

Lawyers & Ethics (530C - 001)

Section 4

Syllabus

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Overview:

Welcome to Lawyers & Ethics! This is a broad topic, but I hope to help you instill a foundational understanding of legal ethics and lawyering. This is not your typical 1L common law course, and hopefully a welcome change from the day-to-day grind of appellate opinions in your common law classes.

You already know lawyers jokes and probably have heard snide comments about law school. Lawyers argue. They seem to play dirty pool whenever they can. They live and die on technical rules of procedure. They represent convicted killers. They go on TV and solicit clients who've been injured by pharmaceuticals. Lawyers look bad all the time. But always remember that television dramas involving lawyers are almost as top-rated as police procedurals and zombie melodramas, and well ahead of shows about TV comedy writers and advertising executives. Lawyers are exciting and the law is dramatic. Own it. "Better Call Saul!"¹

We're going to be reading a variety of material – a few court opinions, yes, but also a collection of non-legal writings, and a great deal of fiction. We're going to talk about morality, civility (or how to disagree properly), and different kinds of trouble you can get into without even thinking.

I'm serious about your input in the class. Take a look at the syllabus right away. Let me know if there's something you'd like to read in addition to (or to replace) an assigned reading. I've done it before, and I will take your input seriously.

In class, we're going to be doing a good bit of writing, probably at the beginning and the end of each class. I'll be able to tell if you've prepped for class and (maybe) if you were paying attention. Also, it's good practice for exam writing, which I hope will help you in all your classes. I won't be able to read all your writing in much depth, but I'll do my best. Typically, I

¹ *Breaking Bad: Better Call Saul* (AMC television broadcast, April 26, 2009).

will read the materials turned in from ten students a week (my TA might read a few more), and provide comments as I can.

You're also going to be practicing (fake) law in this class in something I call "The Game." You will be in on three fake cases, all from original primary documents in real disputes (well, one is a TV show character). You'll be assigned to a small law firm of four students (or so). You'll learn to work together, and probably fight with each other – just like a real law firm – and hopefully learn about professionalism. You'll write a few things, brief motions, oppose motions from the other side, and in one of the three cases you'll be in on, you'll be part of a panel of judges that generates an opinion to decide a case. To support the arguments in the pleadings, you can use any law you wish, whatsoever, from any court, any jurisdiction, or you can just make things up (so long as you're acknowledging the made-up stuff). Google and Google Scholar will be helpful, as will anything you find on Westlaw or Lexis or Versuslaw. I'm not interested in the hierarchy of the law (meaning I bet there's a great state trial court decision or law review article out there that could be more persuasive than a United States Supreme Court case). Argue what you think the law should be, and why. Through this process, we will all develop the common law of the class. This law will develop organically through the process of the class. Right now, you have no idea what I'm talking about. But you will.

Also, I want you to talk. It's a requirement of the class. You're all going to be talking for a living. Talking is part of your grade. You'll talk to me, you'll talk to each other, and you'll do it before a large group of your peers. This is a class about opening up your minds. I'm not going to give you all the malarkey about thinking like a lawyer. You're here to learn how to agree, and how to disagree. However, don't bother raising your hand unless I ask you to. I probably won't call on you just because you have your hand raised. I'll just call on you.

Finally, this isn't opinion class. Don't tell me your opinion. I don't really care about opinions. "Everyone has one" and so on.² Judges and juries don't care opinions either, unless the opinion comes from an expert witness. I care about thinking and analysis. Give me an argument, and support it with reasoning and/or materials from the readings.

IMPORTANT: Put your name(s) on the papers you turn them in. Seriously.

Evaluation:

Your work in your law firm is 50 percent of your grade and your final exam grade is 50 percent. Your class participation might (but probably not) bump you up or down very slightly.

Attendance:

I'll know if you missed class because of the writing assignments at the beginning and end of class periods. Duh.

² See HOME FOR THE HOLIDAYS (Paramount Pictures 1995).

Required Books:

The Postman Always Rings Twice (1934) by James M. Cain ISBN: 978-0679723257 (any edition is acceptable)

The Round House (2012) by Louise Erdrich ISBN: 978-0062065247

Other Class Materials are or will be available on the Turtle Talk blog:

<http://turtletalk.wordpress.com/matthew-lm-fletcher/fletcher-class-materials/lawyers-and-ethics-fall-2013/>

Assignments:**Week 1 (Aug.26, 2013)—Lawyers and Truth**

Read Chapters 9-11 and 15-16 of *The Postman Always Rings Twice* (skim rest of book, or better yet, read the coverage on Wikipedia or elsewhere – it's a pretty rough book lacking modern sensibilities of ethnicity and gender).

