

As you can see, this was the syllabus for this past spring. I post it to give you a strong sense of the course. That said, I plan to make some revisions for this coming semester.

**Syllabus**  
**Practical Legal Ethics**  
Spring 2021  
Course No. 211.2

Instructor: Bruce Budner  
Phone: 510-219-2494 (mobile)  
Email: [bruce\\_budner@berkeley.edu](mailto:bruce_budner@berkeley.edu)

Class Meeting: Wednesdays, 6:25p.m.–8:15p.m. Pacific Time  
Zoom link: <https://berkeley.zoom.us/j/96839433093?pwd=YTBwLzRYd1NaVXN0ODJzal-NX5t5Zz09>

Zoom passcode: 986826

bCourses site: <https://bcourses.berkeley.edu/courses/1500480>

Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.

Preamble to ABA Model Rules of Professional Conduct

Many of you take this course just to satisfy your PR requirement. You think that legal ethics is a boring subject. Au contraire. Legal ethics is exciting, challenging, and profound. It is required for a very good reason: In my humble opinion, it is the most important course taught in law school. At its essence, the exploration of this subject forces one to consider what kind of lawyer, even what kind of person one wants to be. I think you will enjoy our joint exploration. And if you take it seriously, this course may just help you get to know yourself a little bit better. How about that for creating high expectations?

The course considers legal ethics from a real world perspective. The hypos we'll discuss are designed to sensitize you to the kinds of ethical and moral quandaries you will no doubt face in your careers. They demand consideration of the many competing factors that tug at lawyers as they face those decisions. These factors include duties to interests of clients, the rules of professional conduct (of which you will get a healthy dose), lawyers' personal values and self-interests, the demands of justice and truth-seeking, and the rights of others. Lawyers are not merely rule reciters and legal analysts. They are human beings trying to navigate their careers and lives. One important course goal is to assist you in developing a rough methodology for approaching these issues in ways that are consistent with ethical rules and your own sense of self.

## **Before I say more about the substance of the course**

Most of 2020 presented and this coming spring semester will again present challenges for all of us. I can appreciate the difficulty of studying law while being socially isolated, being concerned about your health and that of your family and friends, facing uncertainties about the beginnings of your careers, and much more. Not to mention the limitations of Zoom classes. You can be assured that I am mindful of all these challenges. I am continually working towards determining best practices to assure your well-being and that your learning experience will be as rich as possible. In that regard, here are some of the things this course will offer:

- 1) I invite each student to a one-on-one Zoom meeting with me in the weeks before or after the course begins. This is entirely voluntary, but I confess that it is as much for my benefit as yours. The purpose is for us to begin to get to know each other, something that has been very important for me entire time I have been teaching this course. Just email, call or text me to set up a time.
- 2) Along the same lines, I am going to make myself very available to you, both during regular Zoom office hours (45 minutes before and after each class) and at other times that you would like to arrange.
- 3) Though I considered dropping the skit component of the course (see the description of the student presentations below), I have decided to keep it. Many students have expressed how much they enjoy the creative outlet and opportunity to work closely with other students. I understand that creating and presenting them may be more logistically difficult, but I think/hope that you find it to be worth the effort.
- 4) To allow more time for class discussion and to make classes more about you than me, I am going to experiment with pre-recording and posting in advance of each class part or all of my introductory lecture. For that to be effective, you will need to watch them before class and come prepared to ask any questions you may have about the material I covered.
- 5) We will have breakout sessions in most or all classes. And I am learning new Zoom features with the hopes of incorporating them into my teaching bag of tricks. Please make sure that by the start of the semester you have updated the latest version of Zoom.
- 6) I believe that being able to see one another fosters class discussion and connection. I realize that some students may have legitimate reasons to turn off their video during class, but I strongly encourage everyone to keep your video on to the extent feasible.
- 7) I will happily entertain any thoughts or suggestions you might have.

## **For whom the course is best suited**

So you now probably have a sense that this course is designed for those who enjoy learning by doing and discussing. Its hallmarks are lively discussions of hypothetical problems, student-performed skits, and sufficient lecturing to cover the basics.

