

UNDERSTANDING
LAWYERS' ETHICS

Fifth Edition

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Dedication

In Memory of Audrey, Caleb, and Sarah

and

For Rebeca, Paimaan, Ana, Ben, Andrew, and Joe

and

For David and Anita Smith
Models of Devotion and Zeal

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Preface

A CAUTION AND A CHALLENGE

This book presents a systematic position on lawyers' ethics. We argue that lawyers' ethics is rooted in the Bill of Rights and in the dignity and the autonomy of the individual. This is a traditionalist, client-centered view of the lawyer's role in an adversary system, and corresponds to the ethical principles that are held by a large proportion of the practicing bar.

From this perspective, we analyze fundamental issues of lawyers' ethics with a focus on the ABA's Model Rules. We also address views of lawyers' ethics that differ from ours and explain why we think these views are wrong.

Students, in particular, should be aware that this book takes a distinct position in a continuing and often heated controversy regarding the lawyer's role. We hope we can persuade you to our point of view. Even if you are not persuaded, however, you will benefit from reading this book because it will challenge you to think through the underlying reasons for our position. The best way to achieve a real understanding of legal rules is to test them against your own moral standards and reasoned judgment.

If you do that, the book will have been a success, regardless of whether you end up saying, "I agree with the authors because . . ." or "I disagree with the authors because. . . ." The whole thing is in the "because. . . ."

Foreword to the Fifth Edition¹

As Monroe Freedman and I were collaborating on this newest edition of *Understanding Lawyers' Ethics*, Monroe passed away. He was 86 years old and had lived a full, lively, and productive life. Even so, I was crushed by Monroe's death. He did not look or act like an octogenarian. Even though he used a walking stick in the last years (he had a fabulous collection), he was tall and fit and had a full head of dark hair. He was always spilling over with new ideas and projects and was deeply engaged in the legal and political issues of the day until the very end.

Upon his death, the *New York Times* hailed Monroe as “a dominant figure in legal ethics whose work helped chart the course of lawyers' behavior in the late 20th century and beyond.”² The *Washington Post* called him a “nationally renowned expert” in both legal ethics and civil liberties.³

Monroe was considered the founder of legal ethics as an academic field. As Harvard law professor Alan Dershowitz said, “He invented legal ethics as a serious academic subject Prior to Freedman, legal ethics was usually a lecture given by the dean of the law school, which resembled chapel: ‘Thou shalt not steal. Thou shalt not be lazy.’ But Monroe brought to the academy the realistic complexity of what lawyers actually face.”⁴

Monroe had a unique role in the legal profession as a practicing lawyer, scholar, teacher, and activist. He was an unusual law professor — especially in today's academy — whose work spoke to both theory and practice, sharpening and challenging the way we think about lawyers' ethics and what it means to undertake the representation of another human being.

Monroe's impact was wide and deep. Aside from his scholarly work, he made a practice of meeting, corresponding with, mentoring, and being on call for scores of legal ethics scholars and lawyers. Professor Dershowitz had him on “speed dial.”⁵ The comments of Dan Goyette, the longtime chief public defender of the Louisville-Jefferson (Kentucky) Public Defender Corporation illustrate the service Monroe provided to attorneys around the country:

“I count myself as extremely fortunate to have known Monroe for most of my

¹ Parts of this Foreword were taken from the foreword to *Lawyers' Ethics* (Monroe H. Freedman, Abbe Smith, and Alice Woolley, eds.) (Ashgate Publishing, 2016), written by Alice Woolley and Abbe Smith.

² Margalit Fox, *Monroe Freedman, Influential Voice on Legal Ethics, Dies at 86*, N.Y. TIMES, Mar. 4, 2015, at A19.

³ Matt Schudel, *Monroe H. Freedman, Scholar of Legal Ethics and Civil Liberties, Dies at 86*, WASH. POST (Mar. 1, 2015), http://www.washingtonpost.com/national/monroe-h-freedman-scholar-of-legal-ethics-and-civil-liberties-dies-at-86/2015/02/28/9e9c562a-beb3-11e4-8668-4e7ba8439ca6_story.html.

⁴ Fox, *supra*.

⁵ *See id.*

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professional life and to have had the benefit of his wise counsel and his example as a principled lawyer and zealous advocate Monroe . . . never fail[ed] to respond to a request for help. Whether it involved consulting on a difficult case, clarifying an ethical issue for a journalist writing a story about a controversial legal matter or defending a public defender for simply doing her job, Monroe always came through with advice that was knowledgeable and well-reasoned, and also informed by his unerring moral compass.”⁶

Monroe is rightly lauded as a giant in the field of legal ethics. This is so not because he was one of the first or most controversial legal ethics scholars — although he was both those things — but because he was one of the best. Monroe’s scholarship consistently reflects sharp perception, analytical rigor, deep moral conviction, and compassion. He managed to be consistent in his approach to legal ethics without being fixed or rigid. He relished spirited debate — with both friends and adversaries — and even occasionally changed his mind.

