutting off visitation was the sexual abuse question, Maynard believed that what was lurking in the background was Gladys's failure to cooperate with the first foster placement. "All of the social workers' notes were loaded with things like that, that Gladys was and had continuously been difficult."

The Home's inappropriate promise to Rita's new foster parents in Jenkintown, the Biancos, that the child was definitely theirs to adopt complicated matters further. Kiladis felt that this promise might have been part of "a deliberate cover-up" of Rita's exposure to either sexual

abuse or sexual activity at the Home itself. At first Gladys had reacted passively to Rita's placement in a foster home, as she had when Rita was placed in Germantown the first time. But when the new DPW worker on the case, Mary Nota, who had met Gladys only once before, bluntly told her that Rita was being placed a second time, adding "I'm not going to let you see her," and furthermore made accusations about sexual abuse of Rita by Juan, Gladys's attitude suddenly altered. Maynard recalled: "Gladys went back to Reilly and her staff and drove them crazy, screaming at them, 'You've got to help me!' and they in turn called us." Maynard added:

> I got a call from them saying that we had to help this woman. There had been accusations of sexual abuse and her child had been taken away. They didn't say anything to me about the fact that they had been moving Gladys toward adoption, that they themselves felt that that might be both in Gladys and Rita's best interests. I learned of these things only after the case came to us.

In a complicated series of moves (see legal strategy below) Maynard was able to negotiate a visitation schedule while Rita was being evaluated by a group of specialists at St. Christopher's, who dealt with child and sex abuse victims. After several weeks, however, the "games began again," as Kiladis put it. She commented that Gladys and the Biancos competed for Rita like divorcing parents. Gladys was never on time bringing back Rita and never returned her to the Biancos in the same clothes in which she had left. The Biancos often dressed her inappropriately—for example, dressing her in a party dress when they knew that Gladys was taking Rita on a picnic. The Biancos would then complain when Rita's dress became soiled. Each family criticized the other's way of life. The Biancos were not Hispanic, and Jenkintown had essentially no Hispanic population. Rita, who had been bilingual, could no longer speak much Spanish. In fact, the Biancos severely reprimanded her for any tendencies to use Spanish. At school in Jenkintown she was exposed to racial slurs and made to feel very inferior for being Spanish. Kiladis recalled that Rita had told her that the Biancos said, "If you go back to West Philadelphia you will become scum like the rest of them, but we have this wonderful suburban lifestyle." The attorneys began to believe that the situation in Jenkintown was so bad that returning Rita to Gladys seemed to be a relatively better course. They were concerned that Rita was losing her identity as an Hispanic, and that if Rita were not returned to the Hispanic community, her ethnic roots would be irreversibly lost.

By the time Kiladis entered the case, Maynard had gotten to know Gladys well. He didn't believe for one minute that there was sexual

abuse in Gladys's home. He also believed that losing Rita permanently would be a terrible blow for her. If, during the course of the prolonged legal maneuverings, Gladys's anger and anxiety had dissipated and she had become able once again to consider adoption as in Rita's best interests, Maynard would have been amenable. But by the time he had obtained all the information he needed to represent Gladys, the situation had been reshaped by the judicial process itself.

He had begun his interviewing of the various professionals involved knowing that by the time there was a decision about what might be best for Rita, that decision might not look the same as it would have on the day he began. Appraising his feelings at the time, Maynard commented:

> Invariably I begin investigating these sorts of cases as if the facts are there to be assembled for decision at some future date. But, on the ground that then we will make a decision, in my gut, I know that the decision is not going to be the same once the investigation is completed. Memories, perceptions and positions will all have been affected, influenced by the investigation itself. What might have looked very bad for a client before a lawyer gets into a case can look very different after the lawyer's influence is felt. On the other hand, what are the choices? This is not an extreme case where I suspected that the child was being abused by my client. I did suspect, and this turned out to be true, that Rita's mother was involved much more than Gladys was telling us. Rita had Carlota's phone number and often spoke with her, and Carlota was often at Gladys's house. In addition, Rita went over to her mother's house more often than any of us had realized, and the exposures over there that would be bad for a child were enormous. But this wasn't enough to alter what I did in the case. I simply chose the right of Gladys to make the decision about her grandchild, over other people. I did not decide that I was the lawyer to the whole situation to decide what was best for Rita. Within certain limits, I really did and do allow my role as an advocate in the situation to take its course.

Kiladis' approach to this was somewhat different. Kiladis had let Maynard know, when she first became involved with the case, that she had to speak with Rita before she made a commitment to represent Gladys. If DPW were correct in its evaluation of the situation and if Rita had developed a strong positive bond with the Biancos, then Kiladis felt she would not have "the emotional energy for the case." But if Rita reported that life with the Biancos was very different from the way both

the Home and DPW described it, then "it would be very important to help her." Kiladis recalled:

> Ultimately, it put me in a bit of a bind. It wasn't clear whose attorney I was; what I was advocating for, and so on. Knowing Rita's needs as well as Gladys's and eventually even Carlota's created a lot of tension for me. Their needs were different and it was not clear how to bargain them out; whether to try to get the maximum good for everyone or just for our client, Gladys.

Aside from the question of what might or might not be in Rita's best interests, Maynard had first been confronted with the problem of Gladys's best interests. For Maynard, that issue had two distinct parts. First, Gladys wanted Maynard to move immediately to get Rita back for her. Here Maynard had two concerns: first, that he might lose in court if he had to go in at a time when suspicions of sexual abuse were being raised, and, second, that a court battle would take its toll on Gladys herself. At the outset Gladys was not emotionally capable of withstanding the upheaval of a prolonged court procedure. Early in the case Maynard had come to realize that it would be extremely painful for Gladys to confront an outside observer's evaluation of her fitness for parenthood.

Gladys's one emotional peg was her therapist, Reilly. It was Reilly who had called Maynard and implored him to represent Gladys against DPW. Yet it was also Reilly who believed that Rita should be adopted; if DPW called her at trial, she would make a damning expert witness against Gladys. In fact, at the beginning there had been no expert witnesses available who could make a favorable presentation. Maynard believed that Reilly had, as he put it, "screwed Gladys" by not being honest with her about the therapist's concerns, both that Rita was being exposed to a drug-dominated environment through continued contacts with Carlota and that Gladys was too depressed to cope with the situation. He had insisted, after speaking with Reilly, that she become more honest with Gladys and that he was not going to be the one to go back and tell Gladys what the therapist's position actually was.

Maynard felt obligated both to tell his clients everything he discovered and at the same time to protect them. Although he intended to be Gladys's advocate and try to intervene with DPW, his legal instincts told him he could best manage the case by drawing things out for quite a while despite Gladys's desire to act immediately. Maynard therefore decided that it did not make sense to force the issue to a hearing right away:

> One, I couldn't win. Two, I thought this would be bad for Gladys. And three, the expert who had been doing therapy all of this time could not make a good witness for Gladys. So I went back to Gladys and I said: "I don't think that I can win it now. I don't think I can even get you visitation now, although if you tell me that I have to, I will try. I also don't think that Elizabeth Reilly will be as good a witness for you as she needs to be. I have got to do a lot of work with her, and you should start talking to her as well." . . . Of course she accepted it, the way she accepts all authorities, in a passive/aggressive manner. But I confronted her with that also. We talked about her anger with me and her inability to challenge me. I think we did so in a healthy way, but long after the initial decision to wait had been made.

Legal Strategy

The first official action taken by Maynard as Gladys's lawyer was a letter which he wrote for her on May 10, 1979, more than two months after she came to him. Essentially the letter was a statement from Gladys that she wished to terminate DPW's custody of Rita, and it included a demand that Rita be returned to her. Maynard knew that this would precipitate action on the part of the department, and it did. But by then Maynard had begun the process he described as "obtaining information from, and trying to neutralize," the professionals involved in the case, and he was ready to proceed. In the March through May period, Maynard had constantly asked for visits at critical times: a confirmation ceremony in the family, illness of a close relative, a whole range of similar events. Each time, the visits were refused. There was constant negotiation with DPW about visits. The Department's hard-line position was later brought up by Maynard in conversations with St. Christopher's and with David Slade, whom the court had appointed as Rita's attorney on June 11, 1979. In addition, the staff at PLA had begun to see every person involved in the case. The legal docket in Philadelphia County Probate Court indicates that the DPW moved for temporary custody of Rita on May 25, 1979, and that that motion was allowed by Judge Warren.

On June 8, 1979, Maynard filed two motions: one for visitation and one for the payment of expert assistance for a psychological evaluation. When they went into court on the 11th of June, Maynard did not press the first motion. Instead he again negotiated with DPW about the visitation issue:

> What I said to them was that Gladys should be allowed to visit. I asked them why they felt that she

> shouldn't. They told me that it was too dangerous, that Gladys, or someone in her household, was going to sexually abuse the child. Then I brought up the notion of having an independent expert decide the issue. I used the two motions to get them to concede to the motion for expert assistance.

In fact, the visitation motion was never acted on in court; Maynard continued to pursue that goal through negotiation. On the other hand, Judge Warren allowed the motion for payment of expert assistance, given that DPW did not oppose it. Had the department opposed it at that time, Maynard believed that he still might have been able to prevail, but he couldn't be sure, given the costs it imposed on the county. Instead, everybody agreed that expert assistance was a good idea; that Gladys really couldn't afford it, that it should be provided and, moreover, that it should be provided by the team of specialists at St. Christopher's. Maynard's choice of that team was a deliberate one:

> Before I went on the motion, I went to St. Christopher's. I had two meetings with the people there. They had never seen Gladys, but I had two meetings with them. I had a long talk with them about what I saw was going on and about how important it was that they look into it. I also went to see the fellow who runs the clinic, knowing that at that time St. Christopher's was involved in an internal struggle over whether to support DPW's approach to child custody issues, an approach which many saw as extreme intervention.

Maynard felt that many of the specialists on the team at St. Christopher's had attitudes that were ideal for his client. They were internally involved in a fight about whether they should be supportive of DPW's approach to removing children from their homes; they were sympathetic to poor people; they didn't respect social workers (who generally stood at the bottom of the hierarchy of mental health professionals); and they believed that the social workers' decisions were often ill-advised and unsympathetic to poor people. Maynard recalled, "I knew they would bend over backwards to be non-interventionist in a case with PLA; I knew they would take the general position that these kids belong at home." In this particular case, where a child was being taken from an Hispanic environment and being removed to a distant suburb where she was not being allowed to see her relatives, Maynard thought the team would surely begin with an attitude biased in favor of Gladys. By the time Maynard had met with them twice, he knew that he had a "fairly receptive audience."

Maynard told Judge Warren that he had been to see the people at St. Christopher's, and had talked with them. He indicated that they would be willing to accept the appointment from the court. Maynard was relieved that neither Slade nor the DPW counsel objected to the choice of St. Christopher's as evaluator. Had he been on the other side, Maynard noted, he would have demanded a different appointment, recognizing that the attorney who got to the expert first established a relationship which invariably sets up the case to some extent in his favor. But, in Maynard's words, "They were so relieved to give up this fight on visitation for a period of time that they went along with the appointment of St. Christopher's as an evaluator."

It was not until August of 1980 that Slade voiced some concern about the evaluation being done by St. Christopher's. At that time he moved for an additional psychological evaluation and payment of costs. Although this evaluation was also to be conducted by St. Christopher's, Slade specified that the report evaluate Gladys's household as a potential home for Rita rather than limiting itself to the question of whether or not abuse had occurred there. Although Maynard knew that Slade might have realized that the St. Christopher's team was going over to Gladys's side, Maynard went along with the motion for a new evaluation because "I knew we had St. Christopher's; once you've got them that far, you've got them."

The entire evaluation process was very drawn out. But that also, Maynard thought, worked in Gladys's favor in the long run. In the interim, the PLA attorneys were able to build up visitation, bit by bit; they saw Rita's therapist in Jenkintown, the nun at the Home, the DPW social workers, and Gladys's therapist, Reilly. Every interview had a dual purpose: it was an opportunity to get information and an opportunity to in some way "neutralize" the speaker to ensure his or her passive acquiescence in (if not active support for) a result which favored Gladys. Maynard commented that "all of those contacts were negotiations as well as interviews. The whole strategy was to bring the professionals around so that they saw Rita's placement as something that ought to change."

Maynard knew that Gladys's standing to intervene with DPW's attempts to gain custody of Rita might be challenged. Grandparents, unlike parents, had no special status in custody cases, and Maynard was concerned about the legality in Pennsylvania of a guardianship authorized by New York. He had asked students and others at PLA to research the issue, but there seemed to be no law on it. Maynard treated Gladys as if she were a substitute mother, but he knew that that status was not clear legally. By the end of the case, the DPW counsel and everyone else involved was referring to Gladys as Rita's legal guardian,

and pointing to the New York court's order for authority. In February 1981, PLA filed the New York guardianship records, but Kiladis recalled, "I was reluctant to bring up the issue of Gladys's guardianship from New York because I had researched that and I knew how flimsy it was."

According to Maynard, the DPW social worker on the case when Rita was first placed with the Biancos, Mary Nota, had not only bungled relations with Gladys when the move was made, but also had difficulty managing an adversarial relationship with PLA. He recalled he was able to take advantage of Nota's mistakes: "We worked on Mary Nota to the point where she was so angry with us that she made a terrible witness at St. Christopher's. All she did was rant and rave about us and not talk about Rita." Maynard deliberately did nothing to decrease Nota's vindictiveness nor to improve her relationship with Gladys. Kiladis had also seriously questioned Nota's choice of Betty Bianco as a foster mother. Betty was known as someone who became very attached to the children placed with her, and then was very upset when any one of them left. This bonding, in Kiladis's opinion, was certain to exacerbate the relationship between Betty and Gladys. Both women were fighting to be Rita's mother.

During this period, there were many personnel shifts at DPW; among them, the replacement of Mary Nota by Margaret Kamin. Kiladis and Maynard both perceived this change to be a very beneficial one for their client. People from PLA were in Kamin's office within a week after she started, talking to her about the situation from their point of view. Maynard recalled that Kamin wasn't completely taken in by this strategy, but she was willing to give the case a fresh look.

A great deal had changed under the influence of PLA. A schedule of day visits had been established. The St. Christopher's team was evaluating the situation, and though Gladys was cooperating fully with them, Betty Bianco was not. Because Betty refused to bring Rita in to Philadelphia to go to St. Christopher's, Joan Kiladis and then Margaret Kamin, were driving out to Jenkintown to pick up Rita and bring her downtown. Gladys was still in therapy with Elizabeth Reilly, whom Maynard felt he had "turned around."

The team at St. Christopher's was aware that Rita was feeling a great deal of tension because of the racism in the Jenkintown school she was attending. By March 1980 a talk between Gladys's attorneys and the staff at St. Christopher's indicated that they were coming to three conclusions, summarized in a memo in the PLA file:

> (1) While the St. Christopher's team cannot state categorically that there has been no sexual abuse, nothing

> in Rita's language or behavior indicates any basis for the CY47. If she was abused, she is no longer cognizant of the fact. The team believes that the filing of the CY47 was ill-advised; that a lot of the behavior cited is characteristic of institutional living. (2) Rita wants to go home to her grandmother, cannot understand why she is moved from place to place and is apprehensive that her therapists will be taken away from her. (3) Because of the above, the team would recommend that Rita be returned to Gladys's home and continue in therapy at St. Christopher's.

Kiladis remembered that St. Christopher's was unwilling officially to exonerate Juan of sexual abuse; nor would the evaluators address the possibility that Rita was being beaten by the Biancos. Rita had written a letter to her therapist at St. Christopher's, saying that she was being beaten and generally mistreated by the Biancos and that she wanted to go home to her grandmother and "pappy," her name for Juan. Although Kiladis had not actually handed Rita the pencil and paper to write it, she felt somewhat implicated in the letter-writing process because she frequently urged Rita to be frank with the people at St. Christopher's, reassuring her that what she told her therapist there would not get back to the Biancos.

Kiladis had also told Rita to be frank with David Slade, but as it had turned out, Rita never got to talk with Slade. Although he was the child's attorney, and according to Maynard had left "no legal stone unturned," he never went out to see the child or asked to have her brought to his office. Maynard recalled, "We did not sit down with Slade and say, 'you should see the kid.' If we had, I think that he would have gone. But we didn't do that."

