

2016

# Liberty and justice for all? : Ethics in the American criminal justice system

Haley Hasenstein  
*University of Northern Iowa*

Copyright ©2016 Haley Hasenstein

Follow this and additional works at: <http://scholarworks.uni.edu/hpt>

 Part of the [Legal Ethics and Professional Responsibility Commons](#)

*Let us know how access to this document benefits you*

---

## Recommended Citation

Hasenstein, Haley, "Liberty and justice for all? : Ethics in the American criminal justice system" (2016). *Honors Program Theses*. 245.  
<http://scholarworks.uni.edu/hpt/245>

This Open Access Honors Program Thesis is brought to you for free and open access by the University Honors Program at UNI ScholarWorks. It has been accepted for inclusion in Honors Program Theses by an authorized administrator of UNI ScholarWorks. For more information, please contact [scholarworks@uni.edu](mailto:scholarworks@uni.edu).

LIBERTY AND JUSTICE FOR ALL?: Ethics in the American Criminal Justice System

A Thesis Submitted  
in Partial Fulfillment  
of the Requirements for the Designation  
University Honors

Haley Hasenstein  
University of Northern Iowa  
May 2016

This Study by: Haley Hasenstein

Entitled: Liberty and Justice for All?: Ethics in the American Criminal Justice System

has been approved as meeting the thesis or project requirement for the Designation University Honors

\_\_\_\_\_  
Date

\_\_\_\_\_  
Dr. Gayle Rhineberger-Dunn, Honors Thesis Advisor, Criminology

\_\_\_\_\_  
Date

\_\_\_\_\_  
Dr. Jessica Moon, Director, University Honors Program

## **Abstract**

The American Bar Association (ABA) claims a commitment to ethics for all that fall under its jurisdiction. As a part of the Bar Exam that lawyers must take to join the Association they are issued a character and fitness test, where some prior misbehavior may disqualify an individual from becoming barred. “Miscarriages of justice” is a common theme among literature about lawyers in the criminal justice system. In this study I will shed light on some of the ethical discrepancies in the legal profession’s values and practice. This study focuses on criminal lawyers’ experiences with personal ethics as well as their perceptions of the ethics of their colleagues throughout their legal career starting in law school and continuing through their career. Ethical indiscretions are not limited to prosecutors, defense attorneys, judges, or even just to the American criminal justice system. In this study I look at how the American Bar Association’s Model Rules of Professional Conduct are viewed by practicing attorneys, and delve into the overall perceived ethics of attorneys in Iowa.

## **Introduction**

According to the American Bar Association in 2010 there were over 1.2 million licensed attorneys in the United States. Lawyers are frequently represented in popular culture in movies such as *Legally Blonde*, documentaries like *Making a Murderer* and TV series like *Law And Order: SVU*. These representations all impact the American perception of attorneys working today. The overall idea about lawyers can be seen by popular culture jokes about lawyers such as: how can you tell a lawyer is lying? *Her lips are moving*. What do you have when a lawyer is buried up to his lips in sand? *Not enough sand*, and the countless other quips and quotes about the general untrustworthiness, unlikableness, and unethicalness of attorneys in America. This is in stark contrast with what the ideals of what lawyers should be. The question remains then, is there a disconnect between the perceptions and the actions? The purpose of this research is to assess the perceptions that lawyers have of their own ethics, and the ethics of the legal field that they experience. The research question to be answered is: how well do lawyers believe they follow the American Bar Association's Model Rules for Professional Conduct during the course of their career, and how well do they believe other attorneys follow these rules?

## **Literature Review**

The ABA provides "Model Rules for Professional Conduct" for members of their association. These standards describe lawyers as representatives for clients and dispute resolvers. They claim that all lawyers need to be competent, prompt, and diligent. The standards are broad in scope, even reaching as far as the lawyers' personal lives. A lawyer

should use their learned knowledge to better the world around them and promote equal access for all citizens. Even though the American Bar Association has an apparent commitment to ethics, this is not always the perception that the public holds. Travis and Tranter (2014) claim that, “the public seems quite committed to the vision of lawyers as untrustworthy of the legal profession” (p. 24). They also cite Gallup Polls which finds, “38% of Americans would rate the ethical standards of lawyers very low” (Travis and Tranter). This issue is particularly relevant in criminal law, where it is possible for someone’s life to be in the hands of one of these unethical attorneys. Even though the negative public perception is a major public problem, there is little consensus as to what the remedy should be (Travis and Tranter 2014).