Think about the roles of lawyers in the investigation and prosecution of the first murder. Who does the prosecutor (Sackett) represent? The defense attorney (Katz)? What about the roles of the insurance company employees? Does it matter if the insurance company employees are lawyers or not? Then think about the individuals charged with murder (in the first death, Frank and Cora for the killing of "The Greek"; and in the second, Frank for the killing of Cora).

Finally, think about the justice system as described by the author. What are the ethical implications of being a part of a system that allows murders to go free in one case and prosecutes another for a crime he didn't commit?

Also this week we will quickly discuss the four cases that will form the first part of the game we'll be playing this semester on fake law (*Snowbowl*, *Martin*, *Goodman*, and *Migizi*). And you will meet your law firm, who are your teammates, so to speak.

Here are the teams:

Group A (Teams A1, A2, A3, A4): *Snowbowl* BAR; *Martin* RESPONDENT; *Goodman* JUDGE

Group B (Teams B1, B2, B3, B4): *Martin* BAR; *Goodman* RESPONDENT; *Migizi* JUDGE

Group C (Teams C1, C2, C3, C4): *Goodman* BAR; *Migizi* RESPONDENT; *Snowbowl* JUDGE

Group D (Teams D1, D2, D3, D4): *Migizi* BAR, *Snowbowl* RESPONDENT; *Martin* JUDGE

Follow the instructions for each week's assignments related to The Game carefully.

Week 2 (Sept. 9, 2013)—What Is Law? What is Justice? (Part 1)

Read *The Round House*, chapters 1-6.

Recall *Oliphant* from Immersion week. What was the holding there? Hint – Indian tribes cannot criminally prosecute non-Indians. Consider the tribal court decisions in Chapter 3 of *The Round House*. Assuming *Oliphant* wasn't the law, this court could be the court with primary jurisdiction over the felonious actions in the book. What law would the court apply? Should non-Indians be concerned about being prosecuted by a tribal court? Conversely, if *Oliphant* is the law and Linden can only be prosecuted federally, should Indian people be concerned that criminal violators will be prosecuted far away in, say, Minneapolis or Detroit for crimes committed in Indian country? Who makes the law then?

Due by the beginning of class in hard copy – Three copies of a four-page (double spaced) complaint and brief by BAR against RESPONDENT, with recommendations for penalty. Include facts supporting the complaint, with an argument section supported by legal authority detailing why the facts justify a penalty against RESPONDENT. On separate page, detail hours worked on the project by each law firm member in one-tenths of an hour (six minute intervals).

Label the team name clearly on the top of the front page. Immediately prior to the beginning of class, serve one copy on me, serve one copy to your adversary, and serve one copy on the judge. For example, Team A1, serving as the BAR in the Snowbowl matter, will file a pleading the first week on the RESPONDENT in the Snowbowl matter – Team D1 – and a pleading on the JUDGE in the Snowbowl matter – Team C1. A2 will serve its pleadings on D2 and C2. A3 will serve its pleadings on D3 and C3. A4 will serve its pleadings on D4 and C4. And so on. We'll do this each week. Service by email is not acceptable.

Week 3 (Sept. 16, 2013)—What Is Law? What is Justice? (Part 2)

Read *The Round House*, chapters 6-end.

Now think of revenge, and the Anishinaabe justifications for revenge. What part of Anishinaabe justifications for revenge, if any, is law? Is this justice? Compare what I guess we'll call "windigo justice" with the modern death penalty.

Due at the beginning of class in hard copy – Three copies of a four-page response (double-spaced) by RESPONDENT to complaint. Attach a copy of the complaint filed against your client. On separate page, detail hours worked on the project by each law firm member in one-tenths of an hour (six minute intervals). Serve your professor, your adversary, and your judge in hard copy.

Week 4 (Sept. 23, 2013)—Lawyers and Morality

Read Wasserstrom's *Lawyers as Professionals: Some Moral Issues*. Read Part I of Chief Justice Roberts' opinion for the Court and Part I of Justice Alito's dissent in *Snyder v. Phelps*. Skim the rest of the opinion. Read the introductory material and Part I of Justice Thomas's opinion for the Court and Part I of Justice Ginsburg's dissent in *Connick v. Thompson*. Skim the rest of the opinion. Read all of *Tee-Hit-Ton Indians v. United States*.