Assessing Slade's representation, Maynard observed there were two dimensions to cases like Rita's. First, there was the purely legal obligation to pursue certain issues and employ certain procedural tactics. Maynard thought that Slade clearly understood his legal obligations and met them by moving for, and then supporting, evaluation of Rita's situation by an independent source. He did have a conversation with the team at St. Christopher's. He did talk with the social worker. But he never met Rita: he never dealt with the second dimension, never became involved with his client as a person, never tried to make the legal objective fit the person's needs. Kiladis said that both Rita and Gladys had called Slade's office on numerous occasions and left messages on his answering machine, but their calls were never returned. Maynard added:

> Slade lived in another world. He lived in the downtown world of big firms; those attorneys don't go to

> Jenkintown, and they don't go out to people's houses, and the last thing he was going to do was to go to Gladys's house in West Philadelphia. I think that that is part of the class structure of the bar, and I think it's a shame. Those attorneys miss the chance for the type of practice that a doctor who is a general practitioner has. I have a life as full of people as of law, law as a human service. It's not for everybody, but it's for more people than you'd think if they'd give it a chance.

It was not clear to Maynard what Slade was advocating. At first he had gone along with DPW, but later he opposed them as well and asked for continuances. Slade seemed to feel that Rita had already lost her identification as an Hispanic, and that therefore ethnicity was no longer at issue. Slade was not even present at the final two hearings in the case.

Further, the PLA attorneys were able to turn Kiladis's coincidental friendship with two of the women at DPW who were involved with Rita's case to Gladys's advantage. Memos in the PLA file indicate that Kiladis had long telephone conversations with Susan Goldman, the supervisory social worker. Goldman had often called Kiladis at her home to discuss her worry over Margaret Kamin's extreme emotional involvement in Rita's case. They also discussed the CY47, which at that point was two years old and had never been substantiated or officially pursued. Goldman felt that the psychology student who had made the first report of sexual abuse had been under considerable pressure, pressure to find instances of such abuse for her supervisor's book. She and Kiladis discussed the question of why the Home had chosen to move Rita into foster placement at a time when many of the professionals involved were warning against any change. Kiladis told Goldman of her own belief that Juan was a stabilizing influence on the family, and that his youth counted in the family's favor if any concerns about Gladys's failing health might arise. Kiladis reassured Goldman that DPW need not rely upon Kamin's judgment that Gladys and Juan were "okay as parents," since St. Christopher's was certainly very competent and would be making a favorable report.

Similarly, Kiladis was continually in contact with Grace Myers, the counsel for DPW. Before Grace Myers became the attorney of record on the case, Kiladis had met her at the Philadelphia County Courthouse. Kiladis explained:

> I had several long conversations with Grace. I knew her from law school. When I talked with her at the courthouse, I knew that some of what I was saying would get back to the department. I told her that we had a lot of cases with

> the department in which we concurred with the moves that the department was making, but that we had a few where we felt that the department's behavior was off-the-wall. The department occasionally overreacted, and Rita's case was an example of that; they were much more upset than was warranted.

Kiladis knew that her relationship with Myers "cut through a lot of red tape." Kiladis did not tell Myers that she thought Gladys would fall apart if she had to take care of Rita without the necessary support services from DPW, but rather that there were support mechanisms in place, that Gladys was doing well with them, that Gladys was being very cooperative; when the department told Gladys to do something differently with Rita she did. Myers, according to Kiladis, "knew that I believed in what I was saying, that Rita wanted to go to Gladys; that Gladys wanted her, and that there were support mechanisms at work that I had no objection to."

According to Maynard, "it was Joan's involvement in the case that finally won it for Gladys." Kiladis not only spent many hours talking with Margaret Kamin, Susan Goldman and Grace Myers, she also spent a great deal of time with Gladys and Rita. From Jenkintown she drove Rita to and from St. Christopher's and to and from Gladys's for visits. She met Carlota and recognized the extensive contact that Rita still had with her mother. Indeed, Kiladis felt that the entire custody issue might never have arisen if Carlota had been legally represented from the start. Kiladis in many ways became an advisor and counselor to Gladys, talking with her about the best school placement for Manuel, and eventually, Rita, as well as answering Gladys's questions about various presents for Rita while the child was still living with the Biancos. Kiladis recalled, "I had to set limits or I would have been making up grocery lists for her."

On January 29, 1981, Kiladis filed a petition for Gladys and Juan to adopt Rita. By then Kiladis herself had been with the case since the fall of 1980 and had gotten to know (or knew previously) all of the professionals involved, as well as the "principals": Rita, Gladys, Betty Bianco, and even Carlota and Juan. Since Juan spoke very little English, Kiladis's acquaintance with him was very limited. She had participated in a conference at St. Christopher's and knew that the hospital team's second report, which would come out on February 1, 1981, would contain a recommendation that Rita be returned to Gladys after a period of gradually increasing visitation. The adoption petition, although filed, was not immediately acted upon.

DPW agreed to St. Christopher's' recommendations, and Rita returned to live with Gladys, Juan and Manuel in March 1981. She was,

however, still under the legal custody of DPW. Rita and Gladys attended therapy sessions each week at St. Christopher's. Manuel went along at first, but since the sessions interfered with his first love, baseball, he soon asked to be allowed not to attend. This was agreed to by the therapist at St. Christopher's. Juan refused to go from the very beginning. Kiladis believed that his resistance arose from a combination of his remaining distress about having been accused of sexually abusing Rita and the traditional "macho" notion that men did not talk about their feelings. For whatever reasons, Juan said that if he had to attend therapy sessions, he was moving out. And shortly thereafter he did so, moving in with a woman his own age.

Gladys, Manuel and Rita were now living together at Gladys's home in West Philadelphia. Gladys was in therapy with Elizabeth Reilly, and Rita and Gladys continued to go to therapists at St. Christopher's. Margaret Kamin of DPW remained involved. Finally, in February of 1982, Kiladis convinced Susan Goldman that it was time for DPW to release Rita from its custody by moving to dismiss the original DPW motions for custody and to dispense with Carlota's consent to Rita's adoption. A hearing was set before Judge Yates on February 2. Because Rita was ill that day, she and Gladys did not attend. Kiladis was there, along with Grace Myers and Margaret Kamin for DPW; David Slade was not present. Since there was no opposition to the dismissal of the two motions filed by DPW, the judge was willing to dismiss them. But, he asked, who would then be Rita's guardian? Myers mentioned that Gladys was legally Rita's guardian because of the New York court order. Kiladis, not convinced of the validity of that order in Pennsylvania, told the judge that she had filed an adoption petition for Gladys and Juan. Kamin voiced some concern about allowing Rita to be adopted by Gladys and Juan. All three women were concerned about the possibility that if adopted, Rita might become the object of a custody dispute between Gladys and Juan in the event that their separation ended in divorce. Judge Yates ordered a continuance.

In April, when Rita's case appeared before Judge Yates again, the cast of characters had changed slightly. Rita and Gladys were present with Kiladis, and DPW was represented by Grace Myers and Susan Goldman. David Slade again did not appear. Judge Yates allowed DPW to dismiss its two motions, entered into the record an agreement between Gladys and DPW for after-care services, and allowed the petition for Gladys and Juan to adopt Rita, even though Juan was not present and the judge knew that Juan and Gladys were living separately. Rita ran up to the bench and hugged the judge.

Loose Ends

When they had finished reviewing the case, Maynard stepped out of his office to get some coffee and mused about Kiladis's involvement with the case.

She came as a new student and gradually became more experienced. As she began to grow and I had more confidence in her, I gave her more and more of the case. She developed an excellent relationship with Gladys. I was anxious for that to happen because I needed to separate myself from it psychologically. But, what I also saw develop was the classic problem of over-commitment. It seemed to me that Joan took every little piece of anything that was there and blew it up. At the same time she was driving Rita around town and making Gladys's domestic arrangements. She made the case because of the amount of energy and effort that she put into it. But I never really believed that there was a staff person at the Children's Home who had sexually abused Rita. I don't really know, but I didn't believe it.

Kiladis meanwhile had rediscovered in the files a number of memos that she had written to Maynard describing conversations that she had had with Rita and with Susan Goldman from DPW. In one memo, dated December 13, 1980, Kiladis had recounted Rita's response to her direct question as to whether or not any of the males she knew ever "got fresh with her."

> She didn't know what I meant, except for hitting, and when I explained she said, "like Steve at the Home?" (only it took her a little while to remember his name). Gladys explained that Steve was a social worker who came to the Home about once a month. She often saw him fondling several of the girls, including Rita. He was around in 1978 and is, from what Rita indicated, almost certainly the cause of the CY47.

This conversation had taken place in Kiladis's automobile, as did the next one, described in a memo from Kiladis to Maynard dated December 27, 1980.

> Rita then asked me if I would forgive her for not having told me the truth. "That man at the home who kept bothering me was not named Steve, his real name was Joe or Joey." He had told her that she would get into a lot of trouble if ever she told. She said that she felt badly about telling me his wrong name, and that she had known his name all along.

Kiladis remembered checking with Susan Goldman from DPW to see if the social worker knew of any "Joe" or "Joey" at the Home. In a

memo dated January 18, 1981, she put into the file a synopsis of a lengthy telephone conversation that she had had with Goldman:

> Joe/Joey is the groundskeeper at the Home and is still there. He had little contact with the kids, Susan thinks, but says that since Rita was often sick with ear infections and officially confined to bed in her cottage, what the child says is possible. Susan promises to check into it, if just because she is under pressure to get greater accountability from people and places that DPW uses for placement.

While Kiladis and Maynard were both convinced that Juan had never abused Rita sexually or in any other way, Maynard had reminded Kiladis of the many other opportunities in Rita's environment for sexual exposure or stimulation: with other children at each of the two foster homes; with other children at the Catholic Home; with children in the neighborhood around Gladys's home; when Rita stayed at Carlota's house or even at the home of her Aunt Maria.

Yet Kiladis had always been puzzled by the timing of the Home's placement of Rita with the Biancos. Even the Home's psychologist, who filed the CY47, had put into his report at that time that he did not "think this is an appropriate time to attempt to place this child in a foster home. Her power and control struggles, her volatile emotional state mean that she will be a considerable handful for any foster parents." Perhaps, as Kiladis believed, someone at the Home knew that the "father figure" referred to in the report, who was exposing the child to "sexual overstimulation," was actually a member of their own staff. Rita then had been whisked out to Jenkintown for protection, not from Juan but from Joe.

Although convinced by this evidence that there had been sexual abuse at the Home, Kiladis was not committed to the idea of suing the Home on behalf of Gladys and Rita. She knew that type of trial was a very difficult one. Rita, who was not an easy child to deal with, would be placed in a very vulnerable position. Old wounds would be reopened. Gladys's anger and feelings of betrayal by the Home, an institution which was supposed to have helped Rita, would be rekindled.

As Maynard returned to his office, Kiladis thought about how many other loose ends remained in this case, as in most others like it. PLA knew many things about the family that DPW did not know. She thought of Carlota's continuing involvement with Gladys and Rita and the potential dangers in Rita's exposure to a drug-dominated environment. Moreover, there was the fact that Gladys received a full monthly allowance from the federal AFDC (Aid to Families with Dependent Children) program, even though (unbeknownst to the

government) Gladys and Juan who owned the building that Gladys and the children were living in, had not reported the rent they were receiving from the two apartments in the building, the fact that they owned a building in Puerto Rico (which not being occupied by either of them would have disqualified Gladys from welfare), nor that Gladys was working one job under a false Social Security number given to her employer by Margaret Kamin. Where did Maynard's and Kiladis's duty to their client begin and end? What did it require them to overlook, and what did it require them to pursue? Should they leave Rita's case, and close the file?

NOTES AND QUESTIONS

1. Rita's case reflects many of the central themes of this book. Perhaps the most crucial is the definition of the lawyer's role—or, more accurately, the need for self-definition, which lawyers confront throughout their legal careers. Of the three lawyers who figure in the case, one remains in the background. David Slade, Rita's court-appointed attorney, plays at best a walk-on part, largely, it seems, by his own choice. As seen through Maynard's eyes, Slade has chosen to offer technical expertise but little sensitivity to the personal and relational aspects of his cases. This downtown lawyer leaves "no legal stone unturned" but finds it unnecessary actually to meet with Rita. Maynard's judgment of Slade's performance is unsympathetic. How might Slade himself assess his representation? What might account for his conduct?

2. The other two lawyers in the case, Maynard and Kiladis, define their roles quite differently. Maynard sees his function primarily as representing Gladys, the Legal Aid Society's client:

> I did not decide that I was the lawyer to the whole situation to decide what was best for Rita. Within certain limits, I really did and do allow my role as an advocate in the situation to take its course.

Kiladis, by contrast, admits:

> It wasn't clear whose attorney I was; what I was advocating for, and so on. Knowing Rita's needs as well as Gladys's and eventually even Carlota's created a lot of tension for me. Their needs were different and it was not clear how to bargain them out; whether to try to get the maximum good for everyone or just for our client, Gladys.

3. In the end, is it clear how Kiladis resolves this tension? Is it appropriate for her even to consider trying "to get the maximum good for everyone" rather than only for Gladys? Does this approach breach any obligations to the client? On the other hand, Maynard is convinced

that "it was Joan's involvement in the case that finally won it for Gladys"—an involvement that included spending many hours with Rita. Would attorneys who define their roles purely as "advocates" for their client be likely to invest this amount of time to help another party?

4. Suppose that you were one of the Legal Aid attorneys in this case. If you believed that the best outcome for Gladys would be inconsistent with the best outcome for Rita, would that affect your choice of roles? Would your answer turn on the inadequacy of Rita's representation by David Slade? If so, what about other individuals whose interests were unrepresented—Juan, Carlota, the children in the Catholic home? How should such concerns affect attorneys' ethical obligations?

5. What factors should guide lawyers in choosing between the role of advocate and what Maynard calls "lawyer to the whole situation"? Consider the following issues.

The Law of Lawyering

To what extent do the rules dictate a particular role? Should a lawyer be subject to discipline for choosing the "wrong" role? Did either Maynard's or Kiladis's approach violate any of the bar's codified requirements? See Rules 1.2, 1.3, and 2.1.

The Traditions and Practices of the Bar

To what extent do the conventional practices and traditions of the bar help lawyers define their obligations in circumstances like Rita's case? What if there are competing norms and traditions? Obviously, the zealous advocate is a well-established role, but so is the nonpartisan counselor who attempts to reconcile competing interests. Maynard's term "lawyer to the whole situation" paraphrases Supreme Court Justice Louis Brandeis's description of his own practice of mediating between clients and other parties.[1] As Chapter 4 makes clear, Brandeis's approach has been highly influential.

The role of "lawyer for the situation" implies greater independence from the client than the advocate's role. Thus Brandeis once wrote in a memorandum to himself: "Advise client what he should have—not what he wants."[2] How desirable is this role definition? Is it the one Kiladis adopted? Should it matter whether the client can afford to hire another attorney who might see the issues differently?

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[1] *See* John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

[2] PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 40 (1984) (quoting Brandeis).

Ethical Principles

To what extent should lawyers' choice of roles depend on their ethical principles? What arguments might be made on behalf of Maynard's and Kiladis's different visions of professional responsibility?

Personal Style

How much discretion should lawyers have to select or adapt a role to fit their personalities and priorities? Should so important an issue be left to the preferences of individual attorneys? Is there any practical alternative?

Confidentiality, Advocacy, and Contextual Decision Making

How easily can or should lawyers shift from one role to another depending upon the particular context? Maynard acknowledges that if he had believed that Rita was being abused in Gladys's home, he might not have adopted the advocate's stance. So too, Kiladis's choice of role apparently depended in large measure on the inadequacy of representation of a vulnerable child. In a different context, she might not have experienced the same tensions in the advocate's role.

If such contextual factors affect a lawyer's definition of role, do they also impose any obligations to third parties? If Maynard had known of child abuse, should he have disclosed it? Should Kiladis have informed the Biancos and Carlota that they were entitled to court-appointed attorneys?

6. At the end of the case, Maynard and Kiladis are deliberating about whether to sue the Catholic Home for Children. Kiladis has become convinced that a child abuser works as one of the Home's groundskeepers, but fears that such a suit might have devastating effects on Rita and Gladys. Yet failing to bring formal charges could endanger other children. How should the lawyers resolve this dilemma? Should the considerations be different for "an advocate" than for a "lawyer for the situation"? Are there any alternatives besides litigation that might avoid the dilemma?

7. Are any of Maynard's and Kiladis's legal tactics problematic? For example, is it appropriate for them to "neutralize" other professionals in the case: the psychiatrists at St. Christopher's, Mary Nota, Margaret Kamin, Susan Goldman, and Grace Myers? Kiladis withholds from Grace Myers, a law school acquaintance, the belief that Gladys is unable to care for Rita without outside support services, as well as the knowledge that the legal basis for Gladys's guardianship is dubious. Kiladis and Maynard also keep this information from the court. Is that proper? Does it matter whether nondisclosure involves a matter of fact or a matter of law? What about

the knowledge that Gladys is collecting AFDC payments based on false representations of her income? Under what, if any, circumstances should a lawyer reveal such facts? See Rules 1.2(d), 1.6, 3.3, and 4.1.