## **Law School**

Every lawyer’s career starts with one common denominator: law school. Every practicing attorney will go through roughly three years of legal training at an American Bar Association accredited university. These universities range in prestige, size, cost, and location, but they have one thing in common. These universities carefully consider applicants, and only accept those they believe would benefit the profession as a whole upon their graduation. During the application process law schools require letters of recommendation that speak to the applicant’s academic achievements, but also their overall character. According to the Law School Admissions Council applicants are asked to submit personal statements and resumes that let the admissions teams know about their volunteerism, humanitarianism, and the characteristics and values that cannot be seen by their GPA or LSAT score. These tactics are all

employed to select a professional class of students who will be successful representatives of that university long after their graduation (Shultz and Zedneck, 2011).

These highly critical admissions procedures are intended to produce high performing students for the incoming class. Once they reach law school it is the school's job to teach them how to be the type of lawyers they hope to create. While the American Bar Association notes a strong commitment to ethics, there is no set curriculum or ethical training for students working towards their Juris Doctorate. In his 1969 study of the ethics of law students Wagner Thielens concluded that having an ethical education is unnecessary and wasteful, as the students will learn ethics in practice, for better or worse, during their clinical experiences from older and practiced attorneys (589). His opinion is that sitting in a classroom to learn what will happen when a student is out practicing will not benefit them, because the true way to learn is through their experiences. Law schools have followed this in some regard, as ethical training is not a large component of the curriculum. For a law school to be accredited by the American Bar Association it must have a curriculum that emphasizes the, "exercise of proper professional and ethical responsibilities to clients and the legal system" (American Bar Association). This must be fulfilled by a two credit hour professional responsibility course. Even though there is a claim to be deeply invested in the development of ethics, there is little actual classroom time mandated to the teaching of it.

This begs the question, does there need to be an emphasis in the law school curriculum on ethics, or is this something that is learned in practice? Some legal scholars such as Thelien would say it is sufficient to brush over the topic in law school. Others, such as Tim Dare in his 2010 critique of Alice Woolley's *Survey of Contemporary Legal Ethics* he claims, "Woolley

argues that philosophical legal ethics has focused ‘too much on the ethical experience of the lawyer’s life,’ and too little on ‘what, in a free democratic society the role of a lawyer should be’ (p. 1022). People in this camp would encourage law schools to up the ante with their ethical curriculum and give students a far broader overview of what they are likely to be faced with and how to handle those situations. There are conflicting views in the legal community as to what the ethical training for law students should be, which may result in incohesive standards of ethics for practicing attorneys.

### **Defense Attorney Ethics**

Another area of legal ethics that is frequently addressed is the ethics and morality of defense attorneys. Defense attorneys are often questioned on how they could represent a client that had committed a perceived terrible crime. Rivera-Lopez (2014) argues that even with the adversarial system that the American Criminal Justice system operates under there is still moral criticism towards lawyers for defending a potentially guilty client. This is why so many attorneys do not wish to know if their client is in fact guilty, because it would put a moral burden on them. However, morality and ethics are entirely different things, and a lawyer may be acting ethically while defending a guilty client (Etienne, 2005). A cause lawyer is a person who uses the law as a means of enacting and endorsing social change, Etienne (2005) claims that criminal defense lawyers are in fact “cause lawyers for whom practice is a deeply moral and political activity.” A However, she claims that these practices are unethical with regards to the model rules of professional ethics, “cause lawyering, in many of its forms, seems to directly violate the rules against "material limitation" conflicts of interest” (142). Pollock (2012) argues that all defendants regardless of guilt deserve a zealous advocate, and that is what defense



attorneys are. She claims by putting in the effort to make a good case for their client an attorney is being ethical. The public may find problems with the work that defense attorneys do, however just because there is a public distaste does not mean it is unethical.

Defense attorneys themselves do not find the work they do to be unethical. Many defense attorneys represent the clients that they do because of their commitment to due process, and their belief that their clients should have the rights constitutionally guaranteed to them. The Supreme Court made it clear that every person deserves representation in *Gideon v. Wainwright*, where they concluded all felony defendants have a right to counsel and a proper defense (372 US 335 1963). Defense attorneys feel that they are upholding this decision and the will of the founders by representing their clients. Lenny Frieling writes, “I believe that my goal is to reach a fair result for my client. If their cannabis-growing operation was illegally searched, in violation of their rights as protected and defined by the Fourth Amendment to the U.S. Constitution, ‘fair’ might mean a complete dismissal.” Even if it is ethical to defend a client, there are still many considerations of ethics that need to be accounted for in their day to day practice.

