BEHAVIORAL LEGAL ETHICS
Spring 2017
TR 9:00-10:15 · Room 339

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COURSE DESCRIPTION

Behavioral science provides insight into why lawyers who believe themselves to be ethical nonetheless engage in professional misconduct. Students will gain an understanding of the psychological factors outside of the lawyer's conscious awareness that impact decision-making and develop strategies for combatting these issues in practice. Course materials will include case studies of illegal and unethical lawyer conduct and behavioral science research. Students will analyze and discuss readings in online forums and in the classroom. In a final project, students will present research into how behavioral science explains attorney misconduct in a selected practice setting.

COURSE OUTCOMES

In the course, students will:
   • Re-think their understanding about why lawyers engage in professional misconduct;
   • Gain an understanding of the psychological factors outside of the lawyer's conscious awareness that impact decisionmaking;
   • Develop strategies for self and the legal profession to combat and respond to forces that influence poor decisionmaking in practice; and
   • Appreciate the connection between morality and legal liability, so that the lawyer can make better decisions and provide better advice to clients.

ASSIGNED READING

In most classes, we will read an article and a case study. Sometimes you will watch a video or complete an exercise prior to class. Reading assignments are posted at TWEN and/or via the links provided in this syllabus.

COMPONENTS OF YOUR GRADE

1) **Discussion Forum Posts and Replies. 75 Points.**

We will use Discussion Forums on TWEN to start a conversation about the readings before class. Your posts should have the feel of a law blog post (such as https://behaviorallegalethics.wordpress.com). The replies should be thoughtful, respectful responses to the posts.

The schedule is on the syllabus. The groups are listed on TWEN.

Students in the class are divided into four groups: A, B, C, and D. Groups A & B will write posts and replies for Tuesday classes. Groups C & D will write posts and replies for Thursday classes.

- For Groups A & B: Posts are due by noon on Monday. Replies are due no later than midnight.
- For Groups C & D: Posts are due by noon on Wednesday. Replies are due no later than midnight.
- The entire class should read all posts and replies for every class, regardless of whether your group wrote posts or replies. You should feel free to post replies to posts even if you are not required to do so!

Posts in Discussion Forums. Up to 50 of the 75 points. Five times during the semester, you will write a 200 to 250-word post in the Discussion Forums. Give your post a name that includes the class number (Tuesday, January 17's class is Class 2) and a title that will create interest in reading your post. Be creative in writing your post. You can talk about an aspect of the reading (the article or the case study) that was particularly interesting to you, an aspect of the reading that you disagreed with and why, how you think the reading will impact you (or not) in practice, an additional case study example of the issue, additional research that you found on the subject of the reading, etc.

Replies to Posts in Discussion Forums. Up to 25 of the 75 points. Five times during the semester, you are required to write a reply to one of your classmate's posts. Each post must have at least one reply, so the person who posts a reply first will have the most posts to choose from (and the person who posts last will reply to the remaining post).

Additional Replies in Discussion Forums. The entire class should feel free to post replies to any and all posts. This is not required, but will make the class discussion more interesting if we have heard several points of view before class.

2) **Class Participation. 100 points.**

An essential aspect of this course is class participation. For each class, you should be actively engaged in the class discussion – participating in all in-class exercises and demonstrating that you read and thought about the assigned articles, case study materials, and Discussion Forum posts and replies. You can earn up to 5 points for your participation in each class (from January 17 to March 30). Each student has one "excused absence," when you can be absent for any reason or not participate much (or at all) but still earn 5 points. For any additional absences (regardless of the reason), you will receive 0 points for the day.

3) **Presentation: 100 points.**

We will end the semester with your presentations on behavioral legal ethics topics. Instructions for the presentation are available on TWEN.

COURSE SCHEDULE

Week 1
1) January 12 (Thursday)

Topic: Course Introduction

Attorney Case Study: Marc Dreier
- Bryan Burrough, *Marc Dreier's Crime of Destiny*, VANITY FAIR, available at http://www.vanityfair.com/news/2009/11/marc-dreier200911
- Benjamin Weiser, *Lawyer Gets 20 Years in $700 Million Fraud,* N.Y. TIMES (July 13, 2009). Available at http://www.nytimes.com/2009/07/14/nyregion/14dreier.html?_r=0
- Letters related to the sentencing of Marc Dreier, in the case *US v. Marc S. Dreier*, S1 09 Cr 085 (JSR) (S.D.N.Y 2009), available at TWEN.

