

CRIMINAL PROSECUTION AND DEFENSE LAWYERING WORKSHOP:
Zealous Advocacy and Situational Ethics in the Adversarial System of Justice

Syllabus, Spring 2011

1. **The Adversarial System of Justice:** What are the advantages and disadvantages of the adversarial system of justice? Professor Monroe Friedman, *Understanding Lawyers Ethics*, Chapters 2, 3 and 4; News articles appended to this syllabus: Federal prosecutors likely to keep jobs after cases collapse (*USA Today*, Dec. 8, 2010); Charges dropped in South Florida cat death case. (*Associated Press*, Nov. 24, 2010); Tyler Weinman, Accused 'Cat Killer,' Plans on Suing Miami-Dade Over Bungled Investigation. (*Riptide*, Dec. 7, 2010); Charges Dropped Against Teen in Cat Killings. (*Just News*, Nov. 25, 2010).
2. **The Role of the Judiciary:** Does the Constitution protect an accused from judges who are vindictive? Can the judicial branch penalize a citizen for exercising his right to a jury trial? Can the court penalize a defendant for refusing to cooperate with law enforcement? Given the judiciary's limited jurisdiction to resolve "cases or controversies" under Article III of the Constitution, can a court reject a tendered plea agreement or impose a sentence higher than the prosecutor is seeking? *Corbitt v. New Jersey*, 99 S.Ct. 492 (1978); *United States v. Corbitt*, 996 F.2d 1132 (11th Cir. 1993); *United States v. Burgos*, 276 F.3d 1284 (11th Cir. 2001); *United States v. Gutman*, 95 F.Supp. 2d. 1337 (S.D. Fla. 2000) (relevant parts); *United States v. O'Neill*, 437 F.3d 634 (7th Cir. 2006); *Wilson v. State*, 845 So.2d 142 (2003).
3. **The Role of the Grand Jury:** How does a prosecutor decide who to investigate, which crimes to prosecute, and what evidence to present to a grand jury? Who instructs the grand jurors as to the elements of the offense? If the government fails to present substantial exculpatory evidence to the grand jury, or worse, presents false testimony to the grand jury, can the court dismiss the indictment pre-trial? What role does the judiciary play in the prosecution function? *Wayte v. United States*, 105 S.Ct. 1524 (1985); *United States v. Williams*, 112 S.Ct. 1735 (1992); *United States v. Jacobo-Zavala*, 241 F.3d 1009 (8th Cir. 2001); *In re United States*, 345 F.3d 450 (7th Cir. 2003); Rules 6 and 48, FedR.Crim.P.
4. **The Prosecutor's Obligation to Disclose Favorable Evidence:** Does a prosecutor have a legal/ethical duty to disclose favorable evidence to the accused and/or the jury? Does a prosecutor have any obligation to inform the defendant of exculpatory evidence before taking a plea? *Kyles v. Whitley*, 115 S.Ct. 1555 (1995); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995); *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001); *United States v. Ruiz*, 122 S.Ct. 2450 (2002).
5. **Plea Bargaining:** Does the Constitution protect an accused from prosecutors who are vindictive? Can the executive, legislative branch penalize a citizen for exercising his right to a jury trial? What advice must an attorney give his client regarding the decision to plead guilty or go to trial? What does an attorney do if a guilty client insists on going to trial or an innocent client insists on taking a deal? What is a lawyer's duty of candor during the plea bargaining process? Rules 11, 32, 35, Fed. R.Crim.P.; *North Carolina v. Alford*, 400 U.S. 25 (1970); *Santobello v. New York*, 404 U.S. 257 (1971); *United States v. Goodwin*, 102 S.Ct. 2485 (1982). *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996); *Wooten v. Thaler*, 598 F.3d 215 (5th Cir. 2010);
6. **Immunity and Compulsory Process:** In its "search for the truth," does the criminal trial provide a level playing field for prosecutors and defense attorneys to present the facts to the jury? While a prosecutor can compel a witness to testify, grant immunity and pay for

testimony, how does the defense obtain the exculpatory testimony of a witness who invokes his Fifth Amendment right and refuses to testify? 18 U.S.C. § 6001, et seq.; *United States v. Hubbell*, 120 S.Ct. 2037 (2000), *United States v. Westerdahl*, 945 F.2d 1083 (9th Cir. 1991); *United States v. D'Apice*, 664 F.2d 75; *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (*en banc*).

7. **Confrontation and the Right to Testify:** What defense may an attorney pursue for a client whom the attorney “knows” is guilty? During cross-examination, can the attorney attempt to discredit a government witness whom he knows is truthful? Can the attorney permit a witness to testify in court in favor of his case if the attorney does not believe the witness? Can the attorney permit his client to testify if the attorney has “reason to believe” that the client will falsely exculpate himself? When is “preparing” a witness to testify witness tampering? Friedman, *Understanding Lawyers Ethics*, Chapters 5, 6 & 7; *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986); *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992); *State v. McDowell*, 681 N.W.2d 500 (Wisconsin Supreme Court 2004).
8. **Effective Assistance of Counsel:** Who decides trial strategy, the attorney or the client? Does an attorney provide “effective assistance of counsel” if he overrides the client’s proposed theory of defense? *Indiana v. Edwards*, 554 U.S. 164 (2008); *Florida v. Nixon*, 125 S.Ct. 551 (2004); *United States v. Luciano* 158 F.3d 655; *United States v. Schwarz*, 283 F.3d 76; *Haynes v. Cain*, 298 F.3d 375 (5th Cir. en banc 2002); *State of Kansas v. Carter*, 14 P.3d 1138; *Ryan v. Rivera*, 2001 WL 1203391 (2d Cir. 2001).
9. **Counsel of Choice:** What are the potential conflicts of interest that may disqualify a defendant’s counsel of choice? *Gonzalez-Lopez v. United States*, 548 U.S. 140 (2006); *Wheat v. United States*, 108 S.Ct. 1692 (1988); *Mickens v. Taylor*, 122 S.Ct. 1237 (2002); David Orentlicher, *Fee Payments to Criminal Defense Lawyers From Third Parties: Revisiting United States v. Hodge and Zweig*, 69 Fordham L. Rev. 1083; IRS Form 8300.
10. **Getting Paid Without Getting Indicted:** Do the money laundering and criminal forfeiture statutes require that defense counsel undertake a “due diligence” investigation to determine whether his client is paying him with the proceeds of a crime? See *Caplin & Drysdale, Chartered v. United States*, 109 S.Ct. 2646 & 2667 (1989) (majority and dissenting opinions); *United States v. Monsanto*, 109 S.Ct. 2657 (1989); *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996); *United States v. Velez (Benedict Kuehne)*, 2008 WL 5381394 (S.D.FL. 2008); 18 U.S.C. §§ 982, 1956, 1957 & 1963.
11. **Prosecuting Defense Counsel:** How vigorous can a defense attorney represent the interests of his criminal client without “crossing the line” from criminal lawyer to lawyer criminal acting as “house counsel” or consigliere in furtherance of a criminal conspiracy? Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 Harv. L. Rev. 670 (1992); *United States v. Abbell*, 271 F.3d 1286, 1298 (11th Cir. 2001); *United States v. Knowles*, 66 F.3d 1146 (11th Cir. 1995).

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