### **Prosecutorial Ethics**

Although prosecutors are less prone to having their ethics called into question by the literature, there has been work done discussing the ethical standards that they are held to. Prosecutors are often held to local, state, and federal level regulations for their practice, and this can lead to confusion due to the complications of this system. Although they are subject to the American Bar Association’s Model Rules, and rule 3.8 specifically lists the special responsibilities that are put on a prosecutor as an advocate, Tennis (2010) claims that, “a national ethical code, specifically tailored to the unique features and constraints of the

enforcement of federal criminal laws, may help to alleviate these problems,” (p. 150) although he acknowledges the difficulty selecting who would write and enforce these new regulations. Prosecutors are subject to many ethical standards and can have a hard time being in compliance with all of them.

The high standard that prosecutors are held to may not be a problem for many in the criminal justice system, however there are plenty of documented instances of prosecutorial misconduct. This misconduct can have grave impacts for all involved parties, especially the defendants who quite literally may have their life on the line. Peter A. Joy (2016) places direct blame on the weakness of consistency in ethical standards for this misconduct. He claims “the current ethics rules provide too little guidance to prosecutors, and systems in place to monitor prosecutorial conduct are dysfunctional and rarely hold prosecutors responsible for misconduct” (2006, 428). Michael T. Fisher believes in a similar line of reasoning, citing a general unwillingness to overturn convictions in the event of prosecutorial misconduct as a major factor in the perpetuation of it (1988, 1323). It is clear that just because someone has committed his or her life to being a public servant does not automatically create ethical behavior. Prosecutors are just as susceptible to unethical behavior as defense attorneys and the legal profession as a whole.

The literature on the topic of ethics of lawyers leaves much to be desired on how lawyers practice ethics, how ethical they actually are and how that standard should be determined. The American Bar Association’s Model Rules for Professional Conduct have been put into place in order to guide and regulate attorney’s ethical behavior. However, there has been little research since the 1980’s as to the effectiveness of these rules. There are many speculations and opinions about the ethics of lawyers in the criminal justice system, however

there is little research to prove these. Although the criminal justice system purports itself to be for justice, there is no conclusion as to how lawyers fit into that role, or if they do at all.

### **The Current Study**

Despite the lack of continuity in opinions about the best way to achieve ethics, it is clear there is a large emphasis on ethics for attorneys. There is a significant lack of research on lawyers' perceptions of their own ethics, and the ethics of the system around them. This study aims to evaluate how attorneys working in Iowa's criminal justice system understand their own ethics, the ethics of prosecutors, defense attorneys, and the American Bar Association's Model Rules. This exploratory project provides a basis for other researches to continue doing research in the field on a much broader scale. To understand the answer to this question it is necessary to gain insight on the actual perceptions of lawyers working in the system.

### **Methodology**

#### **Sample Selection**

To answer the research question of how lawyers feel that they and others they practice with use American Bar Association's Model Rules this study includes the testimony of seven interviews participants that are practicing attorneys in the criminal justice system in the state of Iowa. First, the Black Hawk County Public Defender's office was contacted to see if any attorney in that role would be willing to participate. The participants were then recruited with a snowball sampling method, where the participants suggested other attorneys they thought would be beneficial in the study. The participants were contacted by telephone and asked if they would be willing to participate in a study of ethics of lawyers in the criminal justice

system. IRB protocol was approved before the recruitment and selection of any participants, and the protocols were followed throughout.

## **Demographics**

Of the participants, three were females and three were males. There were three prosecutors, one public defender, and three private defense attorneys. Five of the interviewees were Caucasian and one was African American. The participants ranged in age from 29 to 55. The participants all resided and practiced in the state of Iowa. They had attended law schools from various universities in the Midwest ranging in rank and prestige. All participants have been given pseudonyms to protect their confidentiality. It is important to note if the attorneys are a prosecutor or defense attorney. The following list can be used as reference.

Allen: Defense Attorney  
Bob: Defense Attorney  
Cara: Prosecutor  
Dana: Prosecutor  
Edward: Prosecutor  
Faye: Defense Attorney

## **Interview Procedures**

The interviews consisted of thirty open ended questions arranged in four categories: perceptions of ethics in law school, perceptions of defense attorney ethics, perceptions of prosecutorial ethics, and perceptions of the model rules. These interviews were approximately forty-five minutes long. The shortest interview was 21 minutes and the longest was 55 minutes.

A majority of the interviews took place in the attorney's office, and one took place in a coffee shop. A complete list of interview questions can be found in Appendix A.

## **Data Analysis**

After the interviews concluded they were transcribed and the data was analyzed. A system of open coding was used to identify the common themes and patterns. Reading through the transcripts provided insight as to the common experiences and perceptions of these attorneys. A running list was created throughout this process of themes that were consistent across multiple interviews. The five common themes that were the most relevant to the overall research questions were narrowed down from the transcripts. These themes comprise what was found to be the overall perceptions of these attorneys' experiences with ethics in the criminal justice system.