### **What the course covers**

The starting point for our discussions will typically be to identify lawyers' ethical duties in particular circumstances. I define "ethical" for purposes of this course in a non-classical way: compliance with the duties and standards that derive from written rules and case law. We will define "moral" somewhat differently: adherence to one's personal views of right and wrong.

For the ethical duties our particular focus will be the ABA Model Rules of Professional Conduct (Model Rules), which have been adopted in one form or another by every state (California, most recently). We will examine the majority of the Model Rules, upon which the MPRE is based. We will also consider the significant differences between the Model Rules and California's new version of it, with particular emphasis on California's differing treatment of the duty to preserve client confidences.

But we will drill much more deeply than a mere study of rules and cases. This course will challenge you to understand the limitations of the rules and to reflect on how you would conduct yourselves when facing a variety of ethical dilemmas for which the rules fail to offer clear guidance. The Model Rules represent only a minimum standard of conduct to which lawyers must adhere. Only you can decide where to set your bar.

We will explore a range of problems faced by practicing lawyers, including litigation and transactional matters, civil and criminal cases, and the particular concerns of prosecutors and other government lawyers. We will assess the kinds of ethical (as defined by rules) and moral (referring to personal morality) decisions lawyers must make and the many consequences of those decisions.

We will devote our final class to discussing substance abuse and the related topic of professional satisfaction. This has proved to be especially meaningful for many students.

N.B. This course is not designed primarily as a prep for the MPRE. We will not go over the types of multiple choice questions found on the MPRE. We will not cover every rule tested on the MPRE. I am much more interested in exploring with you the kinds of real issues that practicing lawyers face than I am teaching to a multiple choice test. By the end of the course, most students endorse that preference.

Notwithstanding the above, students regularly report to me that the course provides a strong foundation for independent MPRE preparation.

### **How classes are structured**

Unless I have posted a pre-recorded lecture, each class will begin with a foundational lecture about 20-30 minutes in duration, followed by discussion of two or three

hypothetical problems that simulate the kind of hard problems lawyers face every day. The majority of classes will also feature a student presentation of one of those hypos.

The collection of hypos will implicate a wide range of issues. We will assess the kinds of choices lawyers must make and the many consequences of those choices to the lawyer, the client, and others.

We will consider the limits of, the holes in, and even the apparent internal inconsistencies within the Model Rules. The problems often defy the idea of a “correct” answer. They are intended to draw out varying points of view. You are strongly encouraged to introduce your own experiences and your own values and worldview into our conversations.

The following seven questions apply to all the hypos and present the overarching considerations for the dilemmas the hypos pose.

### **The Seven Questions**

The questions (my variation of IRAC) we will examine for the body of hypotheticals and the final exam are:

- 1) What are the ethical issues and choices, which may evolve over time?
- 2) To what extent do the rules and other relevant authority offer guidance and where they stop short?
- 3) What tensions exist between ethical standards and any other considerations?
- 4) What are the potential consequences of the choices for the lawyer, in terms of discipline, civil or criminal liability, and any personal cost?
- 5) What impact might the choices have on the client, third parties, the legal profession, the justice system, and/or the general community?
- 6) How would you conduct yourself when facing such a problem?
- 7) How might the ethical problems have been avoided?

To stimulate a more granular consideration of the hypos, I have posted discussion questions tailored to each hypo. They are intended to help you drill down to the particular aspects of each hypo that we will discuss.

Each of the hypos takes place in Ethicstan, a jurisdiction that has adopted all the Model Rules and comments, but also considers California law on the duty to protect client confidences.

### **Grading**

The final grades will be based on the total of:

Student presentation–10%

Summary–25%

Participation in class discussion–25%

Final exam–40%

## — Student Presentations

Classes in weeks 4–11 (which may change depending on our final class size) will feature a student presentation of one of the hypos on the syllabus for that class. Typically, four students will participate in the presentation. Every student will participate in one presentation during the semester. The presenters may select either of the two non-asterisked hypos on the syllabus for the week of the presentation.

