

Ethics in Criminal Advocacy: Prosecution and Defense

Professor Ellen Yaroshefsky

Course Materials:

Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics, 5th Edition

Posted links for:

ABA Model Rules of Professional Conduct

ABA Criminal Justice Standards

Additional Readings including excerpted cases and materials from Bruce A. Green, *Ethics in Criminal Advocacy*

Recommended Reading for Writing I Paper:

Elizabeth Fajans and Mary Falk, *Scholarly Writing for Law Students*, West 4th ed.

Eugene Volokh, *Academic Legal Writing*, Foundation Press, 5th ed.

Learning Outcomes:

Upon successful completion of this course, students should:

- Understand the purpose of the Model Rules of Professional Conduct
- Understand the purpose of the ABA Criminal Justice Standards for the Defense and Prosecution Function
- Understand and distinguish the role and ethical responsibilities of the prosecutor and defense attorney in the criminal justice system
- Have an in-depth understanding of the model rules and criminal justice standards that apply to prosecutors and defense attorneys
- Be able to spot ethical issues in hypotheticals, apply the relevant model rules, and make appropriate recommendations
- Understand the process for attorney discipline

Assessments:

Student assessments will be based on the final paper and class participation.

SYLLABUS

1. *History and Overview of the Regulation of the Legal Profession*

ABA Model Rules of Professional Responsibility – Preface, Preamble and Scope
ABA Criminal Justice Standards for the Defense Function – 4-1.1
ABA Criminal Justice Standards for the Prosecution Function – 3-1.1
Freedman and Smith, Chapter 1
Alex Karakatsanis, Usual Cruelty, pp. 13-37 (posted)

2. *The Defense Counsel's Duty to Provide Zealous Advocacy*

Freedman and Smith, Chapter 4, pp. 67 – 101
ABA Model Rule of Professional Conduct 1.1, 1.2, 1.3, 1.4, 4.2
ABA Criminal Justice Standards for the Defense Function 4-1.2, 4-1.3
Excerpted Cases (2)

3. *Lawyer Client Confidentiality*

Freedman and Smith, Chapter 5
ABA Model Rule of Professional Conduct 1.6
ABA Criminal Justice Standards for the Defense Function 4-2.2
Excerpted Cases (3)

4. *The Role of the Prosecutor*

Cassidy, Chapter 1 (posted)
ABA Model Rule of Professional Conduct 3.8
ABA Criminal Justice Standards for the Prosecution Function 3-1.2, 3-1.3
Angela J. Davis, “Prosecutors and the Victims of Crime”

5. *The Progressive Prosecutor*

Ellen Yaroshefsky, *Can a Good Person Be a Good Prosecutor?*, 87 Fordham Law Review Online (2018) <https://fordhamlawreview.org/wp-content/uploads/2018/09/Yaroshefsky-35.pdf> (posted)
David Sklansky, *The Progressive Prosecutor's Handbook*, 50 UC Davis Law Review Online 25 (2017) (posted)
The Larry Krasner Memo (posted)
The Rachael Rollins Memo (posted)

6. *Prosecutorial Discretion*

The Charging Decision and the Grand Jury

Film Presentation – “The Plea” Frontline (**view in advance of class**)
Discussion of Ethical Issues in “The Plea”

ABA Model Rule of Professional Conduct 3.8 (a)
ABA Criminal Justice Standards for the Prosecution Function 3-4.2, 3-4.3, 3-4.4
ABA Criminal Justice Standards for the Prosecution Function 3-4.5, 3-4.6
Plea Bargaining
ABA Criminal Justice Standards for the Prosecution Function 3-5.6, 3-5.7, 3-5.8
Cassidy (posted)
Angela J. Davis, “Let’s Make a Deal: The Power of the Plea Bargain” (posted)
7. *Communication with Witnesses*
Defense Counsel Competence

Freedman and Smith, Chapter 4 pp. 101-127
Posted readings on systemic challenges to Ineffective Assistance of counsel
ABA Criminal Justice Standards for the Defense Function 4-1.8 (workload);
4-4.3 (relationship with witnesses); 4-5.4 (collateral consequences); 4-6.4
(waivers); 4-7.6 (witnesses)
8. *Conflicts of Interest*

Freedman and Smith, Chapter 9
ABA Model Rules of Professional Conduct 1.7, 1.8, and 1.9
ABA Criminal Justice Standards for the Defense Function 4-1.7
Excerpted cases (8)
9. *Witness Preparation*

Freedman and Smith, Chapter 7
ABA Model Rule of Professional Conduct 3.3
ABA Criminal Justice Standards for the Defense Function 4-1.4
Excerpted cases (9)
10. *The Ethical Trilemma/Candor to the Court*

Freedman and Smith, Chapter 6
ABA Model Rule of Professional Conduct 3.3
ABA Criminal Justice Standards for the Defense Function 4-1.4
Excerpted cases (10)
11. *Counseling and Decision Making*

Challenging Clients

Freedman and Smith, Chapter 3

Posted readings

Excerpted cases (11)

Spring Break

12. *Discovery Obligations*

ABA Model Rule of Professional Conduct 3.8 (d)

ABA Criminal Justice Standards for the Prosecution Function 3-5.4, 3-5.5

Jessica Brand, *The Epidemic of Brady Violations: Explained*

Judge Emmet Sullivan's Standing Brady Order

Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other*

Disclosure Obligations: What Really Works?, 31 *Cardozo L. Rev.* 1943

(2010) (posted)

Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 *Hofstra L. Rev.* (2018)

(excerpt) (posted)

New York 2020 Discovery Law,

https://www.courtinnovation.org/sites/default/files/media/document/2019/Discovery_NYS-Summary.pdf

13. *Attorney Discipline-Remedies for Criminal Justice Failures*

ABA Model Rules of Professional Conduct 8.1, 8.3, 8.4, 8.5

Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 *Hofstra Law Review* 275 (2007)

In Re Andrew J. Kline (posted)

Bruce A. Green and Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 *Notre Dame Law Review* 51 (2016) (excerpts posted)

14. *Wrongful Convictions: Causes and Remedies*

ABA Model Rule of Professional Conduct 3.8 (g) and (h)

ABA Criminal Justice Standards for the Prosecution Function 3-8.3

NY State Wrongful Convictions Taskforce Report 2019 (posted)

Barry Scheck, *The Integrity of Our Convictions*, (excerpts) (posted)

Bruce A. Green and Ellen Yaroshefsky, *Should Criminal Defense Reformers Care about Ethics Rules?* (forthcoming) (posted)

Adam Liptak, *\$14 Million Jury Award to Ex-Inmate Is Dismissed*
Innocence Project website, www.innocenceproject.org