

SYLLABUS FOR PROFESSOR SIMON'S COURSE IN LAWYERS' ETHICS

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General Information

Course Materials: The three printed sources for assignments in this course are:

1. Richard Zitrin & Carol Langford, ETHICS IN THE PRACTICE OF LAW (Michie 1995) (referred to in this Syllabus as "**Textbook**").
2. "SECOND EDITION UPDATE AND PREVIEW" for Zitrin & Langford, ETHICS IN THE PRACTICE OF LAW (Michie 1995) (referred to in this Syllabus as "**Update**").
3. Stephen Gillers & Roy Simon, REGULATION OF LAWYERS: STATUTES AND STANDARDS (Aspen 2001) (referred to in this Syllabus as "**Rulebook**").

There may also be occasional supplemental handouts. I try to hand these out in class. If you miss a class you will have to pick up any handout from my Secretary, Kristin, in Room 104.

Web sites: In addition to the regular reading, I assign a web site for each class. This will familiarize you with the vast range of information about professional responsibility that is available without charge on the web. You should plan to spend between 15 and 30 minutes clicking around each web site, and should be prepared to discuss each web site in class.

Attendance and Preparation: Attendance and preparation are required. You should not miss more than two classes during the semester, and you should never miss two classes in a row. If you need to miss a class due to illness, a family emergency, or some other urgent situation, send me a short email telling me what class you missed and why. Being unprepared counts as an absence.

Purpose of the Course: This is not a course in morality. The purpose of this course is to alert you to your duties as lawyers and to introduce you to the broad issues that the legal profession is debating today and will be debating throughout your career, and to alert you to the problems that confront practicing lawyers in every type of practice everywhere in the country.

Hofstra Legal Ethics Conference: On Sunday, Monday, and Tuesday, September 9-11, Hofstra will be hosting one of the largest and most important legal ethics conferences ever held. This conference is an extraordinary opportunity for students to hear Justice Antonin Scalia and many distinguished lawyers and scholars in the field of legal ethics, including Carol Langford, a co-author of our textbook. Everyone in the class must attend at least two complete speeches at the conference, and hand in a two-page memo reacting to what you heard. The two-hour conference attendance requirement will serve as an advance make-up class for Friday, October 5th, when there is no class. Check the conference schedule at www.hofstra.edu (click on "The 2001 Legal Ethics Conference").

The MPRE: The MPRE is a multiple choice exam covering a broad range of professional responsibility issues – e.g., bar admission, legal malpractice, the attorney-client privilege, and conflicts of interest. The grading curve is being raised starting in March of 2002, so this is your last chance to take the MPRE on the old “easy” curve.

The MPRE is given three times a year (March, August, and November) and is required for bar admission in more than forty states, including New York, New Jersey, and Connecticut (three popular destinations for Hofstra law graduates). Lawyers’ Ethics will cover many of the topics addressed on the MPRE, but we will not cover judicial ethics (which constitutes 6 to 10% of the exam), and my course is not tailored to the MPRE. Therefore, I encourage you to take one of the commercial MPRE review courses before you take the test. (*Note:* Until 1999, the MPRE had a much narrower focus, so do not use old review materials.)

I strongly encourage you to take the MPRE on November 9, 2001. You can register online at www.ncbex.org/tests.htm. Much of the material on the test will be fresh in your mind, and studying for the test will help you master the material in Lawyers’ Ethics. In addition, it’s good to get the MPRE out of the way early so that you have one less thing to worry about for bar admission. (Because I am encouraging students to take the November 9th test, I am not scheduling class for that day unless we need to hold a make-up class.)

Lichtenstein Lecture on Wednesday, November 7th: On Wednesday, November 7th, Richard Zitrin (a co-author of our textbook) will be delivering the annual Lichtenstein Lecture in Room 308. Attendance at this lecture is required. The Lichtenstein Lecture will count as the make-up class for Friday, November 9th, when we are not holding class because the MPRE is being administered on November 9th. I will take attendance at the lecture and hold a relatively brief discussion period after the lecture is over.