Presentations will be in the form of a role play. This format places the presenters in the shoes of the lawyer and those impacted by the lawyer and to grapple with the difficulty of the situation.

Presentations should last no more than 10 minutes. The presenters should assume that all students have carefully read the hypo and so should not spend time unnecessarily repeating the facts. Rather, the presentation should build on the problem with the aim of demonstrating a nuanced understanding of the issues and consequences of the lawyer's choices. Creativity and humor are always welcome, but not at the expense of the pedagogic purpose.

The structure of the role plays is limited only by your imagination. Some previous skits have been client counseling session, a proceeding before the Bar disciplinary court; meeting with client after a lawyer makes a bad decision, lawyer seeking ethical advice from a mentor, lawyer explaining conduct to a colleague/parent/spouse/best friend. Students have devised skits based on various TV shows, confessions to bartenders, angel and devil themes, and even a trick-or-treat Halloween confrontation.

Some groups have used slides (though I discourage busy slides that distract from the performance) or music or video to enhance their presentations. You may pre-record your presentation or present it live on Zoom.

I have posted in the Summaries module of bcourses a script of a very good presentation from a prior class.

In the week prior to the presentation, the presenting students should Zoom meet with me for about 45 minutes to discuss the issues the presentation should explore, the rules and authorities that pertain to those issues, and idea(s) for the structure of the presentation. The Thursday or Friday before the presentation are particularly good days to meet because they allow sufficient time to prepare for the meeting and then sufficient time thereafter to incorporate new ideas into the presentation.

I evaluate each presentation based on the depth and insight into the difficult choices the lawyer faces, the understanding and effective explanation of the guidance offered by the rules and other standards, the attention it commands from the class, the effort reflected, and the level of preparation demonstrated at the pre-presentation meeting.

Please be mindful of your other commitments when you sign up for your presentation. All presenters are required to attend their pre-presentation meeting.

### — Summaries

Each student will prepare one written summary of a hypo. The summary should analyze the hypo through the lens of the seven questions listed above (not the discussion questions for the hypo) and should be structured with a heading for each of the seven questions. (The final exam will require the same approach.) The summaries should not exceed seven double-spaced pages, with 1 inch margins and 11 point type. As with the presentations, you should not restate all the facts of the problem or the entire body of pertinent rules or comments. Just quote or refer to the particular facts or portions of the rules you are discussing.

The summaries should be emailed to me by 10:00 p.m. on the Monday following the class in which we discuss the hypo. If we do not complete discussion of the hypo, the summary is due on the Monday after the completion of the discussion. Timely submission of assignments is an important part of professionalism. If you need to submit an assignment late for a valid reason, such as a family emergency or illness, email me to request an extension. Unexcused late assignments will result in a points deduction in an amount dependent on the circumstances.

I will review the first draft of the summaries and offer detailed comments and suggestions for improvements or revisions. The revised version will be due within one week after you receive my comments. As each summary is finalized, I will post it to bCourses. Writing the summaries will be good practice for the exam and the collection of summaries will provide a highly useful resource for exam preparation. I encourage you to read the posted summaries as the course goes along.

I evaluate the summaries based on the thoroughness of the issue identification, the sophistication of the application of relevant rules and standards, and the thoughtfulness and insight reflected.

Your answer to question 1 should not be a discussion. Rather, it should merely list the issues. Your answer to question 2 requires in-depth analysis should consume about half of the summary. Questions 3–7 will take the rest of the paper. You may conclude that a particular hypo calls for the same answer for questions 6 and 7. In that case, you may offer a combined answer to those two questions

My assessment of the summary will focus largely, but not exclusively, on the first draft.

Please do not sign up for both a presentation and summary of hypos that are on the syllabus in the same week because I want each student to summarize and present different hypos.