I'm interested in the facts of these cases, and the arguments that had to be argued by either party's attorneys. In the three cases, think about the party you yourself would prefer to represent, and why. Are there any parties you think are so in the wrong under no circumstances would you agree to represent them? As for the outcomes, was "justice" done? Did the outcomes provide "justice" to the aggrieved parties? Were the defenses raised "just"? To whom or what do attorneys have ethical obligations? The court? The client? Opposing parties? Do a lawyer's personal beliefs matter? Why or why not?

Due at the beginning of class in hard copy – Two copies of a two-page (double-spaced) reply by BAR to RESPONDENT's responsive brief. Attach copy of complaint and responsive brief filed in the matter so far. On separate page, detail hours worked on the project by each law firm member in one-tenths of an hour (six minute intervals).

Week 5 (Sept. 30, 2013)—Disobedience

Read the materials related to the incarceration of Eddie Ayau for contempt of court in *Na Lei Alii Kawanana v. Bishop Museum*, No. 05-540 (D. Haw.). Read entirely the Ayau Declaration, the Royal Hawaiian Academy Brief, and the Contempt Order. Skim the Settlement. Read Federal Rule of Civil Procedure 11(b). Read pages 1-8 (skim the rest) of *The Ethics of Pushing the Envelope*.

When is disobedience to a court order acceptable, if ever? Why should court orders be obeyed, especially in the context of religious beliefs? What other areas of law involve questions of disobedience (e.g., journalists and their sources)? What about law reform? To what extent may lawyers advocate for a change in the law?

Week 6 (Oct. 7, 2013)—Civility and Empathy

Read West's *The Anti-Empathic Turn*. Also read part II of Flynn's *The Fight for Information with the Obstructionist Lawyer*.

Civility and empathy are different concepts, to be sure, but by now you might have some experience with both, given the fake law cases you're working on. In the West excerpt, focus on the case, *Williams v. Walker-Thomas Furniture*. Think about contracts you've executed via point-and-click. Do you have more or less empathy for the plaintiff in *Williams*. You've also crafted a judicial opinion. Did you feel empathy for any of the parties? Did you act on your empathy in crafting your opinion? Finally, in your dealings with your law firm partners and your adversaries, were you civil? Did you experience any incivility?

Due at the beginning of class in hard copy – Written opinion by JUDGE in each case. Include a two-paragraph *per curiam* opinion authored by the entire team decision including judgment (whether RESPONDENT should be penalized), and if applicable what penalty should be assessed against RESPONDENT. Then include seriatim opinions by each judge concurring or dissenting in the judgment and penalty, with reasons. On separate page, detail hours worked on the project by each law firm member in one-tenths of an hour (six minute intervals).

Week 7 (Oct. 14, 2013)—What Have We Learned?

Read Kennedy's *Legal Education and the Reproduction of Hierarchy*.

When it first came out, this paper was highly controversial. You might agree with very little here. It might even anger you. Relax. Ironically, many of Kennedy's criticisms are part of mainstream debate about law schools now, often driven by those who share ideologically opposing viewpoints. Identify one of Kennedy's arguments with which you agree (and why), and one with which you disagree (and why). In any event, this is a shortened version of the publication, now in book form as published in 2004 by NYU Press.

On this day, I will have processed the 63-odd judicial opinions generated by the class. I will deliver to you the common law of the class, which you will use on the final exam.

Final Exam (Oct. 21, 2013)

SNOWBOWL

In *Save the Peaks Coalition v. United States Forest Service*, the Ninth Circuit sanctioned plaintiff's attorney Howard Shanker for acting in "bad faith." *Save the Peaks* was the second lawsuit in recent years brought to challenge the Forest Service's decision to allow a private company, Arizona Snowbowl, to operate a ski resort on the San Francisco Peaks in Arizona on public federal lands on the Peaks. The San Francisco Peaks are sacred to about a dozen Indian tribes in the region, including the Navajo, Hopi, Hualupai, Havaupai, and others. Arizona Snowbowl has been operating on the Peaks for a few decades (and survived an initial round of suits back in the 1970s and 1980s to challenge that decision). The Peaks has had little snowfall in recent years, making business no longer profitable for the Snowbowl. The Snowbowl requested, and the government approved, gray water from Flagstaff to be transported to the Peaks to make snow. This gray water is treated sewage water, and no one denies that it contains an extremely small amount of fecal matter. The government contends that the gray water is safe. The tribal communities contend that dumping tchwunk (feces) on the sacred Peaks is awful.

