

# **LAWYERS' ETHICS**

**Spring 2024**

Tu/Th 8:40-10:00 a.m.

**Professor Jennifer Gundlach**

Office: Room 208

E-Mail: [Jennifer.Gundlach@hofstra.edu](mailto:Jennifer.Gundlach@hofstra.edu)

Phone: (516) 463-4190

## **COURSE SYLLABUS – Revised 4/13/24**

---

### **INTRODUCTION**

Welcome to Lawyers' Ethics, which fulfills your professional responsibility graduation requirement and provides you with an introduction to the law governing lawyers' professional obligations. While most of your courses in law school may have tended toward use of the traditional case method and lecture, this class will offer you the opportunity to engage in interactive, collaborative class discussions and problem-solving exercises. I aim to facilitate an open and respectful classroom environment where there are no "dumb" questions and students are encouraged to think beyond the confines of what you've learned from your assigned readings. While I want you to learn the fundamental principles and rules relating to professional responsibility, I also want you to continue to build the essential lawyering skills of critical thinking and analysis.

### **WHAT YOU WILL LEARN FROM THIS COURSE**

- How to identify fundamental ethical issues "in the moment" of law practice
- Ability to recognize tensions implicit in ethical rules
- Development of a decision-making framework for handling "gray areas" of ethical dilemmas not explicitly covered by the ethics rules
- How to critically analyze ethical issues from legal, practical, political, economic, moral and historical perspectives
- Knowledge and successful application of the Model Rules of Professional Conduct for purposes of MPRE and for practice
- Familiarity with the New York Rules of Professional Conduct and distinctions from the Model Rules

## ATTENDANCE, GRADING AND EVALUATION

Attendance: For all classes, I expect students to be present at the start of class and avoid entering late, as it is disruptive to me and the other students. It is a professional responsibility for you to show up early or on-time in practice so now is the time to start good habits. That said, I understand that there may be times where you may be late, and the reasons may be beyond your control. It is always a good idea to contact me in advance, if possible, so I can be alerted.

Class Performance/Participation (20%): Class time will be interactive & dynamic. In an effort to help you learn how lawyers actually grapple with ethical dilemmas in practice, a significant portion of class time will involve discussions and simulated legal arguments requiring you to draw from the cases and rules that you've reviewed outside of class to help discern how to resolve problems from the book or that I have provided to you. Much of our time will involve analysis and interpretation of the relevant rules of professional responsibility or other statutory or constitutional provisions. It is critical that you read these rules *in advance* of class and consider how they were applied in the assigned cases, as well as how they might be applied (or have limited application) to the problems we'll be discussing in class. Each student will have at least one in-class collaborative exercise with a small group, but other times you will be called on to work through problems individually. You will not necessarily have advance notice about when you will be called upon to participate so please be prepared for each and every class. You will be graded on the thoroughness of your preparation and your in-class performance. I will discuss this more in-class on the first day. All students are expected to do the assigned reading each week and to actively participate in class discussion. *If you have more than three unexcused absences and/or you have not been a regular participant in class discussions, your grade will be reduced.* NOTE: Pursuant to Standard 310, the American Bar Association requires that you spend at least six hours per week, on average, studying and preparing for class, in addition to the three hours a week we spend in class.

Midterm (20%) & Final Exam (60%): The midterm will be a take-home mid-term submitted via Canvas. The final exam will be a two-hour, closed-book exam. I will provide more information later to help you prepare for each.

## REQUIRED TEXTS

- (1) Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics*, 12th Edition (Aspen Publishers, Inc. 2021)
- (2) ABA Model Rules of Professional Conduct 2023-24 version – either a hard copy (I recommend Lisa Lerman and Phillip Schrag, *Ethical Problems in the Practice of Law: Models Rules, State Variations, and Practice Questions*, 2023-24 Ed. (Aspen Publishers, Inc. 2023)) **OR** any open-source electronic access site, such as: [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/)

## **CALI MATERIALS**

Hofstra is a member of the Center for Computer-Assisted Legal Instruction (CALI) Consortium, which has put together a series of multiple-choice questions to help you prepare for the MPRE and the final exam at no charge. You can download or run the lessons directly from the CALI website (NOTE: you will need to obtain a password from the reference desk), which can be found at: <https://www.cali.org/lesson>

## **CLASS COMMUNICATION & TECHNOLOGY**

I am always happy to speak with students about the course or anything else. You are welcome to e-mail or call me to set up an appointment. You can also visit me in my office – I'll generally be available before class from 7:30-8:30 a.m., as well as on Tuesdays from 1:00-3:00 p.m. I have set up a course page on Canvas. I will use this site to post all the relevant course materials, including the syllabus, supplemental readings, and classroom slides. I'll use it to post discussion threads, inform you about recent legal developments, or provide links to helpful resources or cases. It is also an excellent way for you to communicate with me and with each other.

