

THE GOOD LAWYER: PHILOSOPHICAL LEGAL ETHICS AND THE LAW GOVERNING LAWYERS

Alexander Guerrero
Wednesday 4:00 – 5:50pm
Furman Hall 310
LAW-LW.12078.001

COURSE DESCRIPTION

The Multistate Professional Responsibility Examination (MPRE) is a multiple-choice test, based largely on the Model Rules of Professional Conduct, that must be passed prior to admission to the bars of all but four U.S. jurisdictions. A common piece of advice given to those taking the test is to rank the answer choices from most to least ethical—based on one’s personal moral beliefs—and to opt for the *second*-most ethical option. This advice is typically offered cynically, as a kind of knowing acknowledgment that the Model Rules permit—and perhaps even require—lawyers to wade into murky ethical waters. A similar conclusion is reached by those academic critics of the “standard conception” of the good lawyer, which requires partisan, zealous advocacy for one’s client to the legally allowable limit. These critics call attention to what they see as the moral shortcomings of the legal profession and highlight the way in which the Model Rules contribute to these shortcomings.

This course is a philosophical examination of the debate between those who defend the existing norms of the legal profession, as embodied in the Model Rules, and those who reject those norms. The course will begin by presenting and discussing the standard conception as embodied in the Model Rules, and by considering the main defense offered on behalf of the standard conception: the adversary system defense offered by Monroe Freedman and others. We will then consider two of the most prominent rival views, those of William Simon and David Luban, both of whom advocate a considerably more “moralized” view of the good lawyer. We will conclude the first third of the course by considering Brad Wendel’s sophisticated reinterpretation and defense of the standard conception.

The last two-thirds of the course will focus on a number of core issues in legal ethics, including the decision to represent, solicitation, conflicts of interest, confidentiality, duties to disclose, client counseling, tactical delay, and withdrawal. For each issue, we will discuss the relevant Model Rules, and will consider a variety of philosophical perspectives on the issue. We will use these discussions to continue to evaluate the broader theoretical concerns raised in the first part of the course.

This seminar will be taught from a broadly philosophical perspective, but no background in philosophy is required or assumed. We will read some of the classic works in legal ethics, in addition to reading most of the Model Rules. The course should be adequate preparation for students interested in taking the MPRE.

EXAM AND GRADING

Your grade will be based on two components:

Class Participation: 20% of your grade will be a function of your class participation. This has two parts.

- Part One: attending and participating in class: 10%

- Part Two: sending three “reading questions” to alex.guerrero@nyu.edu by Tuesday at 2pm. These should be questions that came up while you were doing the reading, and I will use some of them in class to help structure discussion. You get 1% of overall course

credit for each set of questions you do, up to a maximum of 10%. If they arrive late or are below some relatively low threshold of quality, you will not receive the 1% credit. There are 13 classes after the first class, so you only have to do reading questions for 10 of the 13 weeks. For that reason, I will not accept excuses at the end of the term for non-completion for a particular week.

Exam: There will be a take home exam, taken over the entire exam period. There will be a set of questions distributed at the start of the exam period, with answers due at the end. This exam will be worth 80% of your grade.

REQUIRED TEXTS

- MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (4TH ed. 2010)
- DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988)
- WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998)
- W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010)

RECOMMENDED TEXT

- STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS (2012)

PLAN FOR SEMINAR AND READINGS

Week	Topic	Reading
Jan 18	History of the Law Governing Lawyers: 1908 Canons, 1969 Model Code, 1983 Model Rules	♦Model Rules (MR) Preamble and Scope
Jan 25	Zealous Advocacy: The Standard Conception	♦MR 1.3, 2.1, 3.2, 4.4 ♦Wendel pp. 17-48 ♦Luban pp. 393-403
Feb 1	Zealous Advocacy: The Adversary System Defense	♦Freedman & Smith pp. 15-43 ♦Luban pp. 50-58, 67-103
Feb 8	Against Adversarialism: Luban and Simon	♦Luban pp. 128-174 ♦Simon pp. 1-13, 138-181, 187-215
Feb 15	The New Standard Conception: Wendel's Legal Entitlement View	♦Wendel pp. 49-142

Feb 22	Client Control, Client Autonomy, and Decisions to Represent and Withdraw	<ul style="list-style-type: none"> ◆MR 1.2, 1.3, 1.16, 1.18, 3.1, 6.2 ◆William Finnegan, <i>Defending the Unabomber</i> ◆Interview with Jacques Verges ◆Wendel pp. 143-155 ◆Freedman & Smith pp. 46-66, 69-74
Feb 29	Solicitation	<ul style="list-style-type: none"> ◆MR 7.1, 7.2, 7.3, and 7.4 ◆Freedman & Smith, pp. 323-354 ◆Fred Zacharias, <i>What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Under-enforced Professional Rules</i> <p>Skim:</p> <ul style="list-style-type: none"> ◆Anita Bernstein, <i>Sanctioning the Ambulance Chaser</i> ◆Florida Bar v. Went For It, Inc. (1995) ◆Anthony Dukes, <i>Advertising and Antitrust</i>
Mar 7	Conflicts of Interest	<ul style="list-style-type: none"> ◆MR 1.7 ◆Freedman & Smith pp. 255-283 ◆Mickens v. Taylor (2001) <p>Skim:</p> <ul style="list-style-type: none"> ◆“Large Law Firm Lateral Hire Conflicts Checking: Professional Duty Meets Actual Practice,” by James Fischer ◆“Sample Conflict Waiver” from http://eric_goldman.tripod.com/ethics/dualrepwaiver.htm ◆“Conflict Checking System From A to Z” by Jim Calloway
Mar 21	Conflicts and Confidentiality	<ul style="list-style-type: none"> ◆MR 1.8, 1.9, 1.10, 1.18 ◆MR 1.6 ◆Proposed Rule Change MR 1.6(b)(7) ◆Luban pp. 177-205
Mar 28	Confidentiality in the Corporate Context	<ul style="list-style-type: none"> ◆MR 1.13 ◆Freedman & Smith pp. 128-150 ◆Luban pp. 206-234 ◆Simon pp. 54-62
Apr 11	Confidentiality & Candor	<ul style="list-style-type: none"> ◆MR 1.4(a)(5), 3.3, 3.4, 4.1 ◆Freedman & Smith pp. 159-186 ◆Gillers, “Freedman’s Solution to the Criminal Defense Lawyer’s Trilemma is Wrong...” 34 Hofstra L. Rev. 821 (2006)
Apr 18	Counseling, Coaching, and Cross-Examining	<ul style="list-style-type: none"> ◆MR 1.2(d), 1.16(a), 3.3(a)(3), 3.4(b), 4.4, 8.4 ◆Freedman and Smith pp. 187-213 ◆Wendel pp. 135-143

<p>Apr 25</p>	<p>Prosecutors and Wrap-up (session is an extra hour, running from 4-7pm)</p>	<p>♦MR 3.8 ♦Freedman & Smith pp. 285-321 ♦Luban, "The Conscience of a Prosecutor," 45 Val. U. L. Rev. 1 (2010)</p> <p>Skim: ♦Guerrero, "Lawyers, Context, and Legitimacy," 25 Georgetown Journal of Legal Ethics (2012)</p>
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