## **Findings**

### **Law School Training**

A common theme among the respondents was an overall positive view of their ethical training while in law school, despite the relative lack of it. Most talked about the enjoyment they got out of their law school ethics course and described their ethical training as informative and useful to them. All of the attorneys were very pleased with their overall law school experiences and courses, and their ethical training proved to be no different. Most noted the limited training they received in terms of actual class time. For example, Cara said:

*Cara: So in law school I had to take an ethics class it was only two credit hours and I think I took it over a winter break or something like that. I don't know if you can take a*

*semester long ethics class or if it's just the one over the break. I enjoyed the class I think that I had a good professor and it was interesting. That was really the only time that they focused on ethics. In order to I guess, be an attorney, you have to take a separate ethics uh test. Now I can't remember the name of that either which is sad. So they tell you about it, they tell you the rules, they tell you things to do and things not to do. I don't know if when you're in law school at the time you're like ohh I get it all, until you're out practicing and then you're like..oh.. okay I get it now. So there's one class I guess to answer your question.*

Experiences like these were incredibly common among all attorneys interviewed. The American Bar Association's mandate of one course in professional ethics was the standard used by all of the law schools that these attorney's attended. However, many attorneys had the experience of the concept of ethics or professional ethics being brought up in many of their other classes. The attorneys seemed to think that this was not entirely sufficient to cover all of the ethical issues that need to be addressed. For example Bob believes that:

*Bob: Ethics is better taught by examples and scenarios because a lot of times I think ethical situations can arise without really expecting it. And so it really probably needs to be intensely taught than it is where it's kind of just brushed upon in other classes and other areas.*

The attorneys felt that even though there was not a specific focus on ethics in terms of class offerings ethics was an overall theme of the legal education. They noted that in many of their classes their professors would talk to them about the ethics of the particular situations they were learning, and provide them with ethical scenarios that could result from these topics. The once class that they had to take on ethics was not the only time that ethics was addressed during their legal education, instead it was woven throughout their courses. Ethics seemed to be a concept that was ever present in the legal education and flowed throughout the curriculum in ways of class discussions, professor's scenarios, and experiential learning. When asked to rate their ethical training while they were in law school on a scale of 1-10 most found it to be average or above average, ranging in scores from 6-10. Allen claimed that the ethical training

he received was sufficient for his practice after law school saying, “it gives you enough of a background to understand what your obligations are. Those more difficult ones are the ones they prepare you for.

This confirms what the research has found about overall comprehensiveness of law the law school ethical training. The attorneys seemed to believe law schools did not need to have a specific focus on ethics in order to adequately train them in the subject, because the best ethical training comes from the experiences they have in the realm of practicing. The research says All of the attorneys had very similar experiences with regards to their law school training. Even though multiple law schools were attended throughout the span of several decades all attorneys spoke similarly about the content, layout, and extent of their ethical training during their legal education. They all had an overall positive view of the training that they received and felt that their training adequately prepared them to handle ethical situations in the world of a practicing attorney. The attorneys seem to be in the middle of the two extremes that the research shows, they do not consider law school ethical training to be overly useful, but they do not believe that there is a significant need for change.

### **Trust Fund Problems**

The attorneys were asked if what they thought the biggest ethical problems they would face while in law school were actually the biggest ethical problems facing attorneys. Most claimed it was not, and many referred to attorneys’ problems with managing their trust funds and stealing from their clients. A legal trust fund is similar to a checking account where the client’s money is stored over the course of their representation. The attorneys were very

shocked to find this to be a problem when they got out of law school. Cara did not believe that would be a problem, but she quickly found out once she entered the workforce. She said:

*Cara: It seems like a lot of people have trouble stealing from their clients that kind of stuff I never thought I'd have a problem with. I was in private practice for two years before coming here and I still don't quite understand how people do that and think they are going to get away with it. It seems to always bite people in the butt.*

Most of those attorneys did not have experiences with the type of behavior in their personal lives that they noted, but they seemed to be very aware of how big the problem is. Many had heard various stories of attorneys doing this and losing their job, license, and even the firm going under in some cases.

One of the attorneys witnessed this problem firsthand, as directly out of law school the firm she was working for went under because the managing partner's theft from his clients was discovered and he committed suicide. Faye recounted her story when she was asked about what ethical issue she was shocked to find out about after law school.

*Faye: I'm kind of in a weird spot. It was always my dream to go back and work at this one law firm. I got a job with them and my first day as a practicing attorney the big partner committed suicide. He had been stealing a bunch of client money and it all got found out. It was funny the day before that I was sworn in and it was all like yay I'm a lawyer now, and someone told me as long as you don't sleep with your clients or steal from them you'll be fine. And then that happened. So I never thought that would happen to me. That's the biggest thing I've encountered is stealing client money.*

Faye was completely dumbfounded by this experience, as she had known about the prestige and reputation of this firm. She had just landed her dream job, and it was entirely ruined by one person's decision to steal from his clients. She notes how traumatic the experience was for her, and how overall appalled she was that something like this would happen.