8. Maynard and Kiladis have several private conversations with DPW personnel, including Mary Nota and Margaret Kamin. From one perspective, these conversations appear perfectly appropriate: Gladys's lawyers should be able to discuss her case with the relevant officials. However, Maynard and Kiladis structure these encounters for adversarial purposes; the objective is to "neutralize" the officials. DPW has its own legal counsel, and Rule 4.2 forbids lawyers to engage in ex parte contacts with other represented parties unless authorized by law. Did Maynard and Kiladis violate this Rule? Or were the conversations the kind of communications with government officials that are "authorized" by law? Did Kiladis's extensive personal involvement with Rita without David Slade's consent violate Rule 4.2? Did it violate conflict of interest rules that require a lawyer to maintain independent professional judgment?

9. Another important issue in Rita's case involves the allocation of power between lawyers and clients. In theory, attorneys are agents of those they represent. In practice, the Legal Aid lawyers in this case "whether knowingly or unknowingly, [often] steered clients' choices." For example, at one point Maynard talks Gladys out of seeking immediate visitation rights, because "his legal instincts told him he could best manage the case by drawing things out for quite awhile despite Gladys's desire to act immediately." When Maynard advises Gladys that they should not immediately seek visitation because they could not win, is he giving her any real choice? Such opposition to the client's wishes for the client's own good is an example of paternalism, discussed more fully in Chapter 5. Under what circumstances is it justified? Is paternalism ever consistent with the advocate's role? See Rules 1.2(a) and 1.14.

10. In the end, Gladys adopts Rita. Is this an outcome that Gladys genuinely desires, or is it an instance of lawyers' shaping client choices to fit the legal alternatives readily available? From the outset of the case, Gladys expresses ambivalence. She wants to keep Rita, but she also wants public agencies to provide care in those intervals when she is unable to cope. Should Kiladis and Maynard have tried to formalize such an arrangement rather than pursuing adoption? What would the likely response have been by the court, by welfare officials, or by Rita's attorney? Does the adoption raise other ethical concerns? Should Juan have been a party, given that he is likely to separate from Gladys? What about Carlota's rights? How should their interests have been handled?

11. Does the fact that this is a legal aid case present special problems of legal ethics and legal process? Most of the parties whose interests are at stake have no representation or inadequate representation. To what extent are the difficulties in Rita's case attributable to the distribution (or maldistribution) of legal assistance? To what extent do they reflect inadequacies in legal and social welfare alternatives? Would more or better lawyers have led to a better process? A better result? Are you satisfied with the outcome of Rita's case? If not, what reforms would you propose?

Case Study 2:
David Boies's Work for Harvey Weinstein in #MeToo

The following case study involves issues raised in several chapters of the textbook:

- confidentiality;
- conflicts of interest and advance waivers;
- zealous advocacy and the division of authority between lawyers and clients (Rule 1.2(a));
- dishonest conduct by agents under a lawyer's direct supervision;
- the moral implications of long-term continued representation of a client engaged in conduct that the lawyer finds reprehensible.

On October 5, 2017, the *New York Times* published a front-page article by reporters Jodi Kantor and Megan Twohey, titled "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades."[1] The article led to the downfall of movie producer Weinstein, and the beginning of the #MeToo Movement. Weinstein is currently serving a 23-year sentence for criminal sexual assault and third-degree rape (both convictions under appeal as of summer 2020)

Since 2001, Weinstein had been represented in a variety of legal matters by "superlawyer" David Boies, of Boies, Schiller Flexner LLP. Earlier in his career, Boies represented the Justice Department in its massive antitrust case against Microsoft Corporation, leading to a highly favorable settlement. He represented Vice-President Al Gore in *Bush v. Gore*. Together with Ted Olson, Boies represented the victorious same-sex couples in the landmark 2015 Supreme Court case *Obergefell v. Hodges*. Boies's legal representation of Weinstein reportedly reflected both a personal friendship and business arrangements.[2]

A month after the 2017 *New York Times* article, reporter Ronan Farrow (writing in the *New Yorker*) revealed that Boies had helped Weinstein conceal his serial sexual abuse.[3] Most notably, when

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[1] https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html.

[2] JODI KANTOR AND MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT 91 (2019).

[3] Ronan Farrow, *Harvey Weinstein's Army of Spies*, THE NEW YORKER, Nov. 6, 2017.

Weinstein learned that journalists were pursuing investigations of his sexual misconduct, and that an actress was writing a book describing how he had abused her, Boies in July 2017 signed a contract (on behalf of his firm) with a private investigation firm. The firm, Black Cube, is owned by former agents of Israel's legendary Mossad spy agency. The contract specified that Black Cube would help unearth "intelligence which will help the client's efforts to completely stop the publication of a new negative article in a leading NY Newspaper." It was not the first time Boies Schiller Flexner had used Black Cube's services on behalf of Weinstein. The contract that David Boies signed in 2017 was a renewal of an earlier and very similar contract, dated October 2016, signed by the law firm's CFO.[4]

The new contract also authorized investigators to look for material to discredit "harmful negative information" about Mr. Weinstein in a forthcoming book.[5] Under that contract, Black Cube would provide a team including "a full-time agent by the name of 'Anna', who will be available full time to assist the Client and his attorneys." "Anna" was in reality Stella Penn Pechanac, a 30-year-old Israeli actress and former military officer.[6] Pursuant to the contract, she impersonated a finance professional and women's rights activist, in order to gain confidences from actress Rose McGowan, whom Mr. Weinstein had allegedly raped.[7] She also impersonated an imaginary Weinstein victim in an effort to get a *New York* magazine reporter to reveal information about other victims he had interviewed while investigating a Weinstein story. In addition, "Anna" emailed *New York Times* reporter Kantor to try to meet with her. Each of these "pretexting" meetings was initiated under a false name.

Once questioned, Boies denied knowledge of such practices. But commentators pointed out that he surely *was* in a position to have acquired such knowledge and had reason to suspect that questionable tactics would be utilized. Black Cube was known for hardball investigatory practices, and Boies reportedly received reports of Black

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[4] The text of the contract, with Boies's signature, is available on *The New Yorker*'s website here: https://www.newyorker.com/sections/news/read-the-contract-between-a-private-security-firm-and-one-of-harvey-weinsteins-lawyers. The earlier contract is available at https://www.dailymail.co.uk/news/article-5064027/Israeli-military-vet-duped-Rose-McGowan-revealed.html.

[5] Id.

[6] Alana Goodman, *The Spy Who Duped Rose McGowan Unmasked! This is the blonde Israeli military veteran who worked undercover for disgraced mogul Harvey Weinstein and tricked the actress into sharing her memoirs*, THE DAILY MAIL, Nov. 9, 2017, https://www.dailymail.co.uk/news/article-5064027/Israeli-military-vet-duped-Rose-McGowan-revealed.html.

[7] Farrow, *supra* note 3.

Cube's findings.[8] Even as accusations of sexual abuse mounted, Boies chose to believe Weinstein's claims that he just wanted to conceal his philandering. "I thought, like a lot of people in Hollywood surrounded by very attractive women who want to make him like them, he ended up in multiple affairs."[9] *New York Times* reporters asked David Boies if his business dealings with Harvey Weinstein in the film industry and Boies' daughter's desire for roles in Weinstein's films might have encouraged him to conceal mounting allegations of sexual misconduct. Boies responded, "Well, it could you know. If I'm Harvey's lawyer, I'm going to try to keep things under wraps. That's my job, right? … I am very dedicated to my clients."[10] Even after the scale of Weinstein's alleged offenses were revealed, Boies saw "no problem "with the lengths he had gone to protect him. When I look back I don't' have any regret that I represented him the way I did.'"[11]

Boies himself subsequently acknowledged the problems arising from his relationship with Black Cube. He conceded that it was "not thought through," and that "[w]e should not have been contracting with and paying investigators that we did not select and direct."[12] He explained that it was Weinstein and his lawyers, not him, who chose Black Cube and drafted the contract that he signed. Boies stated that Weinstein

> asked me to execute the contract on his behalf. I was told at the time that the purposes of hiring the private investigators were to ascertain exactly what the actress was accusing Mr. Weinstein of having done, and when, and to try to find facts that would prove the charge to be false and thereby stop the story.[13]

> **QUESTION 1:** Why do you think David Boies personally signed the Black Cube contract? Do you think he personally received Black Cube's reports and chose not to look at them? What might account for his behavior?

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[8] Felix Gilette et al., *The Superstar Lawyer Tied to Harvey Weinstein Isn't Panicked,* BLOOMBERG NEWS, Dec. 7, 2017 (reporting claims that, in 2015, Boies helped block an investigation into allegations of Weinstein's abuse by the company's board of directors).

[9] KANTOR & TWOHEY, *supra* note 2, at 91.

[10] *Id.*

[11] *Id.*

[12] David Boies's statement is quoted in full in Miram Rozen, *Boies Responds to Criticism Over Role in Weinstein's 'Army of Spies'*, THE AMERICAN LAWYER, Sept. 25, 2018, https://www.law.com/americanlawyer/2017/11/07/criticism-rises-over-david-boies-role-in-weinsteins-army-of-spies/.

[13] *Id.*

As to his prior representation of Weinstein, Boies stated, "I don't believe former lawyers should criticize former clients." But then he added, "In retrospect, I knew enough in 2015 that I believe I should have been on notice of a problem and done something about it."[14]

In a subsequent *New York Times* profile, Boies defended his role in the Weinstein case, along with his representation of Theranos, a company that had recently been accused of massive fraud, where his efforts reportedly included intimidating whistleblowers. Boies stated:

> A lawyer can choose what clients to represent. A lawyer does not have the choice of how to represent a client. A lawyer is duty-and-honor-bound to represent a client effectively and aggressively, within the bounds of the system itself. A lawyer does not have the right to abandon that client under fire, except in extraordinary circumstances.[15]

Evaluations of Boies's conduct varied. "I don't think this will hurt from a business perspective," said ethics professor Rebecca Roiphe. "It is not going to harm his reputation with most clients. When you hire Boies, you are hiring an aggressive lawyer."[16] Deborah Rhode, in a *New York Times* op-ed, was more critical:

> The time to dissuade Mr. Weinstein from persisting in sexually abusive conduct and hiring investigators to hush it up was when that conduct was occurring. For Mr. Boies to condemn Mr. Weinstein's conduct now seems like throwing a former client under the bus in the hopes of salvaging his own reputation. But that public shaming compounds the misjudgment and shames Mr. Boies as well.[17]

> **QUESTION 2:** To the extent Boies erred, when did he err? By representing an alleged sexual harasser in the first instance? In retaining Black Cube? Once he hired Black Cube, in failing to reasonably manage their investigation, in potential violation of Model Rule 5.3(b)(2)? Or, after

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[14] Farrow, *supra* note 3.

[15] James B. Stewart, *David Boies Pleads Not Guilty,* N.Y. TIMES, Sept. 21, 2018 (quoting Boies).

[16] Goldstein Mathew Goldstein & Adam Liptak, *Weinstein Work Pulls Lawyer Back Into an Ethical Debate,* N.Y. TIMES, Nov. 7, 2017 (quoting Roiphe).

[17] Deborah L. Rhode, *David Boies's Egregious Involvement With Harvey Weinstein*, N.Y. TIMES, Nov. 9, 2017.

> everything went sideways, in "throwing a former client under the bus"? Did Boies violate confidentiality, or were his statements after the scandal broke legitimate self-defense under Rule 1.6(b)(5)?
>
> **QUESTION 3:** Is Boies's description of his conduct consistent with Rule 1.2(a), which governs the allocation of authority between lawyers and clients? Is Boies's description of withdrawal consistent with Rule 1.16?

The Conflicts Questions

As noted earlier, Boies signed a contract on Weinstein's behalf with the Black Cube private investigation organization that directed it to uncover "intelligence which will help the client's efforts to completely stop the publication of a new negative article in a leading NY Newspaper."[18] The newspaper was the *New York Times*, a prominent client of Boies Schiller Flexner. When the Boies Schiller-Black Cube contract surfaced, the *Times*'s lawyers denounced Boies's conduct as a "grave betrayal of trust" and terminated the firm:

> "We learned today that the law firm of Boies Schiller and Flexner secretly worked to stop our reporting on Harvey Weinstein at the same time as the firm's lawyers were representing us in other matters … We consider this intolerable conduct, a grave betrayal of trust, and a breach of the basic professional standards that all lawyers are required to observe. It is inexcusable and we will be pursuing appropriate remedies."[19]

Boies, however, denied that efforts to discredit the *Times* story reflected such a conflict. In his view, it was "entirely appropriate to investigate precisely what [Weinstein] was accused of doing and to investigate whether there were facts that would rebut those accusations." He added: "If evidence could be uncovered to convince the *Times* the charges should not be published, I did not believe, and do not believe, that that would be adverse to the *Times*'s interests."[20]

One commentator expressed skepticism: But what we know from Weinstein's past behavior … (and it does not take much imagination to guess that it was familiar to Boies as Weinstein's longtime legal advisor) is not only to attack the facts … but to attack the accuser's overall

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[18] Farrow, *supra* note 3.
[19] Jim Rutenberg, *Report Details Weinstein's Covert Attempt to Halt Publication of Accusations*, NY TIMES, Nov. 7, 2017.
[20] Boies, quoted in Rozen, *supra* note 12.

credibility on the sadly familiar character grounds that she is promiscuous, voraciously ambitious, greedy, dishonest, etc."[21]

> **QUESTION 4:** Is Weinstein's supposed strategy of bullying and threatening victims into remaining silent relevant to the issue of whether Boies had a conflict of interest because of his joint representation of Weinstein and the *Times*? Does Boies's description of his aim in retaining Black Cube—to help the *Times* avoid embarrassing itself by publishing false allegations—square with the objective in the Black Cube contract: "Provide intelligence which will help the Client's efforts to completely stop the publication of a new negative article in a leading NY newspaper"?

Boies also pointed out that his firm had a clause in its retainer agreement with the *Times* that purported to waive all conflicts of interest on matters unrelated to the matter on which the newspaper had retained the firm, including a libel lawsuit.[22] Specifically, the retainer agreement stated that the firm might engage with clients outside the libel lawsuit "where the interests of the other persons, and the Firm's representation of them, may be against the [*Times's* interests], including adversity in litigation."[23]

The *Times* responded to that claim by stating that it never contemplated that Boies Schiller would contract with investigators to do opposition research on its own reporters. Specifically, the *Times* insisted:

> We never contemplated that the law firm would contract with an intelligence firm to conduct a secret spying operation aimed at our reporting and our reporters. Such an operation is reprehensible, and the Boies firm must have known that its existence would have been material to our decision whether to continue using the firm. Whatever legalistic arguments and justifications can be made, we should have been treated better by a firm that we trusted.[24]

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[21] "Bernie", *More Adventures in Ethics: Did David Boies Cross Any Ethical Lines In His Work For Harvey Weinstein?* The Faculty Lounge weblog, Nov. 9, 2017, https://www.thefacultylounge.org/2017/11/more-adventures-in-ethics-did-david-boies-cross-any-ethical-lines-in-his-work-for-harvey-weinstein.html.

[22] *Id.*

[23] Matt Ford, *David Boies's Complicated Conflicts*, ATLANTIC, Nov. 8, 2017.

[24] Miriam Rozen, *NYT Fires Boies: "We Should Have Been Treated Better*," AM. LAW., Nov. 7, 2017.

Is this response convincing?

> New York's Rule 1.7 reads:
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

In a 2006 ethics opinion, the New York City Bar took the position that "a law firm may ethically request an advance waiver that includes substantially related matters" if (a) the client is sophisticated, (b) "the waiver is not applied to opposite sides of the same litigation and opposite sides in a starkly disputed transactional matter," (c) client confidentiality is not compromised, (d) the conflict is "consentable" under the New York Rules, and one other condition not relevant to the Boies-Weinstein matter.[25] The opinion cites to an earlier and differently-numbered version of New York's rules, but "consentable" means that conditions (1) – (3) in the above-quoted Rule are met.

> **QUESTION 5:** Are the conditions met here? Does the advance waiver cure the conflict of interest between Boies's work for Weinstein and his firm's representation of the *New York Times* – assuming that there is a conflict? Can a lawyer "reasonably believe" that he is providing competent and diligent representation of a client if he is secretly spying on the client on behalf of another client? Should a sophisticated client be able to anticipate that danger?