Monroe’s distinguished career should be a blueprint for legal scholars, practicing lawyers, and law students. He understood that lawyers who live the dilemmas of legal practice cannot always appreciate or reflect on the issues those dilemmas raise, while academics who write about legal ethics cannot always appreciate the complexity of the context in which the dilemmas arise. Monroe bridged that gap, recognizing the important ethical issues that arise in practice and the conflicts of principle and policy that both create those issues and make them difficult to resolve.

His most famous paper, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*⁷ — which caused him to be brought up on disciplinary charges⁸ — identifies the ethical dilemmas arising from conflict between the lawyer’s duty of confidentiality to the client, the client’s right to counsel and presumption of innocence, and the lawyer’s duty of candor to the court. As he cogently argues, in some circumstances it is impossible for a lawyer to simultaneously satisfy all of these obligations; in a situation of real conflict among them, the only issue is which one will be sacrificed.

The Three Hardest Questions, like much of Monroe’s work, is as relevant, forceful, and thought-provoking today as when it was written.

At around the same time as he was writing about criminal defense ethics, Monroe also identified the core ethical dilemmas that arise for the prosecuting attorney and civil litigator. Again, he identified ethical issues that remain of central concern for lawyers practicing in those areas today. For prosecutors, Monroe was concerned about the abuse of power, inevitable conflicts of interest with local police, and the elusiveness of “doing

⁶ J. Vincent Aprile II, *Requiem for a Heavyweight: Monroe H. Freedman*, CRIMINAL JUSTICE, Summer 2015, at 65, 69 (quoting Goyette).

⁷ Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

⁸ Monroe initially presented the article at a continuing legal education program in the District of Columbia. Although they were not at the program, several judges, including Warren Burger, who later was Chief Justice of the United States Supreme Court, made a complaint to the D.C. Bar, seeking Monroe’s disbarment or suspension. After four months of proceedings, the matter was thrown out. *See id.*

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justice.” For civil litigators, he emphasized the issues that arise from the client who wants to do something that is not unlawful, but is unconscionable, or whose case is provable as a matter of law, but is unjustified as a matter of morality.

An important insight by Monroe was his concern with the problem of witness preparation, and the fine line — which both practitioners and those who write about trial practice often gloss over — between helping a witness to remember and prompting a witness to fabricate. As his work in this area demonstrates, Monroe recognized long before others the significance of a more complex appreciation of human psychology to identifying and resolving ethical problems.

The acuity of Monroe’s ability to identify ethical problems was matched only by the cogency of his analysis. Often those who write and think about Monroe reduce his work to two propositions — that “a lawyer should be a zealous advocate” or “sometimes a lawyer must present perjured testimony.” But his point was only secondarily about those ethical conclusions. In all of his written work, he employed the same probing method: he identified an issue (or issues) arising from conflicting principles, set out those principles and the costs and benefits associated with different resolutions, and made his argument in favor of a particular outcome. Monroe obviously believed his answers were right, but he was fully aware of the arguments on the other side and was content with disagreement, provided the disagreement arose from analysis as fully and honestly engaged with the conflicting principles as was his own.

Monroe also had a remarkable gift for brevity and clarity. His many articles are uniformly short, well-written and unencumbered by the endless and useless footnotes common to almost all modern academic articles. He used authority, but only to advance his argument, not to demonstrate his own thoroughness and erudition.

Throughout his scholarly life, Monroe maintained the importance of core constitutional principles — the right to counsel, the presumption of innocence, the right against self-incrimination, freedom of speech (he was an early proponent of lawyer advertising) — to understanding the duties of the lawyer in representing a client. And he never wavered for a moment in his belief in individual dignity and autonomy, and the central role of the lawyer to protect it.

Monroe very much believed in — and genuinely liked — lawyers. In a paper on the role of litigation in pursuing social justice, Monroe eloquently spoke of the good that lawyers can do in cases large and small:

The most one can expect to do in a lifetime is to deal with those situations with which he comes in to contact, to try to help those unfortunate people whom he meets — recognizing that just as every man is of infinite value, the help you can provide to any man may also be of infinite value, even if infinitesimal in some broader scheme of things.⁹

Monroe did more in his lifetime than most of us can ever hope to accomplish.

There is no one like him; he is irreplaceable. For me, his loss is deeply personal. He was one of my best friends. I miss him every day. I couldn’t be prouder of my association with him.

⁹ Monroe H. Freedman, *The Litigating Attorney and Social Reform*, 1 MD. L.F. 13 (1970).

Foreword to the Fifth Edition

This new edition of *Understanding Lawyers' Ethics* builds on previous editions of the book, as well as on Monroe's first, groundbreaking book, *Lawyers' Ethics in an Adversary System*.¹⁰ It is very much in Monroe's voice — and hopefully in mine as well. The new edition also features some brand new material on cross-examination of truthful witnesses in the context of rape, prosecutorial ethics in the context of race and policing, and lawyering in a time of crisis or change.

Monroe was very pleased with this new edition of *Understanding Lawyers' Ethics*. I offer it in his memory.

Abbe Smith
August 26, 2015
Washington, DC

¹⁰ MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

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