### — Class Participation

I evaluate each student's participation in classes 2–13, awarding 0–5 points per class. Please hit the raised hand icon to be recognized. I try very hard to be even-handed in calling on students, but I may give preference to a student who hasn't been participating as much others. I emphasize quality over quantity. I do not reward those who speak when they have nothing to add to the discussion. Participation that I particularly value includes:

- 1) thoughtful contributions that reveal an appreciation of the nuances of the hypos;
- 2) demonstrated understanding of the applicable rules (including the official comments to the rules) and standards;
- 3) sharing your experiences and values;
- 4) comments that tie the assigned articles and videos into the discussion; and
- 5) synthesis of what we've learned from previous classes into the current discussion.

Students with unexcused absences get 0 points for that class. (See attendance policy below.) Students with excused absences get 1 point. Students who attend the entire class but don't participate get 2 points. Students who offer useful comments get 3–5 points based on the criteria stated above.

The best way to prepare for class is to read carefully the assigned readings and hypos and importantly, to think through both the Seven Questions and the discussion questions that I have written for each hypo. Students who prepare in this way should be well able to make meaningful contributions to the discussions.

Differences of opinion, respectfully presented, make the class all the more worthwhile. To quote from an evaluation, "What's surprising (and nice, to some extent) is that you'll be surprised to find people who feel just as strongly, but differently than you about what might seem to be an 'obvious' moral or ethical choice."

### — Final Exam

The final exam will present one hypo similar to, but somewhat wider-ranging than the ones we will discuss throughout the semester. As with the summaries, you will be asked to analyze the hypo through the lens of the seven syllabus questions. It will be an open-book, take-home exam, which you can take at any time during the exam period. I expect to allow three hours for the exam, with a 2850 word limit.

## Important Policies

Classes are where much of the value of this course lies. There we will discuss the hard questions. Important and sometimes opposing points of view are offered. For these reasons, I have policies on attendance and devices that may differ from your other courses. I take these policies seriously and I know you will too.

### — Attendance

We meet only 14 times during the semester. Attendance of these classes is mandatory. Please do not take this course if you do not intend to attend class faithfully.

Of course, this does not mean that you can never miss a class. If you have a good reason (genuine illness, family emergency, travel for a job interview or clinic activity, and the like), I simply ask that you email me before the class or at least by the day after to explain your absence. If I don't hear from you, your absence will be considered unexcused. More than one unexcused absence OR more than three absences, excused or not, absent compelling and unavoidable circumstances, will in my sole discretion likely result in my dropping you from the course or assigning you an NC.

On a related note, I try very hard to begin and end class on schedule. Please be punctual.

### **Office Hours**

I will be in the Zoom classroom beginning at 5:40 p.m. before each class. I will also remain on Zoom after the class has ended for additional "office hours." And I am very flexible in scheduling meetings at other times. Just email or call me.

### **Class Recordings**

All classes will be recorded and posted to bCourses. University policy prohibits redistribution of class video, audio, or screenshots. Doing so would violate student privacy, not to mention my intellectual property rights from which I derive untold riches.

### **Readings**

I very strongly encourage you to have the assigned rules and comments readily available to you during the entirety of each class. You may choose to purchase a rule compilation book to which you can refer during class each week. There are many good ones to choose from. I use the most recent edition of Morgan, Selected Standards on Professional Responsibility. I have asked the bookstore to order it for the class. There are many other similarly good compilations such as those compiled by Zitrin, Dzienkowski, Lerman, and others. If you would like to save some money, Amazon and other online sites sell older editions of these books. As long as they are 2013 editions or newer, they depart from the current version in only a few relatively minor ways.

Alternatively, the ABA Model Rules can be found at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html) and the California rules at <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules>. But, unless you will have the rules available to you on a different device or screen than your main Zoom screen, I suspect you will find it more useful to have one of the books identified above.

Whenever the Model Rules are specifically assigned, you should also read the official comments to them. I suggest you familiarize yourself with the entire Model Rules early in the course (the Rules only, the comments can wait until the week in which we study particular rules). Gaining familiarity with the entirety of the rules at the outset will offer a valuable perspective.



A completely optional text is Rotunda, Legal Ethics in a Nutshell, 5th Edition (West 2018). It is available on Amazon, even for Kindle. Though we will not discuss it directly in class, it offers breadth that the two-credit format of our course doesn't allow. Additional required readings are posted on bCourses and listed below.