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[25] New York City Bar, Formal Opinion 2006-1, *Multiple Representations; Informed Consent; Waiver of Conflicts*, Jan. 1, 2006, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2006-1-multiple-representations-informed-consent-waiver-of-conflicts.

The Pretexting Issue

Another issue, not related to the conflict of interest, concerns the "pretexting" investigation done by Black Cube's agent. New York's Rule 5.3, "Lawyers' Responsibility for Conduct of Nonlawyers," states:

> (b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:
>
> (1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or
>
> (2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and
>
> (i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or
>
> (ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

QUESTION 6: Was the activity of Black Cube's agent Stella Penn Pechanac ("Anna") something that a lawyer could personally engage in under the Model Rules? Consider in this connection Model Rule 4.1, on truthfulness in statements to others, Model Rule 4.3, on communication with unrepresented parties, and Model Rule 8.4(c), prohibiting "conduct involving dishonesty, fraud, deceit, or misrepresentation."

QUESTION 7: Did Boies violate New York Rule 5.3, quoted above? Note that he has stated:

> I did not … direct their [Black Cube's] work; that was done by Mr. Weinstein and his other counsel. … It was a mistake to contract with, and pay on behalf of a client, investigators who we did not select and did not control. It was not thought

> through, and that was my mistake. I take responsibility for that.[26]

Did Weinstein's "other counsel" referred to here violate any rules of professional conduct by directing Black Cube's investigators?

[26] Quoted in Rozen, *supra* note 8.

Case Study 3:
ACLU Counsel Representing an Undocumented Minor Seeking an Abortion

This case study is a document-based exercise: after summarizing the case, with its rather complicated and contested facts, it asks you to read excerpts from dueling briefs to the Supreme Court about whether attorneys representing a pregnant minor in immigration custody should be disciplined for misleading government lawyers in hotly-contested litigation regarding her desire to have an abortion.

The main ethics questions: did the lawyers' failure to tell the government that their client would have the abortion she desired sooner than government lawyers believed she would constitute fraud? Or was it required by their duties of confidentiality and zealous advocacy?

Answering these questions involves close parsing of both the Model Rules on confidentiality, truthfulness, and honesty, and *Restatement* standards on what counts as fraud by omission. But it also requires you to think about the nature of adversary litigation.

The case is doubly interesting because the Supreme Court had an opportunity to answer these questions, but instead ducked the issue—which therefore remains a live one.

Another ethics question concerns the tactics of government lawyers, who may have been drawing out the litigation to delay the abortion until it was too late.

The case concerns litigation in 2017 involving Jane Doe, a 17-year old held in Texas in immigration detention, who learned while in detention that she was pregnant, and sought an abortion. Texas law requires that anyone seeking an abortion must undergo counseling at least 24 hours in advance, by the same physician who will perform the abortion. The Office of Refugee Resettlement (ORR)—in charge of her detention—denied her permission to leave the detention facility for the abortion procedure itself, because in ORR's view that would be facilitating the abortion. According to ORR policy, an undocumented minor has only two pathways to release from immigration detention: she can accept voluntary departure back to her country of origin, or she can find an adult sponsor in the United States to whom she can be released. Such a sponsor must be vetted by HHS, a potentially time-consuming process. Jane Doe's pregnancy was far enough advanced that the vetting might have taken too long for her to have the abortion she desired,

because Texas law prohibits abortions after the 20th week of pregnancy. Jane Doe was in her 16th week.

Contentious emergency litigation followed. Jane Doe's guardian ad litem, working in tandem with the ACLU, challenged the ORR policy in federal district court as a violation of Jane Doe's constitutional right to an abortion, and requested a court order to force the government to release her to the Texas clinic where the abortion would take place. That was on October 13, 2017. The District Court agreed with her on October 18, and issued the order. The government appealed to the D.C. Circuit Court of Appeals, and two days later (October 20), a divided panel of the D.C. Circuit reversed. Jane Doe requested an emergency *en banc* rehearing, and the D.C. Circuit sitting *en banc* reversed the panel decision and ordered the government not to prevent her release; two hours later, the District Court amended the order to require the government to release Jane Doe immediately. That was at 4 p.m. on October 24.

The subsequent events are described in the briefs below; because the two sides "spin" these facts rather differently, we will not fully describe them here. In (very) brief: Jane Doe had received the legally-required abortion counseling prior to the last-minute litigation; but at the time of her courtroom victory on October 24, the physician who counseled her was not available to perform the procedure. It appeared, then, that a different physician would counsel her on October 25, and she would have the abortion on October 26.

But the night of October 24, the original physician became available. Jane Doe's representatives pushed her October 25 medical appointment back from 7:30 a.m. to 4:15 a.m., and informed the government of the change in schedule. They did not inform the government that the appointment's purpose had changed from counseling to the abortion itself.

The upshot was that:

1. Jane Doe was released from detention at 4:15 a.m. on October 25 and had the abortion a few hours later. In the 12 hours between the court order and the abortion, the government did not file an emergency appeal for a stay with the Supreme Court to prevent the abortion.

2. The government accused Jane Doe's counsel of deceiving them about the timing of the abortion. Specifically, Jane Doe's counsel did not inform them that her appointment for counseling was changed at the last minute to an appointment for the abortion itself. That led the government to believe it had extra time to appeal to the Supreme Court.

3. Nine days later, the Solicitor General filed a certiorari petition, asking the Supreme Court to vacate the *en banc* D.C. Court of Appeals

decision that ORR's policy violates the constitutional right to abortion. One of the grounds for seeking cert was the alleged deception by Jane Doe's counsel.

4. Furthermore, the SG's cert petition asked the Supreme Court to demand that Jane Doe's counsel show cause why they should not be disciplined, either by the Court itself or by being referred to their states' bar counsel.

5. ACLU counsel replied that they had not committed any ethics violation, and indeed that informing the government of the changed purpose of her clinic visit would violate their ethical obligations to their client.

6. In a *per curiam* decision, the Supreme Court granted cert to consider the underlying legal issue: the constitutionality of ORR's policy regarding pregnant minors who seek abortions. The Court agreed with the government that the D.C. Circuit's opinions should be vacated, but for reasons not relevant to the ethics issue.[1] On the ethics issue, however, the Court punted:

> The Court takes allegations like those the Government makes here seriously, for ethical rules are necessary to the maintenance of a culture of civility and mutual trust within the legal profession. On the one hand, all attorneys must remain aware of the principle that zealous advocacy does not displace their obligations as officers of the court. Especially in fast-paced, emergency proceedings like those at issue here, it is critical that lawyers and courts alike be able to rely on one another's representations. On the other hand, lawyers also have ethical obligations to their clients and not all communication breakdowns constitute misconduct. The Court need not delve into the factual disputes raised by the parties in order to answer the *Munsingwear* question here.[2]

This on-the-one-hand-on-the-other-hand paragraph, coupled with the many months it took for the Court to decide on the cert petition, strongly suggests that the Justices could not agree about the ethics issue, nor whether the Court should take steps against Jane Doe's lawyers.

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[1] *Azar v. Garza*, 138 S. Ct. 1790 (2018). The Court held that (under a case called *Munsingwear*), a decision on an issue that has become moot before the losing party has had time to appeal to the Court must be vacated and remanded. *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39 (1950).

[2] *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018).

This case study is about the ethics issue. Your assignment is to read the briefs excerpted below and analyze the ethics issues.

Two additional pieces of information, not included in the briefs, may be relevant to your analysis:

First, as mentioned above, Jane Doe was 16 weeks pregnant at the time of these events. Under Texas law, abortion after week 20 is illegal. There was reason to believe that prolonged legal proceedings, coupled with the government's proposed vetting of potential sponsors for Jane Doe on an uncertain timetable, would delay the proposed abortion beyond the legal cut-off date.

Second, Scott Lloyd, the head of ORR, made his strong opposition to abortion clear in a public statement regarding another case, involving "Jane Poe." Jane Poe was a minor in ORR detention who was pregnant due to rape. In declining to permit her temporary release to obtain an abortion, Mr. Lloyd explained that his decision was guided by the belief that abortion is never in the best interests of a minor. That is because of the potential trauma and regret over aborting one's child. He added:

> I am mindful that abortion is offered by some as a solution to a rape. …
>
> I disagree. Implicit here are the dubious notions that it is possible to cure violence with further violence, and that the destruction of an unborn child's life can in some instances be acceptable as a means to an end. To decline to assist in an abortion here is to decline to participate in violence against an innocent life.

Mr. Lloyd concluded:

> The Office of Refugee Resettlement serves a large number of persons who have experienced some sort of violence. Refuge is the basis of our name and is at the core of what we provide, and we provide this to all the minors in our care, including their unborn children….[3]

Mr. Lloyd's statement came during the pendency of the cert petition, and made matters somewhat awkward for government lawyers. It contradicts settled law granting a constitutional right to abortion

[3] Scott Lloyd's full statement is available at https://www.justsecurity.org/wp-content/uploads/2017/12/lloyd.fullmemo.pdf.

regardless of immigration status—which government lawyers had claimed the government was not disputing.[4]

Because the facts of this case turn on the timeline of very fast-paced litigation, we include that timeline here. What then follow are excerpts from the Solicitor General's cert petition, the ACLU's response brief, and the government's reply brief. Following these, we also include passages from the *Restatement (Third) of the Law of Lawyering* cited in the reply brief. Then come the questions for you, the reader.

THE TIMELINE OF JANE DOE'S LITIGATION

Early September 2017

Jane Doe, age 17, crosses the U.S.-Mexico border into Texas and is placed into detention in a Texas shelter. She learns that she is pregnant. She requests an abortion. (Undocumented aliens have the same constitutional right to abortion as citizens.) However, ORR refuses to release her from detention to go to the abortion clinic.

Represented by a local guardian *ad litem* and by the ACLU, she sues.

Under Texas law, women must receive abortion counseling at least 24 hours in advance of the abortion, from the same physician who will perform the abortion.

Wednesday, October 18

Jane Doe wins in federal District Court, which grants a temporary restraining order (TRO) against ORR's policy and orders Doe's release to the clinic for the legally-mandated abortion counseling, to be followed by the abortion.

The government requests an emergency stay of the TRO from the D.C. Circuit Court of Appeals.

Thursday, October 19

Jane Doe receives abortion counseling from Dr. A [unnamed in the documents, identified here as "Dr. A" for ease of reference].

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[4] However, Judge Henderson, dissenting from the D.C. Circuit's *en banc* opinion, expressed doubt that illegal immigrants enjoy full constitutional rights. Judge (now Justice) Kavanaugh also dissented, as did Judge Griffith.

Friday, October 20

A three-judge panel of the D.C. Circuit Court of Appeals grants the government's motion to stay the District Court's TRO. Result: ORR's policy remains in place.

Jane Doe petitions for an *en banc* rehearing.

Tuesday, October 24

2 p.m. The *en banc* D.C. Circuit reverses the panel decision and reinstates the TRO against ORR's policy, permitting Jane Doe to be released for purposes of the abortion.

Shortly after. Jane Doe's counsel petition the District Court to modify the TRO and order Doe's immediate release and transportation to the clinic.

> Doe's counsel explains that Dr. A is currently unavailable, so she will receive the legally-mandated counseling that day from Dr. B, who will perform the abortion on the following day, Wednesday.

4:15 p.m. The District Court modifies the TRO to order Jane Doe's release.

5:26 p.m. In an email exchange to arrange Doe's transport from the shelter to the clinic, DOJ counsel asks for clarification of the time of the abortion, and ACLU counsel responds, "As soon as we understand the clinic's schedule tomorrow we will let you know."

6 p.m. Jane Doe misses the window for her counseling appointment and returns to detention.

6:17 p.m. Doe's counsel informs the government of the missed appointment, and states that the appointment is now scheduled for 7:30 a.m. the following day, Wednesday.

8:13 p.m. DOJ counsel informs Doe's counsel that they will seek an emergency stay from the Supreme Court on Wednesday.

9:31 p.m. Doe's counsel informs the shelter that her clinic appointment has been moved back to 4:15 a.m. on Wednesday, and asks that she be

ready. They do not mention the possibility that this appointment will be for the abortion procedure itself.

11:56 p.m. The shelter forwards this email to DOJ lawyers, adding that it is unclear whether the 4:15 a.m. appointment is for counseling or the abortion procedure itself.

Wednesday, October 22

Shortly after midnight. Dr. A confirms that he *is* available to perform the abortion that morning.

> Because Dr. A has already counseled Jane Doe the previous Thursday, Dr. A can proceed directly to the abortion, with no further counseling required.

4:30 a.m. The shelter informs DOJ that Jane Doe is scheduled to undergo a "medical procedure" that morning.

8:00 a.m. Dr. A performs the abortion on Jane Doe.

9 a.m. In response to DOJ inquiries, Doe's counsel informs the government that she has had the abortion.

The Briefs[5]

Hargan v. Garza: The SG's Cert Petition (Nov. 3, 2017)

Petition for a Writ of Certiorari

2017 WL 5127296 (U.S.) (Appellate Petition, Motion and Filing)

Supreme Court of the United States.

Noel J. Francisco, Solicitor General.

…

II PARTIES TO THE PROCEEDING

The petitioners are Eric D. Hargan, Acting Secretary, U.S. Department of

[5] We have removed most internal citations for space reasons.

Health and Human Services; Stephen Wagner, Acting Assistant Secretary, Administration for Children and Families; and Scott Lloyd, Director, Office of Refugee Resettlement, in their official capacities.

The respondent is Rochelle Garza, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated.

The Solicitor General, on behalf of petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. . . .

STATEMENT

On the afternoon of October 24, the lower courts held that the government had to immediately facilitate the pre-abortion counseling and abortion sought by an unaccompanied alien minor who was apprehended unlawfully entering the United States, who has declined to request voluntary departure to her home country, and who thus is in the government's custody. Under Texas state law, the counseling and abortion must be performed by the same physician and separated by at least 24 hours. When Ms. Doe could not receive counseling from a physician on the evening of October 24, her representatives informed the government that her appointment would be moved to the morning of October 25, pushing the abortion procedure to October 26. The government asked to be kept informed of the timing of Ms. Doe's abortion procedure, and one of respondent's counsel agreed to do so.

Based on those representations, the government informed this Court's Clerk's Office and respondent's counsel that it would file a stay application the following morning, October 25. At that point, by their own account, Ms. Doe's representatives did three things: they secured the services of Ms. Doe's original physician (who had provided counseling the previous week), moved her appointment from 7:30 to 4:15 a.m. on the morning of October 25, and changed the appointment from counseling to an abortion. Although Ms. Doe's representatives informed the government of the change in timing, they did not inform the government of the other two developments—which kept the government in the dark about when Ms. Doe was scheduled to have an abortion. The government did not learn that critical fact until shelter personnel arrived with Ms. Doe at the clinic for her early-morning appointment on October 25. The government's efforts to reach respondent's counsel were met with silence, until approximately 10 a.m. Eastern Time, when one of respondent's counsel notified the government that Ms. Doe had undergone an abortion. . . .

Counsel's representations to the district court on October 24 confirmed that Ms. Doe would need to participate in a new counseling session and then wait a day before she could undergo an abortion. Counsel asked the court to order the government to make Ms. Doe available "promptly and without delay, on such dates, including today, *** *in order to obtain the counseling required*

by state law and to obtain the abortion procedure." Counsel stated: "Plaintiff has been informed, and represents to the Court, that a qualified physician is available at the nearest clinic *today,* and will be available to perform the procedure *tomorrow*.' " (emphasis added). Counsel thus reaffirmed to the court that for Ms. Doe to obtain an abortion, she would need to complete a two-step, 24-hour process.

b. Following the district court's entry of the modified TRO at approximately 5 p.m. on October 24, counsel made similar representations directly to the government. First, Ms. Doe's guardian ad litem, attorney ad litem, and counsel from the American Civil Liberties Union (ACLU) all requested that the Texas shelter transport Ms. Doe to the clinic immediately. At 6:13 p.m. on October 24, government counsel contacted respondent's counsel by telephone, confirming that she was being transported to the clinic and asking to be apprised of the timing of any appointments. Government counsel followed up with an email to respondent's counsel, confirming that the shelter was transporting Ms. Doe to the clinic on October 24, and asking to be notified of the timing of "tomorrow's procedure." At 6:28 p.m., respondent's counsel confirmed receipt of the email and phone call, and assured government counsel that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know."