The first suit, *Navajo Nation v. United States Forest Service*, involving the tribes as the plaintiffs, ended up badly for the tribes. Attorney Shanker's clients are individual Indians and environmental organizations that have brought a second suit with similar, but somewhat different, legal claims. The Ninth Circuit has rejected these claims, holding that they had even less merit than the claims in the initial suit, and further holding that Shanker "abused the judicial process" in allowing or persuading his clients to go forward with them. The Ninth Circuit sanctioned Shanker.

The state bar is considering bringing a disciplinary action against Shanker.

MARTIN

Joe Martin was in-house counsel for the Little River Band of Ottawa Indians legislative branch. The tribe's internal politics was very contentious, and numerous times the tribal chief executive attempted to terminate Joe's employment despite not having the legal authority to do so. Eventually, after several years, the legislative branch terminated Joe's contract. Joe filed suit in the tribe's court system, seeking damages for wrongful discharge (a tort). Joe also filed suit in Manistee County Circuit Court, seeking the same damages. It was apparent that neither of his lawsuits had any chance of to be heard on the merits and would be dismissed for procedural grounds (namely, the tribe's immunity from suit).

So Joe allegedly wrote a letter to his former client threatening to reveal confidences he acquired while the attorney for the legislative branch unless the tribe paid him hundreds of thousands of dollars he believed the tribe owed him. He also allegedly physically threatened an attorney retained by the tribe to defend his lawsuits. Obviously, these are all violations of the code of professional conduct, if proven.

The state bar will begin disciplinary proceedings against Joe.

GOODMAN

Attorney Saul Goodman is a criminal defense attorney who advertises around town – his TV spots and billboards show a dynamic face shot of Saul, his business number, and the text, “Better Call Saul!” are ubiquitous.¹ Recently, Saul began working as counsel for three individuals who form the better part of a gang of drug dealers; the leader working under the assumed name “Heisenberg.” Most of Saul’s work for Heisenberg is legitimate – he represents members of Heisenberg’s drug cartel in court when they are busted and gets good deals for them. He does a lot of asset and estate planning for Heisenberg, too.

However, Saul engages in a bunch of illegal activity, too. Saul locates individuals who will launder Heisenberg’s drug money, taking 17 percent of the net. Saul sets up his other clients so that they will take the fall in drug deals gone bad for Heisenberg. Saul is simply a crook. But, importantly, while everyone and their mother knows Saul is dirty, the only evidence of Saul’s wrongdoing is attorney-client privileged, supposedly making it inadmissible in court.

Eventually, evidence of Saul’s doings is secretly leaked to the state bar disciplinary committee, which begins action to disbar and otherwise penalize Saul. Of course, in order to do so, the state bar will have to break the privilege.

¹ <http://www.bettercallsaul.com/>

MIGIZI

Judge S. L. Migizi has been the Chief Judge of Lake Matchimanitou Band of Anishinaabe Indians for two decades. Like federal judges, he appointed by the executive branch of the tribe, an appointment subject to the advice and consent of the tribal legislative branch. While each appointment has a four-year term, if the executive and legislative branches concur, the judge may be removed “for good cause.” That term has never been defined under tribal law.

In a recent politically charged case, he ruled against the tribal government and struck down a tribal ordinance. Shortly after, he received a letter from the tribal chief executive notifying him that the executive and legislative branches agreed that Judge Migizi should be removed from the bench. The chief executive’s letter offered no reason for the removal.

Judge Migizi had often ruled against the tribal government in many instances over his 20 year tenure, although never in such a political case, and the executive and legislative branches had never said a word. He fully expected to be reappointed to a fifth term. He sues the executive and legislative branches, seeking an order enjoining his removal on grounds that it was invalid for failing to specify and prove that the removal was “for good cause.”

The disciplinary committee of the tribal bar association, which governs the conduct of judges and lawyers on the reservation, is looking to discipline Judge Migizi for inappropriate judicial conduct.