### **Learning Objectives and Outcomes**

The general objectives and outcomes for the course are:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system;
- (d) Other professional skills needed for competent and ethical participation as a member of the legal profession; and
- (e) Using the law to solve real-world problems and to create a more just society.

More specifically, my objectives and outcomes for each class are for you to be able to identify ethical issues in the hypos, to learn the substantive law relating to the topics specifically identified for each class below, to develop an appreciation for the many tensions that lawyers face in complying with their duties, to recognize the wide-ranging consequences of lawyers' ethical decisions, and to think hard about how you might handle similar difficult choices. I have posted below an intro to each class that to some extent identifies the learning objectives for that class.

#### **Required assignments due at least 24 hours before the first class:**

1. Please send me an email with a list of the three core values that best define you as a person. By "values" I mean those things that provide an internal reference for what you see as good, beneficial, important, useful, desirable and constructive. Values generate behavior. If you need help, here is a list that might stimulate thought. <http://www.threadsculture.com/blog/company-culture/core-values-list-threads/>
2. Please introduce yourself in the student intro section of our bCourses page. I have posted my own introduction in the Instructor Welcome on our bCourses home page. Your introduction is important because it helps me and your fellow students get to know you, which is valuable given the nature of the class discussions. And it makes it easier for me to learn all of your names. See my Instructor Welcome note for suggestions for your own intro.

S

#### **Schedule of topics, assigned reading, and hypos for each class**

\*I have a hard time predicting how long discussions of particular hypos will last. We may or may not have time to discuss in class the hypos marked below by an asterisk. But I have included them because they present important issues. If we do not discuss the problem, shortly after class I will post on bCourses my own mini-analysis of the hypo. The topics and rules covered by the asterisked hypos will be the subject of a

student summary and are fair game for the exam, regardless of whether we discuss them in class.

Jan. 20 Introductions; course overview; regulation of the legal profession; ethical rules vs. the greater morality; the adversary system; representing the unpopular client; lawyer liability. Does being an effective lawyer sometimes mean being a bad person?

Intro to 1st class

Preamble to ABA Model Rules; MRs 1.0, 1.3 (comment 1), 4.4(a), 8.3, 8.4, 8.5.

CA Bus. & Prof. Code sec. 6068 (f) and (h).

Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L. Rev. 63-64, 73-89 (1980).

1500+ Lawyers Call for...

Some Lawyers Don't Want...

Why Attacks on Trump's Election Lawyers...

Cleta Mitchell, who Advised Trump...

Hypo #1 Free Drinks

#2 Trump's Lawyers

Jan. 27 Creating and terminating the attorney/client relationship. Duties to prospective clients. Scope of authority.

Intro to 2nd class

MRs 1.2, 1.16, 1.18

CA Bus. & Prof. Code sec. 6068(m)

"1.18 violation results in suspension"

"How to end a professional relationship or..."

Hypo #3 I thought you were my lawyer

#4 I've had enough

#5 No Deal\*

Feb. 3 General duties to clients: fiduciary duty; honesty and fairness; competence and diligence; communication and advice. Limited scope (unbundled) representation. Billing and fees.

Intro to 3rd class

MRs 1.0(e), 1.1-1.5, 1.8 (a), 1.15, 2.1

"When two plus two..."

"Suit Offers a Peek..."

"Grazing..."

“Associate fired, suspended...”  
ABA Formal Opinion 11-458

Hypo #6 No good deed  
#7 Try, try, try, just a little bit harder  
#8 But you asked\*

Feb. 10 Preserving confidences: a duty and a benefit; contrasting MR and California approaches. Compare with attorney/client and work product privileges. Confidentiality vs. the greater good. Disclosure to clients. Special rule for diminished capacity clients.