Roughly 45 minutes later, respondent's counsel informed government counsel that the doctor was not able to stay for the appointment that evening, which would be rescheduled for the following morning at 7:30 a.m. Around the same time, Ms. Doe's attorney ad litem separately informed the assigned Assistant United States Attorney (AUSA) that Ms. Doe's previous doctor was not available; that it was no longer feasible for Ms. Doe to receive counseling that evening (October 24); and that as a result the abortion could not take place until October 26. Ms. Doe's attorney ad litem further stated that the doctor had agreed to stay for an extra day, in order to perform the abortion on October 26.

c. These representations made clear that the appointment rescheduled for the morning of October 25 would be for counseling, with an abortion to follow no earlier than the morning of October 26. By their own acknowledgement, respondent's counsel shared that understanding. See Letter from David D. Cole, Nat'l Legal Dir., Am. Civil Liberties Union, to Noel J. Francisco, Solicitor Gen. 2 (Oct. 30, 2017) (ACLU Letter) (lodged with the Court) ("We did not become aware, until late in the evening of October 24, that it might be possible for the physician who had counseled Ms. Doe on October 19 to return to the clinic to perform the abortion on the morning of October 25. It was not clear until the morning of October 25 that he would in fact be able to do so."). …

Later that night, Ms. Doe's guardian ad litem informed the Texas shelter and the AUSA that Ms. Doe's appointment had been moved to 4:15 a.m. Central Time. The email did not explain the reason for the change nor state that the appointment was now for an abortion. In addition, neither the AUSA nor the shelter was instructed to refrain from giving Ms. Doe food or drink

before the appointment, as would have been medically indicated if the appointment were for an abortion. Although the change in the appointment time caused shelter staff to wonder later that night whether the nature of the appointment also might have changed, they were never told that the early-morning appointment would be for an abortion rather than counseling.

Respondent's counsel has now explained that, unbeknownst to the government, at some point "late in the evening of October 24," they became "aware" that "it might be possible for the physician who had counseled Ms. Doe on October 19 to return to the clinic to perform the abortion on the morning of October 25." Respondent's counsel has further explained that at some point early in the morning of October 25, it became "clear" that the original doctor "would in fact be able to" perform the procedure that morning. Significantly, however, respondent's counsel did not notify the government of this possibility—notwithstanding their earlier acquiescence in a request to keep government counsel informed of the timing of the "procedure" and the government's subsequent notice of its intent to seek relief in this Court that same morning.

At 4:15 a.m. Central Time on the morning of October 25, shelter staff arrived with Ms. Doe at the clinic. At 4:30 a.m. Central Time, shelter staff emailed government personnel that the clinic had indicated that Ms. Doe would be undergoing an abortion. After receiving that information, government counsel twice emailed respondent's counsel to inquire as to the nature of the appointment. Two hours after the government's first email was sent, counsel informed the government that Ms. Doe "had the abortion this morning." Because these developments precluded any possibility of effective relief, the government did not file its stay application with the Court. . . .

REASONS FOR GRANTING THE PETITION

This appeal presented the question whether the government must facilitate access to an abortion that is not medically necessary to preserve the life or health of an unaccompanied alien minor who was apprehended unlawfully entering the United States, who declines to request voluntary departure to her home country, who has not yet identified a qualified sponsor to whom she can be released, and who thus is in the government's custody. The answer to that question is no. …

The divided *en banc* court of appeals reached the contrary conclusion on the afternoon of October 24. Over the dissent of three judges, without holding oral argument, and after requiring the government to oppose the petition for rehearing *en banc* literally overnight, the *en banc* court vacated the panel majority's decision that had put in place a modest period of time—11 additional days—for the parties to secure a sponsor to whom Ms. Doe could be released. That narrow ruling, which had the potential to permit Ms. Doe to access an abortion without requiring the government to facilitate it, was far more

appropriate in the circumstances of this case than the *en banc* court's sweeping constitutional rule and the district court's order for immediate relief that would be final rather than "temporary."

The government therefore was prepared to seek emergency relief from this Court, both because it disagreed with the merits of the *en banc* court's ruling and because HHS believed it had identified a potential sponsor. But Ms. Doe's counsel ensured that did not happen. Although they had represented to the government that, in light of Texas law and logistical constraints, no abortion would occur until the morning of October 26—and although the government had relied on those representations in deciding to file its application for a stay on the morning of October 25 and informed respondent's counsel of its intent to so file—Ms. Doe then underwent an abortion a few hours before the government would seek relief from this Court. Respondent's counsel provided no notice to the government of that critical development, despite their previous acquiescence in government counsel's request that the government be kept informed of the scheduling of the abortion "procedure." . . .

[Eds.: The ethics complaint:]

4. Finally, in light of the extraordinary circumstances of this case, the government respectfully submits that this Court may wish to issue an order to show cause why disciplinary action should not be taken against respondent's counsel—either directly by this Court or through referral to the state bars to which counsel belong—for what appear to be material misrepresentations and omissions to government counsel designed to thwart this Court's review. . . .

Respondent's counsel have taken the position that they did not have "any legal or ethical obligation" to keep the government informed of the timing of Ms. Doe's abortion. Perhaps that would be true if there had not been numerous filings and representations by counsel about the timing of that procedure. But they repeatedly represented—to courts and government counsel—that Ms. Doe would need to attend a new counseling session with a new doctor and wait 24 hours before she could obtain an abortion. Those representations were part of their request for immediate relief from the district court, which the court granted shortly after the court of appeals' ruling. Once the district court did so, government counsel asked to be notified of the timing of Ms. Doe's abortion, and respondent's counsel responded that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know." Ms. Doe's attorney ad litem separately informed the AUSA that the doctor had agreed to stay an extra day, so that the abortion would take place on October 26.

It was against that backdrop that the government decided to file its stay application on the morning of October 25, which should have allowed a full day for this Court to consider the application (and the government's accompanying request for an administrative stay) before Ms. Doe underwent an abortion. The government informed respondent's counsel of its intent to file the next morning. As the ACLU has now explained, at some point thereafter—and

perhaps as a response to the government's notice—Ms. Doe's representatives secured the services of her original physician and changed the purpose of her October 25 morning appointment. Given the dealings between the parties, respondent's counsel at least arguably had an obligation to notify the government of this incredibly significant development. Applicants for emergency relief—for instance, in the capital context—often face imminent action by the opposing party, and in the absence of judicial relief, the challenged action generally may proceed. But that does not mean that those planning to take authorized action may covertly change its timing, without notice to those affected by the change and in full awareness that opposing counsel has relied upon previous representations. The government recognizes that respondent's counsel have a duty to zealously advocate on behalf of their client, but they also have duties to this Court and to the Bar. It appears under the circumstances that those duties may have been violated, and that disciplinary action may therefore be warranted. At the least, this Court may wish to seek an explanation from counsel regarding this highly unusual chain of events. . . .

Hargan v. Garza: The ACLU's Brief in Opposition (December 4, 2017)

Brief in Opposition of Rochelle Garza, as Guardian Ad Litem to Unaccompanied Minor J.D.

2017 WL 6034215 (U.S.) (Appellate Petition, Motion and Filing)

Supreme Court of the United States.

Brigitte Amiri, Jennifer Dalven, Meagan Burrows, American Civil, Liberties Union, Foundation.

Carter G. Phillips,* Sidley Austin LLP, for respondent, Rochelle Garza, Guardian Ad Litem.

David Cole, Daniel Mach, American Civil, Liberties Union, Foundation.

. . .

INTRODUCTION

Jane Doe is a 17-year-old who came to this country without her parents. She was apprehended by the U.S. government and has been detained since September 2017 in a shelter run by a federal government grantee. After receiving a medical examination and being informed she was pregnant, Ms. Doe told shelter staff that she wanted an abortion. With the help of two court-appointed representatives, she received permission from a Texas state court to bypass the State's parental consent law and to consent to the abortion herself. She then sought to attend state-mandated pre-abortion counseling at a local

clinic. Pursuant to a policy adopted in March 2017 by the Director of the Office of Refugee Resettlement (ORR) at the U.S. Department of Health and Human Services (HHS)—and in stark contrast to the policies of U.S. Immigration and Customs Enforcement (ICE) and the Bureau of Prisons (BOP)—the government refused to allow Ms. Doe to attend any abortion-related appointments.

Ms. Doe brought suit in federal district court seeking to enforce her right to an abortion, consistent with the Constitution and the state court's order. The government did not contest Ms. Doe's claim that she has a constitutional right to an abortion. Nor did it argue that allowing her to attend the appointments would violate statutory restrictions on the use of federal funds or any federal regulations. Instead, it argued that it should not have to "facilitate" her access to an abortion—even if it did not pay for, or transport Ms. Doe to, any appointments. Because she was in federal custody, this policy prevented Ms. Doe from exercising what the government did not contest is her constitutional right.

On October 18, 2017, the district court issued a temporary restraining order (TRO) that, among other things, directed the defendants to allow Ms. Doe to attend the necessary appointments. The same day, the government sought an emergency stay pending appeal, which a panel of the D.C. Circuit granted in part on October 20. On October 24, however, the D.C. Circuit *en banc* granted rehearing and denied the government's emergency request for a stay. This time, the government did not seek an immediate stay, even though nothing precluded it from doing so. On the next day, October 25, one month after the state court authorized Ms. Doe to obtain an abortion, she finally had the procedure.

Having failed to seek an emergency stay from this Court on October 24, as it had from the D.C. Circuit on the day the district court granted the TRO, the government filed this petition nine days *after* the events that it claims have rendered the issues in this case moot. The government does not seek review of the single legal issue decided by the court of appeals—whether the government's application for a stay pending appeal met the standards for obtaining such relief. Rather, it asks this Court to vacate that emergency, interlocutory ruling on the ground that some of Ms. Doe's claims for relief have been mooted by her abortion. The government then suggests that this Court should decide, in the first instance, that claims Ms. Doe seeks to bring on behalf of herself and a class are likewise moot and dismiss those claims now while they remain pending in district court. Simultaneously, the government suggests that this Court should consider issuing an order to show cause why disciplinary action should not be taken against respondent's counsel "in light of the extraordinary circumstances of this case." . . .

[Eds.: The response to the ethics complaint:]

Finally, the government's suggestion that this Court should consider issuing an order to show cause why respondent's counsel should not be disciplined provides no basis to find that counsel's conduct presents grounds

for concern, much less sanction. The petition does not present legal or factual grounds for its suggestion that respondent's counsel may have violated any applicable rule of professional conduct. To the contrary, the government's recitation of events shows that it failed to seek a stay from this Court in a timely manner based on assumptions it made about the timing of Ms. Doe's procedure, not on the basis of any commitments from Ms. Doe's lawyers.

COUNTERSTATEMENT OF THE CASE

A. Facts

In early September 2017, Jane Doe, a young woman of 17, entered the United States without her parents. She was apprehended by U.S. authorities and placed in HHS custody in a shelter run by a federal government grantee in Texas. . . . A nationwide consent decree requires ORR and its shelters to provide "appropriate routine medical . . . care, family planning services, and emergency health care services."

On March 4, 2017, the Acting Director of ORR issued a letter informing grantees of its policy of "prohibit[ing] [shelters] from taking any action that facilitates an abortion without direction and approval from the Director of ORR," a policy that effectively gives the ORR Director veto power over a young woman's abortion decision.

Once in HHS custody, Ms. Doe was given a medical examination and told that she was pregnant. She informed her custodians that she wished to terminate the pregnancy. ORR directed the shelter to inform Ms. Doe's mother of her pregnancy over Ms. Doe's objection. The government also required Ms. Doe to attend a counseling session at an anti-abortion center.

To obtain an abortion under Texas law, a minor must obtain parental consent or a court order finding that she "is mature and sufficiently well informed to make the decision" on her own, or that "the notification and attempt to obtain consent would not be in the best interest of the minor." A state court appointed a guardian ad litem and an attorney ad litem for Ms. Doe and, with their assistance, she received a court order on September 25 granting her authority to consent to an abortion without the knowledge or consent of her parents or legal guardian.

Under Texas law, Ms. Doe first had to attend counseling at least 24 hours in advance of the abortion with the physician who would perform the procedure. When Ms. Doe requested permission to attend that counseling on September 27, ORR refused.

ORR took this position notwithstanding contrary ICE and BOP policies that allow detained women to obtain abortions, and despite the government's position in this case that Ms. Doe would have been free to have an abortion if ORR placed her with a sponsor.

B. Procedural History

[For space purposes, we omit the procedural history as rehearsed by this brief; it was explained in the introduction above.]

At this point in time, the government could have immediately sought a

stay from this Court, just as it had immediately sought a stay from the court of appeals when the district court entered the TRO. But it chose not to.

Following the D.C. Circuit's decision, Ms. Doe's guardian ad litem filed an emergency motion to amend the TRO in the district court. The district court granted the motion shortly after 4 p.m. on October 24 and issued an amended TRO that required the defendants to transport Ms. Doe, or allow her to be transported, "promptly and without delay, on such dates, including today, and to such Texas abortion provider as shall be specified by [Ms. Doe's] guardian ad litem or attorney ad litem, in order to obtain the counseling required by state law and to obtain the abortion procedure, in accordance with the abortion providers' availability and any medical requirements." Again, the government could have sought a stay from this Court at this point, but did not.

C. Post-TRO Events

Upon receiving the amended TRO at about 4:15 p.m., Ms. Doe's guardian ad litem emailed shelter and Department of Justice (DOJ) personnel requesting that they transport Ms. Doe to the clinic. Despite the court order, the shelter responded that it would have to wait for ORR instructions. In response, Ms. Doe's attorney attached the court's order and advised the shelter that she would initiate contempt proceedings if the government defied the order.

Soon thereafter, a DOJ attorney called Ms. Doe's attorney to inform her that the shelter was transporting Ms. Doe. The DOJ attorney explained that the shelter needed advance notice "of the timing of any appointments," government counsel emailed Ms. Doe's attorney to thank her for speaking earlier and "to confirm [the attorney's] understanding that the shelter had arranged for transport services this evening per your email." Government counsel continued: "I would appreciate it if you could let me and [the Assistant U.S. Attorney (AUSA) in Texas] know when the timing for tomorrow's procedure is clarified." Ms. Doe's attorney replied minutes later stating that she appreciated the call, and that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know."

Shortly after 6:00 p.m., shelter personnel emailed HHS and DOJ personnel that Ms. Doe's attorney ad litem had informed them that "the window for appointment this evening was missed," and Ms. Doe should return to the shelter.

At 6:17 p.m., Ms. Doe's attorney emailed DOJ attorneys to say that the doctor was unable to stay that evening, and that "[t]he ad litems will arrange with the shelter to have [Ms. Doe] arrive at the clinic at 7:30 a.m." the next morning. A few minutes later, Ms. Doe's guardian informed shelter and DOJ personnel that Ms. Doe "has an appointment tomorrow morning at 7:30 a.m." at the clinic and "must be there on time." The shelter confirmed that it would make "necessary arrangements to ensure minor is present."

At 8:13 p.m., another DOJ attorney emailed Ms. Doe's attorneys to say that DOJ intended to seek a stay from the Supreme Court the next morning. One of Ms. Doe's attorneys emailed back to thank the attorney for letting him

know.

At 9:31 p.m., Ms. Doe's guardian ad litem informed shelter and DOJ personnel that Ms. Doe's "appointment has been moved to 4:15 a.m. at the address provided." The shelter again confirmed receipt and indicated it had made transportation arrangements. Shelter personnel forwarded the email to HHS personnel at 11:56 p.m. to inform them that it had "not received confirmation of what service will take place tomorrow, we were under the impression [Ms. Doe] was going in for mandated counseling, however, provided newly requested time was issued at the request of health center and attending physician, it is unclear whether [Ms. Doe] will partake in mandated counseling or undergo medical procedure."

At 4:30 a.m. on Wednesday, October 25, shelter personnel emailed HHS personnel stating that the "health center charge nurse has *confirmed* that minor is scheduled to undergo medical procedure this morning." (emphasis added).

After 8 a.m. that morning, Ms. Doe's abortion was performed by the doctor who had originally counseled her on October 19. In response to DOJ inquiries, Ms. Doe's attorney confirmed this fact in an email at 9:00 a.m.

Although the petition states that at the time Ms. Doe had her abortion the government "believed that it had identified a potentially suitable sponsor," and "believed that the process could be completed within a week," it is now more than a month later, and the government *still* has not approved a sponsor; Ms. Doe remains in ORR custody. Had it not been for court intervention, Ms. Doe would still be pregnant, against her will, today.

REASONS FOR DENYING THE PETITION

. . .

IV. THERE IS NO BASIS FOR DISCIPLINARY ACTION AGAINST RESPONDENT'S COUNSEL.

The government's concluding suggestion that this Court "may wish to issue an order to show cause why disciplinary action should not be taken" against respondent's counsel, Pet. 26, is both extraordinary and baseless. It finds no support in the facts or the law.