Preparation for Class: We will not post in the Discussion Forums prior to this class. Your only assignment is to read the materials listed above and think about (and be prepared to discuss) the following:
- What are the top 3-5 reasons that explain why Dreier acted as he did?
- How would you describe Dreier's character? How do you think Dreier would describe his own character?
- Is there a way for bar admission authorities to predict conduct like this? What red flags might have appeared in his bar application at the time he was a recent law school graduate?
- Are you capable of acting as Dreier did? Why or why not?
- If you had been an attorney at Dreier's firm, would you have been suspicious that he was engaged in wrongdoing? What steps would you have taken if you had been concerned that he was engaged in misconduct?

Week 2

2) January 17 (Tuesday)

Topic: Obedience

Assigned Reading:
- Andrew Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451 (2007).

Attorney Case Study: Adam Bier
- *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. 2008).
- Kahmir Hill, *An Interview with One of the Qualcomm Six, Adam Bier*, http://abovethelaw.com/2010/04/an-interview-with-one-of-the-qualcomm-six-adam-bier-or-horror-story-from-a-young-associate-wrongfully-sanctioned-and-job-hunting-during-the-great-recession/

Discussion Forum: Group A posts by noon Monday before class; Group B replies by midnight Tuesday before class.

3) January 19 (Thursday)

Topic: Obedience

Assigned Reading:
- Catherine Gage O'Grady, *Wrongful Obedience and the Professional Practice of Law*, 19 J. L. BUS. & ETH. 9 (2013).

Attorney Case Study 1: Ronald Seastrunk
- *In re: Seastrunk*, Ruling of the Louisiana Attorney Disciplinary Board, available at TWEN.

Attorney Case Study 2: Justin Martus Smith
- *Disciplinary Counsel v. Smith*, 918 N.E.2d 992 (Ohio 2009).

Discussion Forum: Group C posts by noon Wednesday before class; Group D replies by midnight Thursday before class.

Week 3

4) January 24 (Tuesday)

Topic: Fundamental Attribution Error

Assigned Reading:
- Brad Wendel, *Stephen Glass, Situational Forces and the Fundamental Attribution Error*, 4 J.L.: Periodical Laboratory of Leg. Scholarship 99 (2014).

Attorney Case Study: Stephen Glass
- *In re Glass*, 58 Cal. 4th 500 (2014).

Discussion Forum: Group B posts by noon Monday before class; Group A replies by midnight Tuesday before class.

5) January 26 (Thursday)

Topic: Naïve Realism / Overconfidence Bias

Assigned Reading:
- Emily Pronin, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, Vol. 111, No. 3, 781-799 (2004).

Attorney Case Study: Jessica Lyons
- Vivien Holmes, *'Giving Voice to Values': Enhancing Students' Capacity to Cope with Ethical Challenges in Legal Practice*, Vol. 18, No. 2, 115-137 (2015) (includes discussion of Jessica Lyons).

Discussion Forum: Group D posts by noon Wednesday before class; Group C replies by midnight Thursday before class.

Week 4

6) January 31 (Tuesday)

Topic: Confirmation Bias

Assigned Reading:
- Leslie C. Levin, Bad Apples, *Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549 (2009).

Attorney Case Study: Arthur Wisehart
- *In the Matter of Wisehart*, 281 A.D.2d 23, 721 N.Y.S.2d 356 (2001).

Discussion Forum: Group A posts by noon Monday before class; Group B replies by midnight Tuesday before class.

7) February 2 (Thursday)

Topic: Rationalization

Assigned Reading:
- Robert Prentice, *Behavioral Ethics: Can it Help Lawyers (and Others) Be Their Best Selves?*, 29 NOTRE DAME J. L. ETHICS & PUB. POL'Y 35 (2015).

Attorney Case Study: Carlos Spinelli-Noseda
- Affidavit of Carlos Spinelli-Noseda, available at TWEN

Supplemental reading related to case study of attorney engaged in billing fraud:
- Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms*, http://ssrn.com/abstract=1790082

Discussion Forum: Group C posts by noon Wednesday before class; Group D replies by midnight Thursday before class.

Week 5

8) February 7 (Tuesday)

Topic: Ethical Fading

Assigned Reading:
- Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, SOCIAL JUSTICE RESEARCH, Vol. 17, No. 2 (2004).