Examination and Grades: The course will be graded on the regular A-B-C grading scale. The grade will be based mainly on the final exam, which will probably be a combination of essays true-false questions, and perhaps short answers. I will also consider your attendance record and your contributions to class discussion. *The examination will be totally open book -- you may bring anything that does not breathe.*

How to Read the Assignments: Here’s some free advice: **(1) Always check the Update first.** The Update (the bound handout) often deletes, replaces, or adds to the materials in the main textbook. The first thing you should do for each assignment is to check out the Update to see what to skip in the Textbook and what new materials the authors have added. **(2) Read the rules as you go.** You should read the assigned rules in the Rulebook as soon as they are cited in the Textbook or the Update. If you read the rules while you are doing the reading in the Textbook and Update, you will understand the rules much better, you will understand the reading materials much better, and it’s easier to get through the rules one or two at a time rather than all at once. **(3) Focus on the Problems.** Focus especially on the “Problems” in the textbook and update. (These are in bold in the Table of Contents and usually come at the beginning of a chapter or section.) We will spend substantial class time discussing the problems, and I may assign students to act out some of the problems and lead class discussion about them.

Class-by-Class Assignments

AUGUST 31ST

INTRODUCTION TO THE STUDY OF LAWYERS

Topic: Why do lawyers have such a bad reputation? In particular, why do lawyers defend people who are guilty? (By the way, what does “guilty” mean?) What are the rules that govern lawyers? How can we improve the legal profession?

Textbook: Pages 1-24

Rulebook: ABA Model Rule 3.1 and Comment (pp. 194-195)
ABA Model Rule 3.2 and Comment (p. 200)
ABA Model Rule 3.3 and Comment (pp. 203-207)
New York Preamble and Preliminary Statement (pp. 973-975)
New York EC 4-7 and DR 4-101 (pp. 998-999)
New York DR’s 7-101, 7-102 & 7-103 (pp. 1009-1011)

SEPTEMBER 7TH COMPETENCE, SPECIALIZATION, AND ACCESS TO LAWYERS

Topic: How do people find lawyers who are competent to handle a particular kind of matter? Should we allow lawyers to “sell” cases to other lawyers who are more competent (*i.e.*, to receive “referral fees” for referring cases to other lawyers)? Should lawyers be required to represent people who cannot afford to pay, or to represent clients whose views are repugnant?

Update: Read replacement for pp. 38-39 and addition to p. 52 of the Textbook

Textbook: Pages 25-57 (except the pages that have been replaced)

Rulebook: ABA Model Rule 1.1 and Comment (pp. 20-21)
ABA Model Rule 7.1 and Comment (pp. 339-340)
ABA Model Rule 7.3 (black letter only) (pp. 364-365)
ABA Model Rule 7.4, Comment, Model Code Comparison & “ABA Standards for Accreditation of Specialty Certification Programs” (pp. 383-383 & 392-393)
NY EC 2-10 (p. 980)
NY DR 2-101(A)-(C) (pp. 983-984)
NY DR 2-103 (pp. 987-989)
NY DR 2-105 (pp. 990-991)

Website: www.lawschool.com Scroll around until you find some good stories about legal education, bar admission, or the legal profession..

From Sunday, September 9th through Tuesday, September 11th, Hofstra will host a major national legal ethics conference entitled “Legal Ethics: What Needs Fixing?” which will feature many of the leading experts in the country on legal ethics, including Carol Langford, co-author of our textbook. (Richard Zitrin will be at Hofstra on Wednesday, November 7th for the Lichtenstein Lecture.) You must attend two hours of the conference and write a two-page report about what you learn. Check the conference schedule at www.hofstra.edu (click on “The 2001 Legal Ethics Conference”).

SEPTEMBER 14TH**COMMUNICATION AND CONFIDENTIALITY**

Topic: What should a lawyer do when a client confesses to murder? What if the client hands the lawyer the murder weapon -- does the lawyer have to turn it over, or say where she got it? What are the limits of a lawyer’s duty of confidentiality? Should the rules permit more disclosure than they do now, or less?

Update: Read addition to p. 99 of the Textbook

Textbook: Pages 75-103

Rulebook: ABA Rule 1.6, including Comment and Legislative History (pp. 61-71);
Blurb on “Attorney-Client Privilege” (p. 78-79);
ABA Rule 1.9(c) (p. 110);
New York EC 4-7 and DR 4-101 (pp.998-999) (review carefully).
New York DR 5-108 (pp.1005-1006) (focus on (A)(2) regarding former clients).