The government's recitation of events shows that: (1) Ms. Doe's counsel made a series of *accurate* statements concerning the availability of, and logistics surrounding, Ms. Doe's ability to obtain an abortion; (2) some government personnel may have incorrectly *assumed* that Ms. Doe could not obtain an abortion before October 26, even though she was legally entitled to obtain an immediate abortion, and had received state-mandated counseling on October 19; (3) some government lawyers may have *believed* that Ms. Doe's counsel would advise them if facts changed; and (4) Ms. Doe's counsel did not take affirmative steps to notify the government that the doctor who provided the counseling on October 19 agreed to come back to the clinic. The government's suggestion that this might amount to sanctionable misconduct is

not supported by legal authorities regarding attorney conduct, is not remotely justified by the disciplinary cases it cites, and is contrary to counsel's respective ethical duties.

In an effort to show otherwise, the government repeatedly claims that opposing counsel "represented" "that no abortion would take place until October 26." Yet no such representation appears in the emails or the declaration of the AUSA lodged with the Court by the Solicitor General that the government cites. Instead, the events recited in the petition indicate that Ms. Doe's representatives stated at various times on October 24 that the physician who was available at the clinic on October 24 (who was not the physician who originally provided the state-mandated counseling) could provide a new counseling session, which would trigger a 24-hour waiting period. The government does not claim that any of these statements was false.

The government also points to statements that respondent's counsel made to the district court on October 24. The petition states that respondent's counsel represented to the court "that for Ms. Doe to obtain an abortion, she would need to complete a two-step, 24-hour process." But this misrepresents counsel's filing. Counsel requested an amendment to the original TRO to make clear that its relief and the government's obligation to transport or allow Ms. Doe to be transported should be effective that very day. In support of this change, counsel noted that "a qualified physician is available at the nearest clinic today, and will be available to perform the procedure tomorrow." The motion specifically noted that it sought to ensure that Ms. Doe could "obtain the abortion . . . without further delay and as *may* be required by Texas state law and the *availability of physicians*." (emphases added). The motion thereby made clear that the TRO should enable Ms. Doe to obtain an abortion at the earliest time and from any available physician.

As this motion underscores, Ms. Doe's counsel did not represent that, in making arrangements for her to see the physician who was at the clinic on October 24, they were forswearing any effort to secure an appointment with any other doctor who might be able to provide the abortion. Indeed, the government knew—and by its own account acknowledged to Ms. Doe's representative on October 24—that the original doctor could perform the procedure without the need to repeat counseling. It also knew that Ms. Doe's representatives were considering various logistical arrangements to ensure that a doctor would be available to provide her abortion. These facts show that the situation was fluid; Ms. Doe's representatives were considering multiple alternatives; and they were seeking to obtain Ms. Doe's long-delayed abortion as soon as possible. The government implies that it reasonably believed these alternatives did not include any effort to return the original doctor to the facility, and claims that Ms. Doe's attorney ad litem had stated that this doctor "was not available," But this suggestion rests on yet another misleading paraphrase: According to the government's own declaration, the attorney ad litem stated that the original doctor "was not available *on October 24*." (emphasis added). The government does not claim that the statement actually made was inaccurate, or that it was a representation that Ms. Doe's counsel would make no effort to have that doctor return to the facility on October 25.

The government also points to a telephone call and exchanges of emails on October 24 in an effort to suggest that respondent's counsel provided assurances that the government did not need to request a stay because the abortion would not occur until October 26. Specifically, the government makes much of an email exchange in which one of its lawyers said the attorney "would appreciate it if [Ms. Doe's counsel] could let me and [the AUSA] know when the timing for tomorrow's procedure is clarified," and Ms. Doe's counsel stated that "[a]s soon as we understand the clinic's schedule tomorrow we will let you know."

The government takes this exchange entirely out of context. Less than an hour earlier, the shelter had refused to transport Ms. Doe to the clinic until it had ORR's approval, and the government had been advised that opposing counsel would "initiate contempt proceedings" if Ms. Doe was not transported to the clinic promptly. The government attorney called respondent's counsel shortly thereafter to explain that the shelter needed advance notice to arrange transportation, and to confirm that Ms. Doe was now being transported to the clinic. The government attorney then sent the email that confirmed "[the attorney's] understanding that the shelter had arranged for transport services this evening per your email," and included the attorney's request for information about the timing of "tomorrow's procedure."

In context, the email exchange merely documents the government's compliance with its obligation under the TRO to provide transportation, its commitment to do so again the following day, and counsel's agreement to let the government know when Ms. Doe needed to be at the clinic the next day to avoid any further problems with transportation. Critically, the government's email does not mention any stay motion, let alone link the request to the timing of such a filing. Nor does the government claim that its attorney mentioned any stay application in the earlier call. It is now wishful thinking to argue that this exchange over transportation logistics reflects a mutual understanding that the government need not seek a stay because opposing counsel "had represented to the government that . . . no abortion would occur until the morning of October 26."

The government's claim is further belied by the email exchange the government points to from later in the evening of October 24. The government asserts that, "[b]ased on the representations of counsel that no abortion would occur until October 26," it informed the Clerk's Office and respondent's counsel that it would seek a stay the morning of October 25. But by the government's own account, no communication about the timing of a motion for a stay occurred until 8:13 p.m. the night of October 24 and, even then, the email the government sent informing respondent's counsel that it would seek a stay in the morning says nothing about any such representations. Nor does it communicate the government's "understanding" about the timing of the procedure or seek confirmation that respondent's counsel shared that understanding, much less a commitment that her counsel would promptly advise the government of any changed circumstances. The response from one of Ms. Doe's lawyers likewise includes no such confirmation or commitment. Indeed, one of her attorneys responded to the 8:13 p.m. email by expressing

relief that he would not have to check his email for any stay motion filed later that night. That email indicates that Ms. Doe's attorneys had expected the government to seek a stay that night—an expectation wholly inconsistent with the government's suggestion that there was a mutual understanding that filing was unnecessary because Ms. Doe's counsel has represented that the abortion would not occur until October 26.

The Solicitor General argues that these statements and events of October 24 led some government personnel to *assume* that Ms. Doe would not be able to obtain an abortion prior to October 26. But none of the statements the government cites was a representation, much less a commitment, "that no abortion would take place until October 26."

The petition describes a course of events where many different parties were communicating into the night as events unfolded rapidly. Particularly given this fluid situation, and the government's knowledge that Ms. Doe had sought throughout the litigation to obtain an abortion as soon as possible, it is striking that government counsel, by the government's own account, neither *requested* that Ms. Doe forbear from obtaining the procedure while the government sought a stay from this Court nor sought confirmation of government counsel's "understanding" that no abortion would occur prior to October 26. Absent such a commitment or confirmation, it was incumbent upon government counsel immediately to seek a stay. The government cannot now blame opposing counsel for its own failure either to act with its customary alacrity or to take any protective steps.

In short, Ms. Doe's counsel had made clear that they were attempting to help their client obtain the abortion as soon as possible; the government knew Ms. Doe had already received counseling from the original doctor, so that if that doctor became available, the abortion could take place immediately; and according to the government's own recitation of events, it did not link its request for information about the timing of Ms. Doe's appointment on October 25 with any statement concerning the timing of a stay motion with this Court.

To suggest that respondent's counsel had a duty to forbear from effectuating the TRO on October 25 under these facts would turn counsel's ethical obligations on their head. The only reason Ms. Doe's representatives needed to talk to government personnel *at all* was to tell them the timing of Ms. Doe's appointment so that the government would not delay Ms. Doe's transportation to the clinic. If government counsel wished to ensure that they would have an opportunity to seek a stay before the abortion procedure, they could and should have requested such an assurance from respondent's counsel and, if they did not receive a sufficiently clear commitment, they could and should have immediately sought relief from this Court. They inexplicably failed to take these reasonable steps, and cannot now blame respondent's counsel for the consequences of their own inaction.

In addition to failing to supply a factual basis for its extraordinary request, the government fails to supply a specific legal rationale or cite to any legal authority that supports its position. The petition vaguely refers to "what appear to be material misrepresentations and omissions" by respondent's

counsel, a claim that, if true, would violate ethical rules. See ABA, *Model Rules of Professional Conduct* R. 3.3 (2016) (prohibiting knowingly false statement of fact to a tribunal); *id.* R. 4.1(a) (barring "a false statement of material fact or law to a third person"); *id.* R. 4.1 cmt. 1 (misrepresentations). But the government identifies no misrepresentations and fails to explain how counsels' statements and/or actions would have amounted to false statements. The petition says that respondent's counsel "arguably" had an obligation to notify the government that Ms. Doe's original physician had become available on the morning of October 25. Yet the petition cites to no rule of ethics, case law, or other authority to support such an obligation. Indeed, no such obligation exists—and for sensible reasons. A lawyer "generally has no affirmative duty to inform an opposing party of relevant facts," except "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." ABA, *supra,* R. 4.1 & cmt. 1; see *id.* cmt. 3. A lawyer has an "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law," *id.* pmbl., and violates that duty "when he or she … fails to take the necessary steps to preserve the client's interests," or to maintain client confidentiality.[6] The events the government recites show that Ms. Doe's counsel acted in their client's best interests, which is precisely what counsel are supposed to do. The government's extraordinary request that the Court consider disciplinary action should be rejected. . . .

Hargan v. Garza: The SG's Reply Brief (December 19, 2017)

Reply Brief for the Petitioners

2017 WL 6508405 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Respondent's brief in opposition is most remarkable for what it does not say. Respondent does not dispute that, after the lower courts ruled late in the afternoon of Tuesday, October 24, Ms. Doe's representatives told the government that Ms. Doe would receive counseling from a new doctor on the morning of October 25, with the abortion to follow on October 26; and that, in reliance on those representations, the government informed respondent's counsel it would file a stay application the morning of October 25, rather than late at night on October 24. Respondent is noticeably silent on what happened next. She does not deny that, after the government's notice, Ms. Doe's representatives secured the services of the original doctor and changed the nature of Ms. Doe's appointment without telling the government. Nor does respondent deny that these actions were a deliberate effort to prevent this Court's review. Respondent contends only that, as a legal matter, the conduct should carry no consequences, either with respect to vacating the court of appeals' judgment or disciplining her attorneys. That is incorrect. . . .

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[6] [Footnote 18 in brief]: Far from requiring Ms. Doe's counsel to apprise the government of the details of Ms. Doe's medical appointments, ethics rules would have precluded them from agreeing to do so if it would undermine her interests. . . .

Second, this Court historically has been its own judge of whether conduct is "unbecoming a member of [its] Bar," Sup. Ct. R. 8.2, and the conduct here speaks for itself. The Model Rules and ethical principles governing the legal profession, however, lead to the same conclusion. Ms. Doe's representatives may have been free to say nothing about the timing of her procedure. But they could not make repeated representations to the government (and the courts) about that procedure's timing, know that the government was relying on those statements, act to render the statements false, and then say nothing to correct the falsehood. That is not conduct becoming members of the Bar of this Court. . . .

2. With respect to disciplinary action, respondent does not dispute any of the key facts: (i) her counsel indicated to the government and the courts that the doctor available to Ms. Doe during the week of October 23 was not the doctor who had provided her prior counseling (and thus the new doctor would have to wait at least 24 hours after counseling to perform the abortion under Texas law); (ii) Ms. Doe's representatives *expressly told* the government that, when she did not receive counseling from the new doctor on Tuesday, October 24, she would not be able to undergo an abortion until Thursday, October 26; (iii) respondent's counsel *knew* that the government was relying on those representations when it delayed seeking emergency relief from this Court overnight on October 24; (iv) sometime after the government provided notice of its intent to file on the morning of October 25, Ms. Doe's representatives secured the services of the original doctor; and (v) they made no effort to correct their earlier statements.

Under Rule 8.2, this Court has the authority to "take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar." That standard is not tied to any State's ethical code or the Model Rules. Rather, "'conduct unbecoming a member of the bar' is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice." If respondent's counsel knowingly allowed the government to rely on statements that either respondent's counsel or Ms. Doe's ad litems deliberately rendered false, such conduct is fairly described as "inimical to the administration of justice."

The Model Rules lead to the same conclusion. Rule 4.1 provides that, "[i]n the course of representing a client a lawyer shall not knowingly *** make a false statement of material fact or law to a third person," Model Rules of Prof'l Conduct R. 4.1 (2017), and shall not, at any time, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation," Model Rules of Prof'l Conduct R. 8.4(c) (2017). Although a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts," misrepresentations can occur through "omissions that are the equivalent of affirmative false statements." Model Rules of Prof'l Conduct R. 4.1 cmt. 1 (2017). Even when a lawyer makes a representation he reasonably believes is true when made, an "obligation to disclose *** ordinarily arises" if the lawyer subsequently discovers the statement to be false. Restatement (Third) of the Law Governing Lawyers § 98

cmt. d (1998). Respondent points to no legitimate reason why these basic principles should not apply here.

Respondent contends the government should have obtained a "clear commitment" that Ms. Doe would not obtain an abortion procedure before the government sought a stay on the morning of October 25. Respondent's contention both ignores critical facts and is legally irrelevant. First, government counsel asked to be kept informed of the timing of Ms. Doe's procedure, and in context the response—"[a]s soon as we understand the clinic's schedule tomorrow we will let you know"—indicated that respondent's counsel would keep the government informed as to the timing of the procedure, not some mundane fact like what hours the clinic would be open. Second, respondent does not dispute that Ms. Doe's attorney ad litem told the government an abortion could not take place until October 26—a representation that could not have been clearer. Third, after the government informed respondent's counsel of its intentions, one of respondent's attorneys expressed relief that he would not need to "check [his] email at 2 a.m.," confirming that he knew the government was relying on his co-counsel's representations about the timing of the abortion. Even in the absence of a "direct inquiry" from opposing counsel, an attorney's silence can be equivalent to a misleading statement where it is "obvious that [the opposing party] [i]s acting under a misapprehension," 2 Geoffrey C. Hazard, Jr. et al., *The Law of Lawyering* § 40.04, at 40-13 (2015) (Hazard); see *id.* § 40.03, at 40-10, particularly where it is *the attorney's own conduct* that created the misimpression.

Respondent insists that her counsel had an obligation "zealously to protect and pursue [her] legitimate interests" and to maintain client confidentiality. But "Model Rule 4.1(a) is not qualified or 'trumped' by reference to the confidentiality principle set forth in Rule 1.6." Hazard § 40.03, at 40-12; see *id.* § 40.03, at 40-10 (The "view that confidentiality is absolute" is "discredited," "goes too far, and is contrary to *** the law of lawyering."). To be clear, the government is not arguing that respondent's counsel had "a duty to forbear from effectuating" the district court's amended TRO as rapidly as possible. Rather, they had a duty not to inform the government (and otherwise lead the government to believe) that the court's order could not be effectuated before October 26; know that the government was relying on those representations; and then actively work to render those representations false in order to prevent this Court's review.

To take an analogous example, consider if government counsel informed opposing counsel that the unavailability of a particular drug would prevent the government from carrying out an execution until some future date, but after learning that the prisoner planned to file an emergency stay application, government counsel undertook extraordinary efforts to obtain the drug and to carry out the execution sooner without notice to opposing counsel. The conduct would be no more becoming a member of the Bar of this Court because the government's statements to counsel were accurate when made; the government never "forsw[o]r[e]" a different course of action; and nothing

prevented counsel from extracting more explicit commitments rather than taking the government at its word. Members of the Bar of this Court, particularly in the context of emergency proceedings, often rely on—and should be safe in relying on—the duty of counsel to update statements that have become materially false, let alone as a result of counsel's own conduct. . . .

Restatement (Third) of the Law Governing Lawyers

§ 98. Statements to a Nonclient

A lawyer communicating on behalf of a client with a nonclient may not:

(1) knowingly make a false statement of matters of fact or law to the nonclient,
(2) make other statements prohibited by law; or
(3) fail to make a disclosure of information required by law.

Comment:

d. Subsequently discovered falsity. A lawyer who has made a representation on behalf of a client reasonably believing it true when made may subsequently come to know of its falsity. An obligation to disclose before consummation of the transaction ordinarily arises unless the lawyer takes other corrective action. See Restatement Second, Agency § 348, Comment *c*; Restatement Second, Contracts, § 161(a) (nondisclosure as equivalent to assertion when person "knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material"). Disclosure, being required by law (see § 63[7]) is not prohibited by the general rule of confidentiality (see § 60). Disclosure should not exceed what is required to comply with the disclosure obligation, for example by indicating to recipients that they should not rely on the lawyer's statement. . . .

e. Affirmative disclosure. In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient. Applicable statutes, regulations, or common-law rules may require affirmative disclosure in some circumstances, for example

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[7] Section 63 ("Using or Disclosing Information When Required by Law") states: "A lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure."

disciplinary rules in some states requiring lawyers to disclose a client's intent to commit life-threatening crimes or other wrongful conduct.

