

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

For law students passionate about prosecuting and/or defending criminal cases, this 2-credit workshop will focus on legal theory and practical application, with an emphasis on ethical constraints. Guest speakers, including judges, prosecutors and defense counsel, will help foster vigorous classroom debates and provide a balanced presentation of the cutting edge legal issues of the day. Class participation is therefore mandatory and comprises up to one-third of the final grade. An open book, take-home, final exam challenges the student to spot the legal issues that were covered during the semester and brief the arguments for both sides.

Syllabus, Spring 2014 (updated November 21, 2013)

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: *Justice and Prosecutorial Misconduct* (NY Times, page A22, Dec. 29, 2011); *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 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) (oral argument: http://www.oyez.org/cases/1990-1999/1991/1991_90_1972); *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.
3. **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? *Smith v. Cain*, 132 S.Ct. 627 (2012) (http://www.oyez.org/cases/2010-2019/2011/2011_10_8145); *Connick v. Thompson*, 131 S.Ct. 1350 (2011); *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).
4. **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 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); *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *United States v. Mezzanatto*, 513 U.S. 196 (1995)

5. **The Role of the Judiciary:** Given the judiciary's limited jurisdiction to resolve "cases or controversies" under Article III of the Constitution, can a judge reject a tendered plea agreement or impose a sentence higher than the prosecutor is seeking? Can a judge penalize a citizen for exercising his right to a jury trial? Can a judge penalize a defendant for refusing to cooperate with law enforcement? How does the Constitution protect an accused from a "vindictive" judge? *Corbitt v. New Jersey*, 99 S.Ct. 492 (1978); *United States v. Corbitt*, 996 F.2d 1132 (11th Cir. 1993); *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); *In re Vasquez-Ramirez*, 443 F.3d 692 (9th Cir. 2006); *Wilson v. State*, 845 So.2d 142 (2003).
6. **Effective Assistance of Counsel:** What is the role of defense counsel: advisor, gladiator or both? What obligation does defense counsel have in advising his client whether to plead 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? 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? *Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012); *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996); *Wooten v. Thaler*, 598 F.3d 215 (5th Cir. 2010) *Indiana v. Edwards*, 554 U.S. 164 (2008); *Florida v. Nixon*, 125 S.Ct. 551 (2004); *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).
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. **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 (5th Cir. 1981).

9. **Right to Conflict-Free Counsel v. Counsel of Choice**: What are the potential conflicts of interest that may disqualify a defendant's counsel of choice? Can co-defendants enter into "Joint Defense Agreements?" *Gonzalez-Lopez v. United States*, 548 U.S. 140 (2006); *Mickens v. Taylor*, 122 S.Ct. 1237 (2002); *Wheat v. United States*, 108 S.Ct. 1692 (1988); *United States v. Almeida*, 341 F.3d 1318 (11th Cir. 2003); 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. Kaley*, 677 F.3d 1316 (11th Cir. 2012); *United States v. Velez (Benedict Kuehne)*, 586 F.3d 875 (11th Cir. 2009); 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. Elso*, 422 F.3d 1305 (11th Cir. 2008) *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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