Website: www.legalethics.com This private site, maintained by a website consultant, contains a wealth of information about the ethical perils of electronic communications (especially websites and email). It also contains links to a wealth of information, including links to bar association sites in all fifty states and D.C. Click around until you find something about confidentiality.

- Topic:** What is the relationship between confidentiality and conflicts of interest? To be more specific, should F. Lee Bailey be allowed to represent both the Lockerbie plaintiffs and Libya's rulers? Should the same lawyer be allowed to represent Billy Joel and Madonna, or the Rolling Stones and Sony Records? Should the same lawyer be permitted to represent more than one defendant in a criminal case?
- Update:** Read replacement to pp. 107-108 and additions to pp. 118, and 131 of the Textbook – the *Swidler & Berlin* decision by the United States Supreme Court, which grew out of one of Ken Starr's investigations as Independent Counsel, is especially important.
- Textbook:** Pages 104-143 (except the pages that have been replaced)
- Rulebook:** ABA Rule 1.7, Comment, and Code Comparison (pp. 80-86);
Texas Rule 1.06, including explanatory note (pp. 91-92);
ABA Rule 1.9 (pp. 109-110);
ABA Rule 1.10, Comments 6-7, and Code Comparison (pp.118-121);
New York DR 5-101 (p. 1001);
New York DR 5-104 (pp. 1003-1004);
New York DR 5-108 (pp. 1005-1006).
- Website:** www.freivogel.com This website is maintained by one of the nation's leading authorities on conflicts of interest. Until April of 2000, he was head of Loss Prevention at Attorneys' Liability Assurance Society ("ALAS"), an insurance consortium formed by the nation's largest law firms. Click just below his name on "Freivogel on Conflicts," then click on two or three of the topics and read Freivogel's concise explanation. He really knows his stuff.
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- Topic:** When a lawyer represents a corporation, who is the “client” -- the officers? the stockholders? the Board of Directors? When a lawyer is hired by an insurance company, who is the lawyer’s client -- the insured, or the insurance company?
- Update:** Read replacements for pp. 145-149 and 168-169 of the Textbook (including Problem 8b on p. 22 of the Update book, which is out of order)
- Textbook:** Pages 144-150 and 155-179 (except the pages that have been replaced)
- Rulebook:** ABA Rule 1.13, Comment, and Code Comparison (pp. 132-137);
NY EC 5-18 (p. 1000-1001);
NY DR 5-101 (p. 1001);
NY DR’s 5-107, 5-108 and 5-109 (pp. 1005-1007).
- Website:** www.acca.com This website is maintained by the American Corporate Counsel Association, the main association of “in-house” lawyers. (Don’t go to acca.org -- that’s the Air Conditioning Contractors Association.) Much of the ACCA site is restricted to members, but a few interesting items are available to the public. Check out the *ACCA Docket* to see the contents of the ACCA newsletter, which reflects the kinds of issues that concern in-house lawyers. Then go to www.elawyering.org, which is co-sponsored by ACCA, and look around.
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The two hours you spent at the legal ethics conference in September (or watching videotapes of the conference) served as an advance make-up class for October 5th. There is no class on October 5th. Use the time to begin seriously outlining the course and reviewing the main rules and concepts that we have studied.

OCTOBER 12TH**CONFLICTS, COMPENSATION, AND CONTROL**

- Topic:** How do fee agreements cause conflicts between lawyers and clients? What should a lawyer do when the lawyer and client disagree about how to handle a matter? What should a lawyer do if a client on death row does not want to appeal his death sentence?
- Update:** Read the lengthy replacement for bottom of p.183 to middle of p.185 of the Textbook
- Textbook:** Pages 178-201, 209-216, and 221-233 (except the pages that have been replaced)
- Rulebook:** ABA Rule 1.2, Comment, and Code Comparison (pp. 26-29);
Wisconsin Rule 1.8(k) (p. 443);
NY DR 1-102 (p. 977);
NY DR 2-106 (p. 991-992);
NY DR 5-101 (p. 1001);
NY DR 5-103 (pp. 1002-1003);
NY DR 5-104 (pp. 1003-1004);
NY DR 5-111 (p. 1008).
- Website:** www.nysba.org This web site is maintained by the New York State Bar Association, a voluntary association of nearly 70,000 lawyers. At the home page, click on the “Ethics” button, then scroll down to the summaries of the ethics opinions and click on one that discusses conflicts of interest.