All of the attorneys were shocked to find out about issues with trust funds when they began their law practice. They had thought the biggest issues they would encounter were things they had seen on TV or heard about such as hiding evidence and lying. Although some noted that such examples do happen attorneys stealing from their clients seemed to be a pervasive issue that they were either directly faced with or were made very aware of through their time in practice. They also noted that it was a problem the Iowa Supreme Court was very aware of and tried to spread awareness of this issue by sending out opinions relating to these issues.

The attorneys all seemed aware of issues that could cause attorneys to be participating in this type of illegal and unethical behavior. Many mentioned the illegal drug use by attorneys that led them to start stealing from their clients. Allen mentions the pervasiveness of mental health issues as well as substance abuse for many attorneys that cause problems for defense attorneys in the criminal justice system.

*Allen: Most of the problems attorneys have is in the cover-up and often times its not some character flaw like the attorney is a liar it's mental health issues depression, substance abuse or financial problems. That's coming from a true defense attorney. There are no bad people just people with bad circumstances. But by and large that's what you see. And you see the biggest ethical issues is when someone gets in over their head but instead of pulling out they stay in it and it just gets deeper and deeper and worse.*

These sorts of problems seem to plague the legal community in Iowa as it is something that all attorneys are very aware of. The attorneys interviewed seemed to think of this as an incredible problem, and also be unaware of how people could do things like this to their clients. The issue of attorneys stealing from their client's trust funds was not one that was addressed in the research.

## **Prosecutorial Ethics**

Most of the attorneys on both sides of the aisle thought very highly of opposing counsel as a whole. Defense attorneys expressed the utmost respect for prosecutors and vice versa. However there were criticisms that were noted. Defense attorneys and prosecutors alike heavily commented upon the perception of the necessity to win for prosecutors. The attorneys were asked what they believed the biggest ethical weakness of prosecutors as a whole were, and many had a very similar answer. Edward had particularly strong feelings about the topic of prosecutorial ethics.

*Edward: Prosecutors want convictions, they want guilty verdicts. If you have that philosophy that you want a guilty verdict it turns the adversarial system into a contest. The prosecutors I've met, unfortunately, have always had that desire. The way the system is set up creates a problem...You have prosecutors that are bent on prison, and they might think it's right they are protecting the interest of the community or it's what justice looks like. Justice is all my perception of what justice looks like. It's all subjective experiential concept. If you are a prosecutor that thinks justice is prison they will advocate for prison at any point in time, but I think on an ethical basis justice is a prosecutor being able to realize justice could be a reduction of his sentencing. Unfortunately that doesn't happen and the concept is always how punitive can it be? And I think that is a very unethical process.*

Cara talked about this issue as well saying, *"I think in the pursuit of 'justice' I think sometimes it's the same as defense attorneys that they get so blinded and they start ignoring the rules and they start not making those disclosures that they need to or not being honest with the court. I guess they just start getting too wrapped up in it."* Both prosecutors and defense attorneys spoke of the problem with prosecutors being too focused on the punitive aspects and losing sight of what true justice is. They all have witnessed that many prosecutors have a 'win at all costs' attitude, which they believe is not what prosecutors set out to do. Many pick up on the fact that prosecutors can be too punitive and set on jail or prison time rather than attempting to rehabilitate the offender. The idea of justice was frequently brought up, and neither prosecutors nor defense attorneys are convinced that it is being done in all cases. They believe that many

prosecutors believe in retributive justice and locking an offender up, rather than looking at justice as a broader concept. This ties in to the inconsistencies of the guidelines prosecutors are given to follow according to Tennis (2010). They are not given many constraints on when to bring down the hammer of the law, and the attorneys recount that means they rarely place a constraint on themselves.

The attorneys all realize that being overly punitive is not an ethical violation that could be reported to the ethics board and result in disciplinary action in any way. However, they expressed that this is an issue of ethics, and a fault that many prosecutors have. The attorneys were hesitant to call most of the issues that they encountered an ethical violation, since a reportable ethical violation could cost someone their job. To both defense attorneys and prosecutors alike there is an issue with being focused on winning and jail time over justice actually being done. The research about prosecutorial ethics speaks to the lack of consistency in the standards that prosecutors have to follow. This can be seen in what the attorneys believed about prosecutorial ethics, because they did not believe they were breaking any rules or standards, they just did not believe that being overly punitive means being ethical. Fisher (1998) found that prosecutorial misconduct was unlikely to be reported or punished. The attorneys seemed to believe the same, even though prosecutors may be acting unethically they and others around them are not willing to turn them in for their behavior.