Rules of the Supreme Court of the United States (2019)

Rule 8. Disbarment and Disciplinary Action

2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

Questions

See Model Rules 1.6, 4.1, 8.4

1. Although the facts as laid out in the briefs are convoluted and may be confusing, the gist of the issue is this: until late in the evening of October 24, both Jane Doe's counsel and government counsel believed that at her October 25 appointment she would receive counseling, in which case she could not proceed with the abortion until October 26. That night, her counsel learned that the physician who had previously counseled her was available to perform the procedure on the 25th. They pushed the time back from 7:30 to 4:15, and informed government counsel of the time change. But they did not inform government counsel that the purpose of the appointment had changed from counseling to the abortion itself. The government claims that this omission is equivalent to an affirmative false statement. Is the omission indeed equivalent to a lie?

What is your intuitive answer?

Construct the strongest argument you can think of for each side's position on the ethics issues. In doing so, consider the following questions:

2. Was the information about the changed purpose of the October 25 appointment a client confidence under Model Rule 1.6? If so, do any of the exceptions to Rule 1.6 apply in this case?

3. Consider the fifth full paragraph of the government's reply brief (beginning "The Model Rules lead to the same conclusion."). There, the

government maintains that Jane Doe's counsel's omission violates Model Rule 4.1(a). That rule states that in the course of representing a client, a lawyer "shall not knowingly make a false statement of material fact or law to a third person." Did Jane Doe's counsel violate this rule?

Consider in this context Model Rule 4.1(b), which states that a lawyer representing a client shall not knowingly:

> fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Jane Doe was not committing a criminal or fraudulent act, because she had a right to terminate her pregnancy. So Rule 4.1(b) does not apply to the facts of the case. Does it nevertheless affect the interpretation of Rule 4.1(a), regarding whether a failure to disclose a material fact is equivalent to lying about a material fact? What does it imply that clause (b) specifically prohibits "failure to disclose a material fact" whereas clause (a) does not? And what does it imply about clause (a) that clause (b)'s obligation to disclose material facts has an exception when "disclosure is prohibited by Rule 1.6"?

4. The same paragraph from the government's reply brief cites *Restatement* § 98. Section 98 prohibits failure to disclose a material fact when disclosure is required by law. Is disclosure in the present case required by law? What law requires it?

5. Comment *d* of the *Restatement*, cited in the Reply Brief, seems to fit the facts of this case: Jane Doe's counsel believed that her October 25 appointment was for counseling, but subsequently came to know that this was no longer true. The Comment states that in such cases: "An obligation to disclose before consummation of the transaction ordinarily arises unless the lawyer takes other corrective action." Does this Comment apply in this case? What would be the "transaction" it refers to? Does § 98 apply in adversarial litigation, or only in business transactions?

6. Were ORR and the government lawyers drawing out the litigation until it would be too late for Jane Doe to receive her abortion? In a paragraph omitted from the cert petition excerpt above, the SG denies that ORR was stalling:

> Although ORR . . . denied Ms. Doe's request that ORR facilitate an abortion, it continued to look for other avenues to accommodate her. . . . Indeed, at the time Ms. Doe ultimately underwent an abortion, the government believed that it had identified a potentially suitable sponsor, and it was assisting in compiling the materials for

> that person's application. At that time, the government believed that the process could be completed within a week, and it intended to so inform this Court in its stay application.

Quoting this paragraph, ACLU's reply brief in opposition notes that a month after these events, there was still no sponsor for Jane Doe. Recall as well that the head of ORR had publicly expressed his principled opposition to abortion. Does this undermine or contradict the SG's assertion?

Would it be legitimate for DOJ lawyers to draw out the Jane Doe litigation until it was too late for her to obtain an abortion? Consult D.C. Rule 3.2:

Rules of Professional Conduct: Rule 3.2—
Expediting Litigation

> (a) In representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another.
>
> (b) A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Clause (b) of this Rule is identical to Model Rule 3.2, but the Model Rule has no counterpart to Clause (a).

Is it in the interests of DOJ's client to make it impossible for Jane Doe to obtain an abortion? Who is DOJ's client?

Case Study 4:

Guantánamo Defense Counsel

This case study involves an unusually dramatic set of ethical dilemmas in a very atypical setting: the US Military Commissions in Guantánamo Bay, Cuba, set up to try accused terrorists. Some defendants face the death penalty. These include Al Qaeda members accused of orchestrating the 9/11 attacks, as well as an earlier attack on a US destroyer, the USS *Cole*, which was docked in Yemen. A speedboat full of explosives approached the *Cole* at night, and the explosion killed 17 US Navy sailors and wounded 39. The man accused of masterminding the *Cole* bombing is a Saudi national named Abd al-Rahim al-Nashiri, who was captured in 2002. The legal ethics events in this case study involve his defense.

In brief, al-Nashiri's civilian death-penalty lawyers attempted in 2017 to withdraw from the case, apparently because they believed that government spying had made it impossible for them to communicate confidentially with their client—"apparently," because they are not permitted to say exactly what provoked their withdrawal. However, the presiding military judge refused to permit them to withdraw. The stand-off between judge and lawyers escalated, with dramatic consequences including the contempt conviction of a Marine Corps general, threats to have the defense lawyers arrested and forcibly brought to represent al-Nashiri, abatement of the proceedings, and—unexpectedly—ethics accusations against the judge that resulted in a scathing rebuke from the D.C. Circuit.

The ethics issues include:

- confidentiality
- client communication
- lawyer conflict of interest
- withdrawal
- judicial conflict of interest

Background: The Guantánamo Bay Military Commissions

The Guantánamo Bay Military Commissions (hereafter 'GBMC' for short) were created by the Military Commissions Act of 2003. After the Supreme Court declared them illegal in 2006,[1] the statute was amended to cure defects, and it was amended again in 2009. The Military Commissions are not part of the US domestic criminal justice system—where cases are tried in Article 3 courts—nor part of the military justice system of courts-martial, used for criminal cases involving members of the armed forces. The GBMC are special-purpose courts. Military commissions have been used in the past; most famously, the assassins of President Abraham Lincoln were tried before a military commission. The GBMC are limited to trials of "alien unprivileged enemy belligerents for violations of the law of war and other crimes" specified in the statute.[2] Trials are before a jury of active-duty service members, and the prosecutors and judges are also active-duty service members. The statute provides for rules of evidence and procedure that differ in many respects from those of Article 3 courts, most notably in heightened concern not to reveal classified information, especially information about "sources and methods" of intelligence gathering.

Overseeing the Military Commissions is its so-called "convening authority," who at the time of these events was Harvey Rishikof, an eminent national security law expert, law teacher, and law school dean. Disputes such as the one detailed below are ruled on in the first instance by the trial judge, and next by the convening authority. Issues concerning the law of the military commissions then go to the United States Court of Military Commissions Review (CMCR)—a specially-created appeals court—and then to the federal courts.

Defense Counsel: The MCDO

The Military Commissions Act also creates the Military Commissions Defense Organization (MCDO, pronounced "McDough")—the equivalent of the "public defender" for GBMC defendants. Defendants are assigned a JAG officer as "detailed" defense counsel, and can also have civilian co-counsel. By law, capital cases require defense counsel who "shall be learned in the law applicable to capital cases"—*learned counsel* for short, also referred to as "special defense counsel" (SDC). All the learned counsel are civilians. The Chief Defense Counsel (CDC) of the MCDO at the time of these events was Marine Corps Brigadier General John Baker. The military judge in al-Nashiri's case was Air Force Colonel Vance Spath.

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[1] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[2] 10 U.S.C. §948b(a).

Al-Nashiri's military counsel at the time was Navy Lieutenant Alaric Piette, a former Navy SEAL, who subsequently went to law school and was at the time in his fifth year of practice as a JAG. Learned counsel were Richard Kammen, an Indiana lawyer, and two assistant counsel, Mary Spears and Rosa Eliades. At the time of these events, Kammen had devoted thousands of hours to Al-Nashiri's case.

To keep the personnel straight, here is the "cast" in the dramatic events in the case study:

Abd al-Rahim al-Nashiri, defendant, accused mastermind of the *Cole* bombing

Navy Lieutenant Alaric Piette, al-Nashiri's detailed military defense counsel

Richard Kammen, "learned" counsel (special defense counsel or SDC)

Mary Spears, SDC, assisting Mr. Kammen

Rosa Eliades, SDC, assisting Mr. Kammen

Marine Brigadier General John Baker, Chief Defense Counsel (CDC)

Air Force Colonel Vance Spath, military judge in al-Nashiri's case

Harvey Rishikoff, convening authority

For a variety of reasons, the GBMC trials have proceeded at a glacial pace, and the cases of al-Nashiri and the 9/11 defendants are still mired in pretrial proceedings, 18 years after their capture and more than a decade after indictment. In part, this reflects a two-year hiatus after *Hamdan* declared the earlier GBMC illegal; in part, it comes from many complicated and novel legal issues under litigation; and in part, from a number of scandals described below. But the delay also comes from ferocious discovery battles as defense counsel try to get evidence of al-Nashiri's (and other defendants') mistreatment while in CIA custody, and the government fights tenaciously to keep this information out of defense hands.

Background: The Question of Torture

Between the time of his capture in 2002 and his transfer to Guantánamo Bay in 2006, al-Nashiri was held in secret CIA prisons

(known as "black sites") in several countries. During that time, he was subjected to what the government calls "enhanced interrogation," but is usually described, simply, as torture. Al-Nashiri was slammed into walls, shut into a "close confinement box," waterboarded, threatened with an electric drill, deprived of sleep and clothing, and kept for years in miserable conditions of confinement (continuous white noise, long periods of continuous darkness, long periods of continuous light, long periods of total isolation, sleep disruption).

No US court, including the GBMC, has yet ruled on whether what was done to al-Nashiri and other defendants satisfies the legal definition of torture.[3] But in public statements during his presidency, Barack Obama labeled it "torture," and Donald Trump apparently agrees, having vowed during his presidential campaign that he would bring back torture "in a heartbeat." In this case study, we will use the word "torture."

Unsurprisingly, the CIA resists efforts to have its "sources and methods" of interrogation debated in court—revelations of the torture program created a national scandal. As recently as February 2020, defense counsel for the 9/11 defendants spotted a silver tablet on the prosecution's table. It turned out to be a direct link from the prosecution to the CIA and other "original classification authorities," approved by the judge, so that these agencies can instruct prosecutors in real time when to halt the proceedings over concerns that "sources and methods" might be revealed.[4] Intelligence concerns help explain a series of events that have dogged the GBMC and which set the context for the conflict at the heart of this case study.

Background: Interference with Defense Counsel

For years, MCDO counsel have complained of severe government interference in the client-lawyer relationship, including reading their client-lawyer mail and bugging the client interview rooms. But there have been other interferences as well, dating back to 2011. For example, FBI agents approached a MCDO employee and "turned" that employee into a mole who provided confidential and privileged defense documents to the FBI. In 2015, the government-provided interpreter given to one defendant turned out to be the same individual who worked as an interpreter at a CIA "black site" where defendants were tortured. In

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[3] It is codified in 18 U.S.C. §2340A.

[4] John Ryan, *Due Process Violation Claimed Over CIA Electronic Presence in 9/11 Pretrial*, LAWDRAGON, Feb. 20, 2020, http://www.lawdragon.com/2020/02/20/due-process-violation-claimed-over-cia-electronic-presence-in-9-11-pretrial/.

another incident, a judge discovered that the CIA was secretly monitoring hearings in his courtroom and censuring the audio feed to onlookers.

The following excerpt from a judicial opinion by the Court of Military Commissions Review describes the circumstances leading to learned counsel Kammen, Spears, and Eliades seeking "excusal," meaning withdrawal from al-Nashiri's case. (However, the CMCR sided with Judge Spath against the three lawyers, on the ground that there is no evidence that the government misconduct prejudiced al-Nashiri's defense in violation of the Fifth or Sixth Amendment.)

United States v. Al-Nashiri

CMCR 18-002

October 11, 2018

BURTON, CHIEF JUDGE

…

Mr. Kammen requested excusal from representing Al-Nashiri, and he cited a series of intrusions into the attorney-client relationship from October 2011 ("Guards confiscate privileged legal materials from the accuseds' cells, and JTF GTMO's [Joint Task Force Guantánamo, Cuba] legal department reads counsels' correspondence to their clients. Defense counsel have no ability to independently investigate the extent of the disclosure or whether intelligence agencies were involved.") to June 2017 ("The government acknowledges having 'unintentionally' eavesdropped on attorney-client communications at Guantanamo."). Appellee did not present any evidence that the prosecutors involved in this case received access to communications to or from Al-Nashiri or his counsel. . . .

In January 2012, the JTF-GTMO Staff Judge Advocate learned that microphones were hidden inside a smoke detector where defense counsel met with their clients. A military judge ordered the listening devices to be dismantled. There is no evidence that the microphones were ever used to monitor communications between Al-Nashiri and his counsel.

Al-Nashiri alleged that the government accessed the attorney-client mail of detainees at Guantanamo. In February 2012, the military judge ordered the establishment of a Privilege Review Team (PRT), independent from JTF-GTMO and the prosecution, to screen detainee

legal mail for prohibited contraband. Al-Nashiri did not present any evidence that the PRT violated the military judge's restrictions prohibiting the PRT from communicating contents of detainee mail to prosecutors.

Al-Nashiri alleged that in 2013, during technical upgrades of servers and other technology, DoD information technology (IT) personnel caused the loss of numerous defense files.

Al-Nashiri objected to DoD IT personnel monitoring of computer Internet searches. DoD IT personnel monitor all DoD computer systems for inappropriate use. DoD IT personnel also have access to all files stored on DoD computers connected to DoD servers, including attorney-client communications. A DoD IT person checked a defense employee's files for improper materials.

On June 14, 2017, the CDC wrote his subordinate MCDO defense counsel and advised them he had recently received information that led him to believe that there was no guarantee of confidentiality for attorney-client communications in the rooms that the JTF-GTMO and the Joint Detention Group provided for defense counsel to meet with their clients. He cautioned counsel to "not conduct any attorney-client meetings at Guantanamo Bay, Cuba until they know with certainty that improper monitoring of such meetings is not occurring."

On the same day, the CDC wrote further:

> On 30 November 2016, the Military Judge in *United States v. Khalid Shaikh Mohammed et al.* ordered that intrusive monitoring (i.e., listening and audio and video recording) of attorney-client meetings be formally prohibited in the standard operating procedures for [JTF-GTMO] and the [Joint Detention Group]. The Military Judge further ordered that defense counsel must be advised in advance if a meeting with an accused is to be monitored. The Military Judge issued these orders because he recognized the legitimate concerns of defense attorneys that attorney-client meetings at GTMO were being improperly monitored by government personnel.
>
> At present, I am not confident that the prohibition on improper monitoring of attorney-client meetings at GTMO as ordered by the commission is being followed. My loss of confidence extends to all potential attorney-client meeting locations at GTMO. Consequently, I have found it

> necessary as part of my supervisory responsibilities under 9- 1a.2 and 9-1a.9 of the Regulation for Trial by Military Commission to make the above-described recommendation to all MCDO defense counsel. Whether, and to what extent, defense teams follow this advice is up to the individual defense team.

On July 7, 2017, the military judge ruled that he did not have the authority to allow SDC to discuss classified information with Al-Nashiri, who had no security clearance. In doing so, the military judge noted, "the Government, as officers of the court, have represented facts which affirmatively negate what the Defense seeks to disclose to the Accused." Each of Al-Nashiri's lawyers had a security clearance that required them not to disclose classified information to anyone who was not authorized to receive it.

The defense moved on July 13, 2017, to take discovery regarding potential intrusion by the government into privileged communications. On September 20, 2017, the military judge denied Al-Nashiri's request for discovery. After full briefing that included classified information, the military judge concluded that there was no "basis to find there had been an intrusion into attorney-client communications" between Al-Nashiri and his counsel.

Despite the repeated urgings of the military judge, the government took several months to declassify the circumstances involving the microphone or microphones found in April 2017 in the room in which defense counsel and Al-Nashiri met. Most of the information was release after the SDC ended their representation of Al-Nashiri. Some information about the intrusions relating to detainees other than Al-Nashiri and the August 2017 inspection of a room in which Al-Nashiri and his counsel previously met continues to be classified.