OCTOBER 19TH**TRUTH, ZEAL, AND THE ADVERSARY SYSTEM**

- Topic:** Why do we use the adversary system in America? How far can a lawyer go to make a truthful witness look like a liar, or to make a guilty client look innocent?
- Update:** Read additions to pp. 226-227 and 230
- Textbook:** Pages 237-245 and 251-273
- Rulebook:** ABA Rule 1.3, Comment, and Code Comparison (pp. 36-37);
ABA Rule 3.1, Comment, and Code Comparison (pp. 194-195);
NY DR’s 7-101 and DR 7-102 (pp. 1009-1011).
- Website:** www.abcny.org This website is maintained by the Association of the Bar of the City of New York, one of the nation’s oldest and most prestigious bar associations. On the home page, click on “Professional Ethics Page,” then click at the top of the page on any year since 1996 and look for an ethics opinion that interests you. (Until 2001, all of the ethics opinions issued in a given year are on one Internet page.)
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- Topic:** What are the most common ways in which lawyers commit legal malpractice or breach their fiduciary duties to their clients? Why do lawyers do commit malpractice and breach fiduciary duties? How can you avoid committing legal malpractice? Two veteran legal malpractice defense lawyers, Ken Balkan and Anthony Colavita of L'Abbate, Balkan, Colavita & Contini in Garden City, will visit our class and share their experience with you.
- Update:** Read replacements to pp. 38-39 on "Competence and Negligence" (including the Ramos article on legal malpractice)
- Textbook:** Pages 38-39 (section 5 on "Competence and Negligence" and section 6 on "Fiduciary Duty") and 533-554 (which we are reading because of the close connection between legal malpractice and substance abuse)
- Rulebook:** ABA Rule 8.3 and Comment (pp. 418-420);
1991 Amendments and Committee Report (pp. 420-421);
Kansas Rule 8.3(c) and related Rule 206(e) (pp. 422-423);
Texas Rule 8.03 (p. 424);
ABA Commission on Impaired Attorneys (p. 425);
New York DR 1-103 (pp. 977-978);
New York Judiciary Law § 499 (p. 1039).
- Website:** www.labbatebalkan.com This web site is maintained by L'Abbate, Balkan, Colavita & Contini, the firm where our two guest speakers are name partners. Look for the biographies of Ken Balkan and Anthony Colavita, then click around the site to find out more about the firm. Then go to www.abanet.org/cpr/colap – the web site maintained by the ABA Commission on Lawyer Assistance Programs – and click on some of the links to articles on the home page. Addiction and substance abuse is a major problem in the legal profession, and the ABA is trying to address it head on.
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- Topic:** What should you do if your client wants to lie on the witness stand?
- Update:** Read additions to pp. 291, 295, and 299 of the Textbook
- Textbook:** Pages 274-313
- Rulebook:** ABA Rule 3.3, Comment, and Code Comparison (pp. 202-208);
Florida Rule 3.3 (pp. 209-210);
District of Columbia Rule 3.3 and Comment (pp. 921-924);
NY DR 2-110 (pp. 993-995) (look for grounds relevant to client perjury);
NY DR 7-102 (pp. 1010-1011).

Website: www.law.cornell.edu This remarkable website is maintained by Cornell Law School. Use it to explore the law and ethics of client perjury in New York. To do this, follow these steps:

- At the Cornell web site, click at left on “American Legal Ethics Library”
- Click at right on “Listings by Jurisdiction, ” then click on “New York”
- Click on “American Legal Ethics Library Narrative”
- Click at left on “Query,” then in “Search Text,” write “perjury” and hit enter
- When results come up, click on the box showing “Perjury” and the number of hits
- Keep clicking on the “Next Hit” at left and read what pops up

Richard Zitrin, one of the co-authors of our textbook, will deliver the Lichtenstein Lecture on legal ethics, an annual lecture arranged by Professor Monroe Freedman, Hofstra’s Lichtenstein Distinguished Professor of Legal Ethics. Mr. Zitrin is a practicing lawyer, a long-time adjunct professor of legal ethics, a stimulating thinker, and a provocative public speaker. **YOU ARE REQUIRED TO ATTEND THIS LECTURE.** (Remember, this lecture serves as a “make-up” class for Friday, November 9th, when we will not hold class due to the MPRE.) I will hold a relatively brief discussion for our class when the lecture is over.