## WEEKLY ASSIGNMENTS\*

\* Please note that the assignments may change if I feel that we need to slow down, speed up, or skip readings. I will give you advance notice both in class and on Canvas.

### WEEK ONE

Thursday, January 11<sup>th</sup>

#### **In-Class:**

- The What, Who, How, When, and Why of “Legal Ethics”
  - Defining the Attorney/Client Relationship
    - Is There a Client Here?
    - What Do Lawyers Owe Clients?
      - Competence (Rule 1.1)
      - Confidentiality (Rule 1.6)
- Perez v. Kirk & Carrigan*

#### **Reading:**

- Gillers, *Regulation of Lawyers*: pp. 1-24, 26-35
- Model Rules: Preamble, Rules 1.1, 1.6, 1.18 (and Comments to all)

### WEEK TWO

Tuesday, January 16<sup>th</sup>

**NO CLASS** (time will be made up with take-home midterm later in semester)

Thursday, January 18<sup>th</sup>

#### **In-Class:**

- Defining the Attorney/Client Relationship
    - What Do Lawyers Owe Clients?
      - Confidentiality (Rule 1.6)
- Slip & Fall Part I*  
*Upjohn Co. v. United States* (U.S. 1981)
- Exceptions to Privilege and Confidentiality
- The Case of the Innocent Lifer*  
*Lori is on Opioids*  
*How Does Your Garden Grow?*

#### **Reading:**

- Gillers, *Regulation of Lawyers*: pp. 24-26, 36-54
- Model Rules: 1.6 (and Comments to all)

## **WEEK THREE**

**Tuesday, January 23<sup>rd</sup>**

### **In-Class:**

- Defining the Attorney/Client Relationship
  - What Do Lawyers Owe Clients
    - Lawyers As Agents and Fiduciaries  
*Taylor v. Illinois* (U.S. 1988)  
*Choice Hotels Int'l v. Grover* (7<sup>th</sup> Cir. 2015)
    - Loyalty and Diligence (Rule 1.3)
    - The Duty to Inform and Advise  
*Nichols v. Keller* (Cal Ct. App. 1993)  
*In a Box*
  - Autonomy of Attorneys and Clients
    - Criminal Cases  
*Lesser Included Offenses*  
*I Want to Die*  
*Jones v. Barnes* (U.S. 1983)  
*McCoy v. Louisiana* (U.S. 2018)

### **Reading:**

- Gillers, *Regulation of Lawyers*: pp. 54-75
- Model Rules: 1.2, 1.3, 1.4, 1.14 (and Comments to all)

**Thursday, January 25<sup>th</sup>**

### **In Class:**

- Defining the Attorney/Client Relationship
  - Autonomy of Attorneys and Clients
    - Civil Cases  
*It's the Right and Decent Thing to Do*  
*Accept the Offer*  
*Olfe v. Gordon* (Wis. 1980)
  - Terminating the Relationship
- Protecting the Attorney-Client Relationship Against Outside Interference
  - Communicating with Another Lawyer's Clients
    - Civil Matters  
*"We Want to Know What Reach Tekkno is Saying"*  
*Niesig v. Team I* (N.Y.S.2d 1990)  
*"The Adverse Client . . ."*
- Improper or Accidental Acquisition of Confidential Information  
*It's the Discovery Wellmost Suppressed*

### **Reading:**

- Gillers, *Regulation of Lawyers*: pp. 75-97, 104-108
- Model Rules: 3.4(f), 4.2, 4.3, 4.4 (and Comments to all)

## **WEEK FOUR**

**Tuesday, January 30<sup>th</sup>**

**In Class:**

- Lawyers, Money, and the Ethics of Legal Fees
  - The Role of the Marketplace  
*Brobeck, Phleger & Harrison v. Telex Corp.* (9<sup>th</sup> Cir. 1979)
  - Unethical Fees and Billing Practices  
“*Sparrow Owes Robin a Refund*”  
“*What Are You Worth?*”  
*In Re Fordham*
  - Contingent Fees