### **Ethics of Defense Attorneys**

Neither side painted defense attorneys with such a broad brush, however issues of honesty and integrity were often cited as the weaknesses of defense attorneys. Multiple attorneys gave the example of domestic violence cases, and how a defense attorney could

potentially be unethical in that situation. As with prosecutors it is not a clear reportable ethical violation, but attorneys feel very strongly that the behavior is wrong. When asked what an ethical weakness of defense attorneys are, prosecutors brought up the way that defense attorneys may go about attempting to help and be a zealous advocate for their client.

*Edward: I've had phone calls that... I deal with a lot of domestic violence cases...when the victim and offender are in an intimate relationship you can tap their phone calls from the jails. And 8 out of 10 phone calls they don't know their being monitored and the conversations are clear, my defense counsel said this, or don't say this, or don't show up, or disappear, and uh the criminal defendant talk about this when they talk to their loved ones about what advice the defense counsel gave and it's make the victim lie or disappear. I think depending on the case or the strength of the evidence in the case defense attorneys do that.*

It is not every defense attorney that does these types of things, however it is very concerning to the attorneys in this study that there are people that do. In this case it was the prosecutors who found this to be an ethical weakness or problematic situation for defense attorneys. This relates to the research regarding the ethics of defense attorneys.. The prosecutors felt that this type of behavior was problematic because they were not encouraging honesty, and were in some ways hiding the truth from the court. Encouraging a witness to not be there was also not allowing the state to present their best case in the minds of the prosecutors. There are many people, prosecutors and average Americans alike that believe a defense attorney is being unethical by representing a guilty client (Rivera-Lopez 2014). The prosecutors that were interviewed did not believe they were unethical just for defending them, but seemed to believe that alerting their clients of things such as a lack of victim presence was unethical. In the eyes of a the prosecutors interviewed there was a very fine line between what is ethical and what is not in terms of representing a client.

This situation was brought up in another way for defense attorneys. When asked what an ethical problem would be for prosecutors one of the defense attorneys brought up the potential ethical issues of domestic violence situations. Faye said:

*Faye: I think something that would cause them difficulty is when someone is reporting something like a domestic violence situation and then they have to rely on that person but they can change their story or they don't want to be a witness for you so I feel like that interaction could become very difficult. You can't tell them what to say, but it's like don't go changing your story on me. When maybe it's when they were in the beginning lying.*

It is not clear if Faye meant that this changing of a story was something that the defense attorney could have a role in. However, she was aware of the problems that this type of thing can cause. Defense attorneys are aware that it would be easier to defend a domestic violence case if there is not a witness to support the state's claims. Faye's perception of this issue seems to fit Pollock's (2012) understanding of the ethicalness of representing clients. She surmised that every defendant should be fully aware of all of the opportunities for them to be successful in their cases. The defense attorneys tended to believe that representing their client in the manner that would lead to the best outcomes for their client was ethical so long as they were not lying to the court or other flagrant rule violations.

The attorneys believe there is no hard and fast rule that they are breaking, however it is not how these attorneys perceive that things should be done. They all think that it is an issue if defense attorneys are attempting to misconstrue and weaken the evidence against the defendant by encouraging a witness to not be present or share their whole story. The attorneys feel that this situation can be a very fine line because if the defense became too involved with attempting to dissuade a witness that would be a clear violation and an ethical offense.

However, if they are just to mention that it would be beneficial to their client the attorneys perceive that to be right on the line of zealous advocate and unethical behavior.

### **Usefulness of the Model Rules**

All of the attorneys believed that the Model Rules were a good starting point for a list of ethical mandates. However, they did not believe them to be overall very broadly used. Even though the attorneys do not believe them to be useful, they do not see an issue with that. Cara did not have use for them in her daily life, however she used them when needed. She claimed that:

*Cara: I think they are useful when you have a question and need to look it up. I'd say in my day to day practice I don't look at the rules very often. When you do one type of law like I do you kind of know what your rules are already so it's not like you need to keep refreshing yourself on them. I suppose they are useful when I need them.*

Dana saw the rules as something that just restated what the majority of attorneys already knew about ethics and their role in the criminal justice system. For Dana they were more a list of things that you clearly should not do, but people have done in the past. When I asked Dana if the Model Rules were useful she stated:

*Dana: I think they are good because they give attorneys a guideline for their behavior. If you are honest or a good person and are fair you don't really need the rules. But the rules are always made for people that created the problem. Laws are usually enacted after something has occurred and people decide they need a rule because of it. The rules are enacted because people have screwed up prior.*

For the attorneys the ABA Model Rules of Professional Conduct are something that need to be there, and can be a good reference in a particularly unique situation. However they are not something they feel they need in their day to day practice, and they feel they are sufficiently informed about them. They feel similarly about the Model Rules as they do to ethical training in law school. The attorneys find that most of the situations that arise come from practice, and

no written mandate or class time can prepare someone for all of the situations that they will encounter. They feel that many of the rules are self explanatory and obvious, any many of them are unnecessary. Many of the attorneys were shocked about the amount of rules and specific types of things that were covered, however noted it was as a result of someone doing something so obviously unethical that it now needed to be covered.