In August 2017, a defense inspection of the room allocated for meetings between Al-Nashiri and his counsel revealed a microphone or microphones that were not connected to recording or transmission equipment. The government referred to the devices as "legacy" microphones left over from before 2012 when the building was configured for detainee interviews. Thus, Al-Nashiri's meeting room was equipped with recording equipment. However, the government represented to the military judge that when Al-Nashiri met with his SDC, the room included disconnected, legacy microphones that were not connected to any audio listening/recording device. While it was apparent that this room serving as the new meeting location had been previously

configured for interviews, no audio equipment was used while Mr. al Nashiri was in the room.

As the events unfolded during the summer of 2017, Mr. Kammen sought an opinion from Ellen Yaroshefsky, an ethicist and professor at Hofstra University's School of Law in New York regarding his ethical obligations to continue to represent Al-Nashiri in light of SDC's concerns. As understood by Professor Yaroshefsky, Mr. Kammen was concerned that (1) the government had intruded into SDC's privileged communications with Al-Nashiri, and (2) SDC lacked confidence that they could securely communicate with their client, and because of this lack of confidence, SDC were unable to inform Al-Nashiri of these matters and discuss their concerns with him.

In addition to the dispute involving "legacy" microphone(s) in the meeting room where Al-Nashiri met with his counsel, the bases of SDC's concerns over the security of their privileged communications with Al-Nashiri included a series of events that occurred between 2008 and 2017. Among these events were intrusions or alleged intrusions by the government into the privileged communications of detainees and defendants at JTF-GTMO. Mr. Kammen summarized the SDC contentions regarding these matters in a document titled, "Governmental Interference with Attorney-Client Communications, Intrusions into Attorney-Client Relationships, Undisclosed Monitoring, and Infiltration of Defense Teams" (Defense Intrusion Allegations).[5]

The Events

After they found a "legacy" microphone in the interview room, the defense asked for discovery on the issue; Judge Spath denied the request, finding that al-Nashiri's confidentiality concerns extended only to attorney-client conversations used by the prosecution against him. He also denied their request for a hearing on the issue, and, finally, he denied counsels' request to be able to inform al-Nashiri about their privacy concerns. Interestingly, in its responses to these motions, the government acknowledged that the room had more microphones than the one counsel discovered.

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[5] In a 2018 speech to the National Association of Criminal Defense Lawyers, General Baker provides further details about these intrusions. (Readers should recognize that they are hearing only the defense side of the story.) The YouTube of the speech is available at https://www.youtube.com/watch?v=7ZL4TRv2p3E .

The three civilian learned counsel concluded that, under these circumstances, they could not continue to represent their client.

The Chief Defense Counsel, General Baker, agreed with Kammen, Spears, and Eliadis and excused them from the case.

All this resulted in drama: Judge Spath told General Baker that he, not the CDC, must approve excusals. He pointed to a provision in the Trial Judiciary Rules of Court indicating that excusal requires judicial approval—and that he did not approve the excusal. He ordered the three SDC back to Guantánamo. But they did not show up to board the airplane.

General Baker stood by his decision. He pointed to a rule in the Manual for Military Commissions stating that "an authority competent to detail such counsel may excuse or change such counsel"—and that he, as CDC, is the authority competent to detail defense counsel. Judge Spath disagreed, because the Trial Judiciary Rules of Court—a bench book for GBMC judges—is inconsistent with the Manual for Military Commissions, and gives the judge final authority over excusal.[6]

Judge Spath found General Baker in contempt of court, and sentenced him to 21 days of confinement to quarters. This would likely be a career-ender for General Baker. Baker appealed to the convening authority, who upheld the contempt conviction but reversed the sentence.[7] General Baker next appealed to the U.S. District Court in the District of Columbia for a writ of habeas corpus, on the ground that the judge has no contempt authority in this case. Months later, the court agreed and reversed General Baker's contempt conviction.[8] While Baker's appeal was pending, Secretary of Defense James Mattis fired the convening authority who had ratified the contempt conviction, reportedly because of his efforts to explore possible plea bargains in these long-stalled cases.

Meanwhile, the three learned counsel refused to continue the case. That left Lieutenant Piette as Nashiri's sole counsel. He, however, told the judge that he could not represent Al-Nashiri because he is not

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[6] *Compare* MANUAL FOR MILITARY COMMISSIONS [MMC], Rule 505(d)(2), (f) (2016 rev. ed.) (giving excusal authority to "an authority competent to detail such counsel"), *with* MILITARY COMMISSIONS TRIAL JUDICIARY RULES OF COURT, Rule 4.4.b (Sept. 1, 2016) (requiring judge's permission for excusal of counsel).

[7] Memo from Harvey Rishikof, Convening Authority, to BGen. John G. Baker, Chief Defense Counsel, Action on Contempt Proceedings, Nov. 21, 2017.

[8] Baker v. Spath, 2018 WL 3029140 (D.D.C. 2018).

learned counsel. He attended sessions of court but insisted that he was merely an observer, not acting in a representative role. This repeatedly drew the judge's ire, but Lieutenant Piette remained firm. The judge accused the defense team of deliberate stalling tactics. He then ruled that the trial must continue even without learned counsel, because the statute requires the presence of learned counsel only "to the greatest extent practicable."[9]

But nobody was budging. The three learned counsel did not obey the judge's subpoenas, arguing that it would be unethical to do so. Lieutenant Piette attended the hearings, but only to reiterate that he was unable to represent Al-Nashiri without learned counsel.

Finally, in February 2018, a frustrated Judge Spath shut down the proceedings in *Al-Nashiri*. "I am abating these proceedings indefinitely. We're done until a superior court tells me to keep going."

> And whatever that looks like, either myself or my successor will pick it up and start going. If it is—the superior court tells me next week, Spath, you abused your discretion, get to work, I'll get to work, or whoever takes my place. Hopefully the appellate court will give us some guidance. Maybe they'll say Lieutenant Piette, you're stuck. Colonel Spath got the law right, you don't get learned counsel if it's not practicable, and it's not practicable. Get to work. And then Lieutenant Piette can sit there and not ask questions from now until we finish the trial.
>
> But that's where we're at. We're done until a superior court tells me to keep going. It can be CMCR [Court of Military Commission Review]. It can be the Washington—or the District in D.C. They're all superior to me. But that's where we're at. We need action. We need somebody to look at this process. We need somebody to give us direction. I would suggest it sooner than later, but that's where we're at.[10]

As journalist Carol Rosenberg reported:

> He said Friday morning he made the decision to stop the trial after a sleepless night and a walk on a treadmill to "calm me down." He said he debated "for hours" whether to dismiss the case, then chose not to do it because it would

[9] 10 U.S.C. § 949a(b)(2)(C)(ii).

[10] Tr. 12, 297-98.

> be "rewarding the defense for their clear misbehavior and misconduct."
>
> He then talked at length about when people in the military can lawfully defy orders and said it did not apply to his decision-making in the Nashiri case.
>
> "I hope cool minds reflect on what my orders have been. I'm not ordering the Third Reich to engage in genocide," he said. "This isn't My Lai," a reference to the 1968 massacre of villagers in Vietnam by U.S. soldiers. He said parties to the court had a duty to comply with subpoenas, Bar rules and his orders. "Those are the extent of my orders. Not war crimes, people. It's just stunning where we have come."[11]

Judge Spath walked off the bench, declaring, "We are in abatement. We are out. Thank you. We're in recess."[12]

On October 11, 2018, the CMCR handed down a decision supporting Judge Spath. (This is the decision excerpted above, describing the intrusions.) It found that the judge, not the Chief Defense Counsel, must approve excusals. The court pointed to the Rules of Professional Conduct in Illinois and Indiana, the states in which the three learned counsel are licensed. Like the Model Rules, their Rule 1.16 states:

> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, [and] allowing time for employment of other counsel . . . .

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[11] Carol Rosenberg, *Frustrated judge halts Guantánamo's USS Cole war crimes trial*, MIAMI HERALD, Feb. 16, 2018, available at http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article200496069.html .

[12] *Id.*

The court also found that, until learned counsel could be found, Al-Nashiri's trial could nevertheless proceed; and that there was no good cause for Nashiri's counsel to excuse themselves.

> The government made an unequivocal representation to the military judge that it did not intrude into Al-Nashiri's privileged communications with his attorneys. The military judge stated, "[N]o evidence *has yet been presented* to demonstrate intrusions in this case affecting this accused which would ethically require withdrawal or disqualification of outside appointed learned counsel." Moreover, even if there was evidence of an intrusion into Al-Nashiri's attorney-client relationship, there also must be evidence of prejudice before relief may be granted.
>
> Before considering the issue of prejudice, however, there must first be evidence of an intrusion into the relationship between Al-Nashiri and his counsel. No such evidence has been presented to-date. We have no evidence the prosecution received or attempted to receive any of Al-Nashiri's attorney-client strategy or communications. Of course, the door is not closed to Al-Nashiri on this issue. If his defense counsel obtain and present such evidence, the military judge should make findings and consider an appropriate remedy.[13]

This decision was not the final act of the drama, which took an unexpected turn. But, at this point, it is time to raise some ethical questions. Did defense counsel do the right thing by excusing themselves?

NOTES AND QUESTIONS

1. Given the extensive history of intrusions, can defense counsel have any confidence that their conversations with their clients are confidential? If not, can they ethically represent their clients?

Note that Judge Spath denied defense motions for discovery on the extent of intrusions on confidentiality, and the CMCR mentioned repeatedly that there was no evidence that the prosecution had access to attorney-client confidences. Without discovery, how could the defense find such evidence? Judge Spath took the prosecution's word. He also held that al-Nashiri's confidentiality interest extends only to attorney-

[13] United States v. Al-Nashiri, CMCR 18-002, Oct. 11, 2018, slip op. at 31.

client privileged information used by the prosecution against him. Is this a correct understanding of confidentiality?

2. Under Rule 1.6, Al-Nashiri can waive the right of confidentiality if he gives informed consent. Richard Kammen states that, because information about the intrusions is classified, he cannot explain to Al-Nashiri the basis for his concerns about bugging, and that informed consent is impossible. If so, can Kammen or other defense counsel fulfill their obligation of client communication under Rule 1.4?

3. In the CMCR decision excerpted above, the court states that, "even if there was evidence of an intrusion into Al-Nashiri's attorney-client relationship, there also must be evidence of prejudice before relief may be granted." The decision cites Fifth and Sixth Amendment cases on ineffective assistance of counsel, which do not grant reversal if the defense was not prejudiced. Is this the correct standard for determining whether counsel can ethically proceed with a representation? In other words: is the constitutional standard the same as the ethical standard?

4. After Judge Spath ordered Al-Nashiri's counsel to proceed with the defense, under threat of contempt of court, was there a conflict of interest for the lawyers? Under Rule 1.7(a)(2), "a concurrent conflict of interest exists if there is significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." Concurrent representations are prohibited. Will lawyers judicially coerced into representing a death penalty client be materially limited by their own personal interest in avoiding punishment? Judge Spath threatened to have Kammen, Spears, and Eliades arrested. Were they in a position to stand up to the judge when necessary?

Clause (b)(1) of Rule 1.7 states that, "notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if [among other conditions] the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Was that condition fulfilled here?

5. Suppose that substitute counsel were recruited. Could they take the case under Rule 8.4(a)?

6. Did the learned counsel and Lieutenant Piette have "good cause" for excusal? Did they do the right thing?

7. Judge Spath accused the lawyers of deliberately stalling the slow-moving case. Suppose the lawyers believe that their client is likely to be convicted and sentenced to death. (We do not know this, and many

observers believe that the court will not impose the death penalty on a defendant who was tortured by the government.) If it is in the client's interest to delay the trial and verdict, may defense counsel do that? Must they do that? Consult Rule 3.2 ("Expediting Litigation") and its comment. (This rule is substantially identical to the rule covering Lieutenant Piette.[14])

The Denouement

The confrontation between Judge Spath and al-Nashiri's defense team came to a surprise ending when unexpected information emerged. As an opinion of the D.C. Circuit Court of Appeals explains:

> Air Force Colonel Vance Spath began presiding over Al-Nashiri's commission in July 2014. But just over a year into his assignment to the case, he applied for a job with the Department of Justice's Executive Office for Immigration Review. Spath, however, never disclosed the fact of his application, much less its details, to Al-Nashiri or to his defense team. Instead, records obtained through a Freedom of Information Act (FOIA) request—documents whose authenticity the government does not dispute—reveal the information we now possess about Spath's job search. . . .
>
> Spath submitted his application to an open immigration judge position in the Executive Office for Immigration Review on November 19, 2015. In his application, Spath highlighted his "five years of experience as a trial judge," including that he had been "handpicked" to preside over "the military commissions proceedings for the alleged 'Cole bombing' mastermind"—that is, Al-Nashiri—"at Guantanamo Bay." He also included as a writing sample an order he issued in Al-Nashiri's case.[15]

Judge Spath was notified in 2017 that his application had been accepted, but a negotiation ensued over the start date. The negotiation continued during his confrontation with defense counsel. The Court continues:

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[14] Dep't. of the Navy, JAG Instruction 5803.1E, Rule 3.2, https://www.jag.navy.mil/library/instructions/JAGINST_5803-1E.pdf .

[15] *In re* Al-Nashiri, 921 F.3d 224, 227 (D.C.C. 2019).

> The two subplots of Spath's story—the judge's employment negotiations with the Executive Office for Immigration Review and his standoff with Al-Nashiri's defense counsel—reached their denouement the week of February 12, 2018. On Monday, Spath orally denied Spears's and Eliades's motions to quash, leaving in place the subpoenas requiring their appearance via videoconference the following day. But when, on Tuesday morning, Spears and Eliades informed the government that they would not appear, Spath directed the government to draft writs of attachment for their arrest so that, as he put it, he would have "options available . . . when we get here tomorrow." Spath, however, made no decisions on Wednesday or Thursday. Instead, he explained that he was "still trying to figure out what to do," and that he would "think about this overnight."[16]

This was Judge Spath's sleepless night when he walked on the treadmill "to calm me down" while deciding to abate the proceedings. The Court continues:

> But Spath apparently was mulling a different important decision on Thursday night. Earlier that day, he had received an email from a human resources specialist in the Executive Office for Immigration Review informing him that he was "able to [start] with [the] agency . . . on July 8, 2018." "When you have returned to the [S]tates," she wrote, "please let me know so we can arrange a time to call you and go over the Immigration Judge appointment information. "Thank you," Spath replied. "I get back over the weekend. I will give you a call on Tuesday."
>
> The following morning, Spath abated "indefinitely" the commission proceedings against Al-Nashiri. Declaring that "[o]ver the last five months . . . [his] frustration with the defense [had] been apparent," Spath concluded that "[w]e need action from somebody other than me" or else "[w]e're going to continue to spin our wheels and go nowhere." He added, "[I]t might be time for me to retire, frankly. That decision I'll be making over the next week or two."[17]

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[16] *Id.* at 230.

[17] *Id.*

Judge Spath stepped down from the GBMC, retired from the Air Force, and took up his job as an immigration judge in Arlington, Virginia, where he currently serves (as of July 2020).

During the summer of 2018, al-Nashiri's defense team received " 'credible reports' that Spath had been pursuing appointment as an immigration judge."[18] This resulted in a defense appeal to the CMCR seeking discovery on the matter and requesting vacatur of Spath's prior rulings. The CMCR denied the motion, and counsel appealed to the D.C. Circuit Court of Appeals.

The Court of Appeals reversed the CMCR and vacated all 460 of Judge Spath's orders issued during the two-plus years he had been negotiating for the IJ position.[19] That includes his orders to the three learned counsel and his order to proceed in the absence of learned counsel.

Explaining why the judge's conduct created a conflict of interest calling for such a drastic remedy, the Court of Appeals noted that "the Attorney General himself is directly involved in selecting and supervising immigration judges," and the Attorney General simultaneously "was a participant in Al-Nashiri's case from start to finish."[20] Both judicial and lawyer ethics prohibit judges from negotiating for a job with a party before their court, because it creates the appearance of partiality.[21] In this case, the judge had a financial stake, because the immigration judge position would give him a salary over and above his military pension.

Astonishingly, the military judge who replaced Judge Spath was also negotiating for a post-retirement immigration judgeship. Upon revelation of that fact, she was swiftly removed from the case.[22]

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[18] *Id.* at 231.

[19] *Id.* at 238, 240.

[20] *Id.* at 235–36.

[21] RULE 1.12(b); Scott v. United States, 559 A.2d 745 (D.C. 1989) (en banc) (holding that a trial judge in a federal criminal trial who was applying for a job in the DOJ must recuse himself under the Code of Judicial Conduct and the federal recusal statute and that failure to do so requires a new trial for defendant).

[22] *Al-Nashiri*, 921 F.3d at 233.