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 109-131
- Model Rules: 1.5 (and Comments to all)

**Thursday, February 1<sup>st</sup>**

**In Class:**

- Lawyers, Money, and the Ethics of Legal Fees
  - Court-Awarded Fees  
*Evans v. Jeff D.*
  - Mandatory Pro Bono Plans  
“*Should We Adopt Mandatory Pro Bono?*”

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 136-152
- Model Rules: 1.5, 6.1, 6.3, 6.4, 6.5 (and Comments to all)
- New York Pro Bono Requirements (on Canvas)

## **WEEK FIVE**

**Tuesday, February 6<sup>th</sup>**

**In-Class:**

- Concurrent Conflicts of Interest
  - Client-Lawyer Conflicts
    - A Lawyer's Business and Financial Interests  
*Lawyer. Realtor. Any Problems?*  
*In re Neville*
    - Financial Assistance  
*Becca Dionne is Puzzled*
    - Can a Lawyer's Gender, Religion, Race Create a Conflict?  
*Implicit Bias in the Jury Room*

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 155-178
- Model Rules: 1.7, 1.8, 1.10, 8.4 (and Comments to all)

**Thursday, February 8<sup>th</sup>**

**In-Class:**

Catch-Up and Review

**Reading:**

None

## **WEEK SIX**

**Tuesday, February 13<sup>th</sup>**

**In Class:**

- Concurrent Conflicts of Interest
  - Client-Client Conflicts
    - Civil Cases
      - “Will You Represent Us Both?”*
      - “My Birthday Poodle”*
      - “If You’re Adverse to Gyro, You’re Adverse to Us”*
      - “Significant and Direct Financial Harm”*
      - Fiandacca v. Cunningham* (1<sup>st</sup> Cir. 1987)
      - Simpson v. James* (5<sup>th</sup> Cir. 1990)
  - The Insurance Triangle (skip *Ed’s Daughter was Driving*)
  - The Advocate-Witness Rule

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 207-235
- Model Rules: 1.7, 1.10, 3.7 (and Comments to all)

**Thursday, February 15<sup>th</sup>**

**In-Class:**

- Successive Conflicts of Interest
  - Private Practice
    - Divorce and Default*
    - “What Do I Owe Haywood Tallman?”*
    - “Stop the High Rise”*
    - Analytica, Inc. v. NPD Research* (7<sup>th</sup> Cir. 1983)
  - Imputed Disqualification and Migratory Lawyers
    - “You Don’t Know Anything”*
    - “Can We Hire Taylor Monk?”*
    - A Conflict Bouquet*
    - Cromley v. Board of Education* (7<sup>th</sup> Cir. 1999)
  - Government Service (1.9, 1.11)

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 237-267
- Model Rules: 1.9, 1.10, 1.11, 1.18 (and Comments to all)



## **WEEK SEVEN**

**Tuesday, February 20<sup>th</sup>**

**In Class:**

Review & Catch-Up

**Reading:**

None

**Thursday, February 22<sup>nd</sup>**

**In-Class:**

- Ethics in Advocacy
  - Four Views of Adversary Justice
    - “*Adversary Justice is Good for Lawyers but Bad for Justice*”
  - Are Lawyers Morally Accountable for Their Choice of Clients or What They Do for Them?
  - (Courtroom) Truth and Confidences
    - “*Out Carousing with Mikey*”
    - Nix v. Whiteside* (U.S. 1986)

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 271-302
- Model Rules: 1.2(b), 3.3 (and Comments to all)

Take-Home Midterm Available on Canvas

## **WEEK EIGHT**

**Tuesday, February 27<sup>th</sup>**

**In-Class:**

- Ethics in Advocacy
  - (Courtroom) Truth and Confidences
  - “*Streets for Bikes Not Trucks*”
  - “*Maybe I Was Insane*”

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 302-313
- Model Rules: 3.3 (and Comments for all)

**Thursday, February 29<sup>th</sup>**

**In-Class:**

- Ethics in Advocacy
  - Fostering Falsity or Advancing Truth?
    - Literal Truth
    - “*Did You Talk to Cassie?*”
  - Cross-Examining the Truthful Witness