The attorneys feel that the rules are even something they rarely even really need themselves. They all say it is simple, and bring up the common advice of “don’t steal, don’t lie, and don’t sleep with your client.” Many of the attorneys note that the Iowa code of conduct is even more stringent than the model rules, so if they are complying to the state rules they have no reason to be concerned with the overarching rule set. However, they do say that they could be focused on more to keep attorneys refreshed and up to date on what the standards are. I asked how useful the attorneys felt the model rules were and Bob said:

*Bob: I believe they are probably useful. The best use of those rules are probably to have seminar time devoted to them because attorneys are notorious for not keeping up on things they should keep up on and ethics probably gets less attention than other areas such as areas that you practice in and you spend more time looking at that stuff. I think ethical rules is probably something that needs to be forced on attorneys just because it’s important because it’s important.*

The participants are in agreement that there should be a set of ethical standards for all attorneys to follow, and all hold their own ethics and being an ethical attorney in very high regard. Even though they do not need or use the rules that often they believe it is a good thing to have because every profession needs a code of conduct.

## **Discussion**

This study sought to learn more about the perception of ethics for attorneys practicing in the criminal justice system in regards to their own ethics, prosecutorial ethics, defense attorney

ethics and the model rules. When discussing law school with the attorneys several themes arose. It is clear that while the participants believe ethical training was not an emphasis in their legal education, they also they did not find it to be problematic. The general consensus is that ethics are not learned in the classroom, rather they are learned through experiences.

Even though attorneys found their training to be sufficient the law school ethical training program could be revamped to assist in helping attorneys understand the real world ethical issues that they will encounter. It seems that the attorneys found their biggest source of ethical education came after law school when they were practicing. Law schools could use the knowledge that their student learn ethics best outside of the classroom by putting their students into experiential learning situations that would help them be prepared for the ethical scenarios they may face. Many law students already participate in clinical experiences, externships and internships in their legal education. It may be beneficial for law schools to find a way to incorporate ethical training into these preexisting programs. Tim Dare (2010) believed that adding broadness to law school ethical training would be beneficial. If law schools were to keep the current classroom model they could integrate scenarios, role play, and real life situations into their lessons. The attorneys all note that they were faced with challenging situations that they did not cover in law school. These courses could have practicing attorneys come speak to their students about the unique ethical issues that they face to give students an understanding of what may happen when they begin to practice on their own. The American Bar Association has not placed a significant emphasis on ethical training while in law school, and that lack of emphasis is shown by the lack of required ethics curriculum.



A pervasive ethical issue mentioned by the attorneys in this study was attorneys stealing from their clients. This type of behavior encourages and perpetuates the negative stereotypes of attorneys that the general public has. The attorneys in this study all surmised that the issue of stealing and mismanaging client money comes from deeper issues such as substance abuse problems. This is an issue that needs to be managed within the legal community, and could be benefited by a variety of solutions. The American Bar Association or each state could have more stringent requirements for how client money is handled or accessed. The power of accessing the money could be taken away from the attorneys and placed exclusively in the hands of an office manager of sorts. This would be a start to not allowing the client's money to be mishandled and taken by the attorneys. There was not a significant amount of past research to support that this is an overall problem with the legal system, and additionally there is not research to guide these solutions. However, the field could borrow ideas from research on substance abuse and company theft and apply it to benefit the legal community.

Attorney perceptions of prosecutorial ethics show a complete inconsistency between the role of a prosecutor and what is occurring in practice. Prosecutors have a significant amount of discretion, they have the ability to decide to bring charges and what charges to bring, and these decisions have serious implications for the accused. The role of a prosecutor is to make sure that justice is done. However, it is clear the attorneys do not believe that this is always happening. They believe that many times the prosecutors are over charging and focusing on punitive measures rather than helping people and being the public servants they are supposed to be. The attorneys were not satisfied with this, because it was not what they believed to be

ethical behavior. The attorneys felt that prosecutors get too wrapped up in their positions, which allows them to focus only on punitive measures.