Attorney Case Study: John Yoo
- Michael Hatfield, *Professionalizing Moral Deference*, 104 NW. U.L. REV. COLLOQUY 1 (2009).
- *John Yoo's Torture Memos, Lessons for Us All*, http://legalethicsforum.typepad.com/blog/2008/05/op-ed-on-john-y.html
- *Redefining Torture*, http://www.pbs.org/wgbh/pages/frontline/torture/themes/redefining.html
- Frontline Interview with John Yoo, http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html#3

Discussion Forum: Group B posts by noon Monday before class; Group A replies by midnight Tuesday before class.

9) February 9 (Thursday)

Topic: Ethical Fading

Assigned Reading:
- Tigran Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333 (2012).

Attorney Case Study: Douglas Anderson
- *State v. A.N.J.*, 225 P.3d 956 (Wash. 2010).

Discussion Forum: Group D posts by noon Wednesday before class; Group C replies by midnight Thursday before class.

Week 6

10) February 14 (Tuesday)
Topic: Blind Spots

Assigned Reading:
- Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, ANNUAL REV. LAW. SOC. SCIENCE (2012).

Attorney Case Study: Mike Nifong
- *N.C. State Bar v. Nifong*, Final Order, available at TWEN.
- David Barstow, *As Duke rape case unravels, D.A. judgment questioned / Defense describes him as willing to skirt law for conviction*, N.Y. TIMES, http://www.sfgate.com/news/article/As-Duke-rape-case-unravels-D-A-s-judgment-2482639.php

Discussion Forum: Group A posts by noon Monday before class; Group B replies by midnight Tuesday before class. |

11) February 16 (Thursday)
Topic: Failing to Recognize Our Own Mistakes

Assigned Reading:
- Catherine G. O'Grady, *A Behavioral Approach to Lawyer Mistake and Apology*, 51 NEW ENG. L. REV. _ (forthcoming 2017), available at TWEN.

Attorney Case Study: Paul Robson
- *Law Society of Upper Canada v. Robson*, available at TWEN.

Discussion Forum: Group C posts by noon Wednesday before class; Group D replies by midnight Thursday before class. |

Week 7

12) February 21 (Tuesday)

Topic: Implicit Bias

Assigned Reading:
- Jerry Kang, *Implicit Bias, A Primer for Courts*, http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf

Complete an Implicit Association Test prior to class. You do not have to share your results with the class. Choose one or more tests from those available at this link: https://implicit.harvard.edu/implicit/selectatest.html

Discussion Forum: Group B posts by noon Monday before class; Group A replies by midnight Tuesday before class.

13) February 23 (Thursday)

Topic: Thinking (Too) Fast

Assigned Reading:
- To be announced.

Attorney Case Study: New Advocates
- Richard Moorhead, et al., *The Ethical Capacities of New Advocates*, excerpt available at TWEN.

Discussion Forum: Group D posts by noon Wednesday before class; Group C replies by midnight Thursday before class.

Week 8

14) February 28 (Tuesday)

Topic: Zealous Advocacy Bias and Advisors

Assigned Reading:
- Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone,* 38 FLA. ST. U. L. REV. 251 (2011).

Attorney Case Study: Joseph Collins
- *In re Refco Inc. Sec. Litig.,* 609 F. Supp. 2d 304 (S.D.N.Y. 2009).
- Chad Bray, *Refco Lawyer Gets 7-Year Sentence,* http://www.wsj.com/articles/SB10001424052748704363504575003200481973346
- Excerpts from transcript of Joseph Collins' testimony in his first trial, available at TWEN.

Discussion Forum: Group A posts by noon Monday before class; Group B replies by midnight Tuesday before class.

15) March 2 (Thursday)

Topic: Zealous Advocacy Bias and Advisors

Assigned Reading:
- Richard Moorhead & Rachel Cahill-O'Callaghan, *False friends? Testing Commercial Lawyers on the Claim that Zealous Advocacy is Founded in Benevolence Towards Clients Rather than Lawyers' Personal Interest,* LEGAL ETHICS, Vol. 19, No. 1, 30-49 (2016).

Attorney Case Study: Vinson & Elkins, as counsel to Enron
- *Scummery Judgment,* http://www.slate.com/articles/news_and_politics/jurisprudence/2002/06/scummery_judgment.html
- *Enron's Lawyers Faulted Deals but Failed to Blow the Whistle*, WSJ, available at TWEN.

Discussion Forum: Group C posts by noon Wednesday before class; Group D replies by midnight Thursday before class.