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 313-31
- Model Rules: 3.3, 3.4, 3.9, 8.4, 4.4 (and Comments for all)

## **WEEK NINE**

**Tuesday, March 5<sup>th</sup>**

- Ethics in Advocacy
  - Fostering Falsity or Advancing Truth
    - Appeals to Bias  
*People v. Marshall* (Ill. App. Ct. 2013)
    - The Boundaries of Proper Argument  
*"I Hang a Key on a Nail"*  
*The Eyewitness Part I*  
*The Eyewitness Part II*  
*Zapata v. Vasquez* (9<sup>th</sup> Cir. 2015)  
*Phantom Profits*
    - Spoliation
  - Hardball and Incivility
  - Misstating Facts, Precedent, or the Record
  - The Obligation to Reveal Adverse Legal Authority  
*Thul v. Onewest Bank, FSB* (N.D. Ill 2013)

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 331-41; 349-53; 358-63
- Model Rules: 3.3, 3.4, 4.1, 4.4, 8.4 (and Comments for all)

**Thursday, March 7<sup>th</sup>**

**In Class:**

- Special Issues in Criminal Prosecutions
  - Real Evidence  
*The Client's Loaded .45 (Parts I, II, III)*
    - Real Evidence and Legal Ethics  
*In re Ryder* (E.D. Va. 1967)
    - Real Evidence and Criminal Law
    - Real Evidence and the A/C Privilege  
*People v. Meredith* (Cal. 1981)  
*The White Women on the Walls Have to Go*

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 367-84
- Model Rules: 3.4, 3.8 (and Comments for all)

## **WEEK TEN**

**Tuesday, March 12<sup>th</sup>**

**In-Class:**

- Negotiation and Transactional Matters
  - Lawyers as Negotiators
  - Negotiations: Risks to Lawyers
    - The “Bad Client” Problem  
*The Bad Builder’s Good Lawyer*  
*“Come to the Cabaret”*
    - The Lawyer’s Own Statements  
*True or False in Negotiation Land*  
*Graycas, Inc. v. Proud* (7<sup>th</sup> Cir. 1987)  
*Hoyt Properties v. Production Resource Group* (Minn. 2007)

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 401-419
- Model Rules: 1.2, 1.6, 1.16, 3.3, 4.1, 8.4 (and Comments)

**Thursday, March 14<sup>th</sup>**

**In-Class:**

- Lawyers for Companies and Other Organizations
  - Companies Behaving Badly: “Where Were the Lawyers?”  
*Should We Forbid Secret Settlements that Conceal Danger?*
  - Conflicts and Confidentiality in Entity Representation
    - Internal Investigations  
*“Please, Just Find Out What Happened”*  
*In re Grand Jury Subpoena Under Seal* (4<sup>th</sup> Cir. 2005)
    - Change of Corporate Control  
*“We’re Still on the Same Side”*  
*Tekni-Plex, Inc. v. Meyner & Landis* (N.Y.2d 1996)
  - Sarbanes-Oxley, Dodd-Frank, and the Rule 1.13 Amendments

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 427-448, 454-459
- Model Rules: 1.9, 1.13 (and Comments for all)

**Tuesday, March 19<sup>th</sup> & Thursday March 21<sup>st</sup> - *No Classes – Spring Break!***

## **WEEK ELEVEN**

**Tuesday, March 26<sup>th</sup>**

**In Class:**

- Judges
  - Conflicts and Disqualification
    - Abortion on Appeal*
    - My Daughter Abby Is a Lawyer*
    - The City Gets the Money, Not the Judge*
    - Caperton v. A.T. Massey Coal. Co.* (U.S. 2009)
    - Williams v. Pennsylvania* (U.S. 2016)
    - Liljeberg v. Health Services Acquisition Corp.*

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 461-90
- Model Rules: Links to Codes of Judicial Conduct (on Canvas)

**Thursday, March 28<sup>th</sup>**

**In Class:**

- Judges
  - Conflicts and Disqualification
  - Expressions of Gender, Racial, and Other Bias
    - The Judge and the Boy Scouts*
    - Where You Live, Not Who You Are*
- Visit from Professor James Sample re: Supreme Court Code of Ethics

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 490-96
- Model Rules: Links to Codes of Judicial Conduct (on Canvas)