Intro to 4th class

MR 1.0(d), 1.2(d), 1.6, 1.8(b), 1.9(c), 1.14, 4.1(b)  
CA Rule of Professional Conduct 1.6  
Fed R. Civ. Proc. 26(b)(3)  
CA Evid. Code secs 950-962

Hypo #9 Selling her out  
#10 Do you want to know a secret?  
#11 Are you sure?\*

Feb. 17 Avoiding conflicts of interest. Concurrent conflicts: actual and potential conflicts between concurrent clients; multiple client representation; personal interests of lawyer.

Intro to 5th class

MR 1.0(e),(i), and (n), 1.7, 1.8, 1.10[3]  
“Clearly enforceable future conflict waivers”

Hypo #12 Vince and Vicky  
#13 Is this comfortable?  
#14 Work on this\*

Feb. 24 Concurrent conflicts II: criminal co-defendants; insurance defense; taking inconsistent positions in litigation. Corporate/affiliate conflicts.

Intro to 6th class

MRs 1.4(a)(5), 1.7, 1.8(f)  
“Unholy Alliance...” (pp 3-8 of bCourses posting)

Hypo #15 Defend my life  
#16 Defending whom?  
#17 Because we pay you\*

- Mar. 3            Successive conflicts. Imputation of conflicts. Screening.  
Intro to 7th class  
MRs 1.0(c) and (k), 1.3[4], 1.9, 1.10  
Norton Rose Terms of Engagement  
Hypo #18 Loyalty to whom?  
      #19 Thanks partners
- Mar. 10           Duties to organizational clients. Government lawyer conflicts. Confidential settlements and restrictions on practice.  
Intro to 8th class  
MR 1.11, 1.13, 5.6  
“How G.M.’s Lawyers Failed in their Duties”  
Does Boies Schiller Represent Theranos’ Elizabeth Holmes or Not?  
Hypo #20 A nonstarter  
      #21 Under the bus  
      #22 Shaking it up\*
- Mar. 17           Duties to the adjudicative process I: filing suit--knowledge and good faith; honesty and fairness in discovery; concealment of evidence. Responsibilities of supervising and subordinate lawyers. Lance Armstrong.  
Intro to 9th class  
MRs 2.1, 3.1–3.4, 5.1, 5.2, 8.3, 8.4  
Fed R. Civ. Proc. 11(b), 26(g)  
“Lance Armstrong Justifies PEDs”  
“Fatal Discovery”  
<https://talkingpointsmemo.com/news/giuliani-white-house-dominion-letters>  
Hypo #23 All in the Family  
      #24 Sign this while I’m out
- Mar. 24           Spring break!
- Mar. 31           Duties to the adjudicative process II: truth-telling.  
Intro to 10th class  
MRs 1.0(f), 3.3, 3.4  
Hypo #25 Preparing the witness  
      #26 Truth be told

- Apr. 7           Duties to the adjudicative process III: Duties to third parties (including adversaries): negotiation ethics; litigation tactics and trial publicity. Civility and professionalism.
- Intro to 11th class
- MRs 1.2(d), 3.6, 4.1, 4.4, 8.3  
                  “Inadvertent Disclosure”  
                  “21st Century Lawyer’s...”
- Hypo #27 To save the earth  
                          #28 Competitive sport  
                          #29 Look what I found (discussion will carry over to the next class.)
- Apr. 14           Communication with represented and unrepresented persons.
- Intro to 12th class
- MRs 3.7, 4.2, 4.3, 5.3
- Hypo #30 Talk to them  
                          #31 Let’s see what we can find
- Apr. 21           Duties of criminal prosecutors.
- Intro to 13th class
- MR 3.8
- Scot-Free: What Happens...  
                  Innocence Project/Santa Clara Law School Executive Summary  
                  NY Times Editorial: Rampant Prosecutorial Misconduct
- Hypo #32 Who is guilty?  
                          #33 You can trust me
- Apr. 28           Substance abuse. Professional satisfaction.
- Intro to 14th class
- “The Lawyer, the addict” New York Times, July 15, 2017
- Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of  
                  an Unhappy, Unhealthy, and Unethical Profession  
                          and/or  
                  Deborah Rhode, Conditions of Practice
- “Why associates are leaving law firms”

What it takes to become a partner

May

Exam Review Session