Week 9

16) March 7 (Tuesday)

Topic: Zealous Advocacy Bias and Litigators

Assigned Reading:
- Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639 (2015).

Attorney Case Study: Matthew Murray
- *Isaiah Lester v. Allied Concrete Company,* 285 Va. 295 (2013)
- *In the Matter of Matthew B. Murray*, Agreed Disposition (July 2013), available at TWEN.

Discussion Forum: Group B posts by noon Monday before class; Group A replies by midnight Tuesday before class.

17) March 9 (Thursday)

Topic: Moral Courage

Assigned Reading:
- Tigran Eldred, *Moral Courage in Indigent Defense*, available at TWEN.

Attorney Case Study: To Be Announced

Discussion Forum: Group D posts by noon Wednesday before class; Group C replies by midnight Thursday before class.

Week 10

18) March 21 (Tuesday)

Topic: Putting the Pieces Together: Why Did this Misconduct Happen?

Attorney Case Study 1: Chris Gossage
- Firm profile: http://www.russells.co.uk/people/chris-gossage.html
- John Stock, *JK Rowling Unmasked: The Lawyer, The Wife, Her Tweet – and a Furious Author*, THE TELEGRAPH, http://www.telegraph.co.uk/culture/books/10192275/JK-Rowling-unmasked-the-lawyer-the-wife-her-tweet-and-a-furious-author.html
- Maeve Kennedy, *Lawyer Who Uncovered JK Rowling's Robert Galbraith Alter Ego Fined*, THE GUARDIAN, https://www.theguardian.com/books/2013/dec/31/lawyer-uncovered-jk-rowling-robert-galbraith-fined-cuckoos-calling
- Josh Halliday, *JK Rowling's Identity as Crime Writer Revealed During Twitter Discussion*, THE GUARDIAN, https://www.theguardian.com/books/2013/jul/31/jk-rowling-crime-writer-twitter-cuckoos-calling

Attorney Case Study 2: Lawyer Decisionmakers at Charlotte School of Law
- *Barcheisi v. Charlotte School of Law*, Complaint, available at TWEN
- Students file $5 million Class Action Lawsuit Against Charlotte School of Law, http://abovethelaw.com/2016/12/students-file-5-million-class-action-lawsuit-against-charlotte-law/

Discussion Forum: Group A posts by noon Monday before class; Group B replies by midnight Tuesday before class.

19) March 23 (Thursday)

Topic: Putting the Pieces Together: Why Did this Misconduct Happen?

Attorney Case Study 1: Bill Lockett
- *Lockett v. Board of Prof'l Responsibility*, 380 S.W.3d 19 (Tenn. 2012).

Attorney Case Study 2: Joseph Harold Smith
- *Disciplinary Counsel v. Smith*, 944 N.E.2d 1166 (Ohio 2011).

Discussion Forum: Group C posts by noon Wednesday before class; Group D replies by midnight Thursday before class.

Week 11

20) March 28 (Tuesday)

Topic: How Lawyers and Law Firms Should Respond to the Lessons of Behavioral Legal Ethics

Assigned Reading:
- Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. L. REV. 1107, 1156-82 (2013).
- Scott L. Rogers & Jan Jacobwitz, *Mindful Ethics and Cultivation of Concentration*, 2015 NEV. L. J. 730 (2015).

Discussion Forum: Group B posts by noon Monday before class; Group A replies by midnight Tuesday before class.

21) March 30 (Thursday)

Topic: How Courts Can Harness the Power of Behavioral Legal Ethics

Assigned Reading:
- Paula Schaefer, *Attorneys, Document Discovery, and Discipline*, _ GEO. J. LEGAL ETHICS __ (2017).

Case Study: James Himmel
- *In re Himmel*, 533 N.E.2d 790 (Ill. 1988).

Discussion Forum: Group D posts by noon Wednesday before class; Group A replies by midnight Thursday before class.

Week 12
22) April 4 (Tuesday)
Topic: **Presentations 1-3**
23) April 6 (Thursday)
Topic: **Presentations 4-6**
Week 13
24) April 11 (Tuesday)
Topic: **Presentations 7-9**
25) April 13 (Thursday)
Topic: **Presentations 10-12**
Week 14
26) April 18 (Tuesday)
Topic: **Presentations 13-15**
27) April 20 (Thursday)
Topic: **Presentations 16-18**
Week 15
28) November 24 (Tuesday)
Topic: **Presentations 19-20**
29) November 26 (Thursday)
Topic: **Course Wrap Up**