## **WEEK TWELVE**

**Tuesday, April 2<sup>nd</sup>**

### **In-Class:**

- Control of Quality: Reducing the Likelihood of Professional Failure
  - Admission to the Bar
  - Geographic Exclusion
  - Geographic Restriction
  - Education and Examination
  - Character Inquiries
    - Borrowing from the Moot Court Account*
    - The Racist Applicant*
    - In re Glass* (Cal. 2014)
  - Admission in a Federal System
- Transient Lawyers and Multijurisdictional Firms: Local Interests Confront the National Bar
  - Admission *Pro Hac Vice*
    - Leis v. Flynt* (U.S. 1979)
  - Services Other Than Litigation
    - Food Pantry Law*
    - Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*

### **Reading:**

- Gillers, *Regulation of Lawyers*: pp. 501-531
- Model Rules: 5.5 (and Comments)

**Thursday, April 4<sup>th</sup>**

### **In-Class:**

- Unauthorized Practice of Law
  - “The Landlord’s Lawyers are a Mean Bunch”*
- Control and Quality: Remedies for Professional Failure
- Malpractice and Breach of Fiduciary Duty
  - Liability to Clients
    - When Sally Left Ari*
    - Togstad v. Vesely, Otto, Miller & Keefe* (Minn. 1980)
    - Tante v. Herring* (Ga. 1994)

### **Reading:**

- Gillers, *Regulation of Lawyers*: pp. 531-33; 536-40, 543-55
- Model Rules: 5.5 (and Comments)

## **WEEK THIRTEEN**

**Tuesday, April 9<sup>th</sup>**

**In Class:**

- Discipline
  - Why Do Lawyers Violate the Rules, Purpose of Discipline, Sanctions
  - Disciplinary Systems
  - Acts Justifying Discipline
    - A Research Shortcut*
    - In re Warhaftig* (N.J. 1987)
    - In re Disciplinary Proceedings Against Siderits* (Wisc. 2013)
    - In re Jordan Shiff* (N.Y. 1993)
    - “Affirmative Action Hurts Those It Promises to Help”*
    - LGBTQ Policy*
    - “Inappropriate Touching”*

**Reading:**

- Gillers, *Regulation of Lawyers*: pp., 574-597
- Model Rules: 1.15, 8.3(a), 8.4(g) (and Comments for all)

**Thursday, April 11<sup>th</sup>**

**In Class:**

- Control of Quality: Nonlawyers in the Law Business (and Related Issues)
- Nonprofit Entities and Intermediaries
  - Public Interest Organizations
    - NAACP v. Button* (U.S. 1963)
    - In re Primus* (U.S. 1978)
- For-Profit Enterprises
  - “Can Viktor Be Our Partner?”*
  - “Can We Make This Deal?”*
  - AmazonLaw.com*

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 605-620, 625-634
- Model Rules: 5.4 (and Comments)

## **WEEKS FOURTEEN & FIFTEEN**

**Tuesday, April 16<sup>th</sup>**

**In Class:**

- Free Speech Rights of Lawyers and Judicial Candidates
  - Public Comment About Pending Cases  
*Gentile v. State Bar of Nevada*  
*People v. Harvey Weinstein*
  - Public Comment About Judges  
*#SourOnHoney*  
*In re Holtzman* (N.Y. 1991)

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 637-51
- Model Rules: 3.6(a), 3.8(f) (and Comments for all); Excerpts of ABA Code of Judicial Conduct (on Canvas)

**Thursday, April 18<sup>th</sup>**

**In Class:**

- Marketing Legal Services  
“*The Top Ten*”
  - Defining the Borders: *Bates and Ohralik*  
*Ohralik v. Ohio Bar Ass’n* (U.S. 1978)
  - Defining the Center: *Zauderer and Shapero*
    - Targeted Advertisements  
*Zauderer v. Office of Disciplinary Counsel* (U.S. 1985)
    - Targeted Mail  
*Shapero v. Kentucky Bar Ass’n* (U.S. 1988)
  - Defining the Methodology
    - How Does the Court Know Things?
    - Professionalism and Money

**Reading:**

- Gillers, *Regulation of Lawyers*: pp. 663-85
- Model Rules: 7.1, 7.2, 7.3 (and Comments to all)

**Tuesday, April 23<sup>rd</sup>**

**In Class:**

Catch-up and Review

**Thursday, April 25<sup>th</sup> - *NO CLASS – MONDAY SCHEDULE***