Because so many of you are taking the MRPE on November 9th, we will not have class today. Good luck to everyone who is taking it!

NOVEMBER 16TH

ETHICS IN DISCOVERY AND NEGOTIATION

Topic: What are the outside limits of zealous advocacy in litigation? In particular, where is the line between ethical zeal and unethical concealment in discovery? What is the difference between puffery and lying in negotiations?

Update: Read the additions to pages 335 and 349, the replacement for pp. 354-355, and the addition to p. 368

Textbook: Pages 332-341 and 349-371 (except the pages that have been replaced)

Rulebook: ABA Rule 3.4, Comment, and Code Comparison (pp. 215-217);
NY DR 7-101 (p. 1009-1010);
NY DR 7-105 (p. 1012);
NY DR 7-106 (p. 1012);
NY DR 7-109 (p. 1015).

Website: www.cybersettle.com This website is maintained by a private company that claims to be “the first company to offer an online, computer-assisted method for settling insurance claims.” Click on the “Online Demo” and see how it works! Then go to www.clicknsettle.com and compare its services to Cybersettle’s services.

NOVEMBER 23RD

NO CLASS – HAPPY THANKSGIVING

Use this break wisely. There is *no* “reading period” after classes end this year, so this is your best chance to study for final exams. Happy Thanksgiving!

NOVEMBER 30TH**MISCONDUCT AND DISCRIMINATION**

- Topic:** What should a lawyer do when another lawyer in the firm is engaging in serious misconduct? What kinds of discrimination do women face in the workplace, and what is the legal profession doing about it?
- Update:** Read the additions to pp. 496, 509, and 526, and the replacements for pp. 515, 522, and 526-527
- Textbook:** Pages 487-497 and 502-532 (except the pages that have been replaced)
- Rulebook:** ABA Rule 5.1, Comment, and Code Comparison (pp. 279-280);
ABA Rule 5.2, Comment, and Code Comparison (p. 282-283);
ABA Rule 8.4, Comment, and “1998 Amendment” (pp. 426-427 & 431);
California, Florida, Michigan, and Washington Variations on Rule 8.4 (pp. 434-443);
NY EC’s 1-7 and 1-8 (p. 976);
NY DR’s 1-101, 1-102, 1-103, and 1-104 (pp. 976-978) (pay special attention to DR 1-104(E) & (F)).
- Website:** www.abanet.org/women This site features the work of the ABA Commission on Women and the Profession, which was chaired by Professor Deborah Rhode of Stanford Law School. Click on “The Unfinished Agenda: Women and the Profession” (issued in April of 2001) and read a few pages. It is the most comprehensive and up-to-date report about women and the legal profession.
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DECEMBER 7TH**MONEY AND MORALS IN THE LEGAL PROFESSION**

- Topic:** How do lawyers calculate legal fees? How much is too much? How does the legal profession attempt to serve those who cannot afford legal fees? If we are not meeting the legal needs of the poor, should we require lawyers to perform pro bono work?
- Update:** Read additions/replacements for pp. 587-588, 596, 604, 606-607, 612-615, and 618
- Textbook:** Pages 577-619 (except the pages that have been replaced)
- Rulebook:** ABA Model Rule 6.1, Comment, and Code Comparison (pp. 320-323);
ABA Model Code EC 2-25 (p. 543);
NY DR 2-106 (pp. 991-992).
- Website:** www.greedyassociates.com This website was established by unhappy associates at large law firms across the country. They discuss salaries and bonuses, complain about working conditions, and generally ramble on about life in a large law firm.
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GOOD LUCK ON ALL OF YOUR FINAL EXAMS!