One explanation of this harsh prosecutorial behavior is the fierce competitive nature that has been integrated into the criminal justice system. The attorney Edward comments that it often times goes from an adversarial system to a contest, but that is what prosecutorial agencies promote. Their offices focus on a high win percentage, and that is a major way that prosecutorial success is measured. However, this does not align with justice being done. Incarcerating an innocent person, overcharging to force a plea deal, and other punitive prosecutorial measures are not justice. However, they are what the system encourages in many cases. The attorneys did not believe that the contest that the system can create is the best way to ensure ethics and the model rules are being followed. The attorneys did not believe that prosecutors behaving in this manner to be ethical or in complete compliance with the ethical standards set forth by the American Bar Association. However, they did not view it as a large enough issue to report it to the Bar or any other disciplinarian. In order to encourage more ethical behavior in prosecutors there needs to be a bigger focus on justice within these governmental agencies. The research shows that the standards for prosecutors are inconsistent. Having more standards set in place, and not created disjointed policies because the research shows this is challenging for prosecutors to have a full understanding of all of their obligations. They need to create a culture that encourages justice over all else, and that in turn could assist in creating more ethical behavior in prosecutors.

The ethical problems for defense attorneys were all related to integrity issues when representing their clients. Defense attorneys are there to be a zealous advocate for their client

and make sure their right to due process is upheld. However, it is clear that the line is being crossed if they are encouraging their clients to do what they can to not have a witness testify against them. Even though the attorneys personally found it to be an issue, they were unclear if it resulted in an actual ethical violation in relation to the rules. To effect change there needs to be a more clear definition of what can and cannot be done by defense attorneys in their attempts to best represent their clients. The research shows that despite a negative public perception of defense attorneys as long as they are complying with the local, state, and federal laws they are being ethical. A defense attorney's job is to protect their client's due process rights. Even if a prosecutor or the public do not like that a defense attorney is allowed to be a zealous advocate, it is still in the interest of justice that this is done. In order for justice to be done everyone needs the opportunity to present his or her best case. The Constitution guarantees every defendant this right, and the attorneys felt that client's due process rights were upheld.

Both prosecutor and defense attorneys had many situations that they found to be ethical issues. However, all were quick to say they were not in violation of the rules or an actual reportable offense. The bar seems to be set high for what constitutes as a reportable offense, and this allows attorneys to get away with behavior that is considered unethical because it is not illegal. In order for the overall ethicalness of attorneys to improve their needs to be stricter guidelines they need to follow. There are clear issues with the ethics of practicing attorneys, however there is a general consensus that there is little to be done about it because of the way that the system is set up.

The American Bar Association attempts to provide ethical and behavioral guidelines through their model rules, however if they are perceived to not be useful they will not benefit the overall ethicalness of the profession. The attorneys all comment that they are very rarely used, and they were not aware of the exact content of them unless they had a specific question. This can contribute to the perpetuation of unethical behaviors because the attorneys do not have a full grasp of their expectations as set by the model rules. The attorneys felt the best way to encourage an understanding of the Model Rules would be continuing education courses that emphasize the rules and ethical training more. The attorneys felt they had a good understanding of the rules and the acceptable behavioral standards, and it is likely that most practicing attorneys share the same sentiments. If they are required to have more frequent contact with the rules there may be far less inconsistencies in the ethical practices because they will have a better overall understanding of what the standards are. Providing more continuing education in this capacity will also force attorneys to be self reflective of their own practices, and they may realize their own ethical shortcomings before they develop into larger problems. There has been little research in the past thirty years about the usefulness of the Model Rules, and the attorneys did not believe they were overly useful. However, they all believe a set of rules need to be in place, and as research on prosecutorial guidelines shows consistency of the rules is the best way to provide an attorney a through understanding of their role an obligations (Tennis 2010).

Overall the attorneys surveyed had a positive view of attorney ethics in the criminal justice system. They felt they were sufficiently prepared to practice and face the ethical situations that may arise. The attorneys had many criticisms of the ethics they experienced in the criminal justice field, however there were many positive aspects that they noted as well.

Many of the attorneys had a strong respect for their office and many of the other attorneys practicing in the state of Iowa. There are definitely aspects that need to be approved upon, and this study sheds some light as to what those are. The ethical issues of attorneys in the criminal justice seem to be problems that can be addressed and improved with measures set forth by law schools, government agencies, individual firms, and the American Bar Association. Over time if these changes are made and sustained the general perception of legal ethics may change, and justice may truly be done for all.

#### Limitations and Future Research

While this study provides information about attorneys' perceptions of legal ethics there are some limitations in scope. This study is limited to attorneys in Iowa, which may affect the generalizability of the information. Secondly, the sample size was small, which again may affect the way it can be generalized to the whole. Consequently, future research could investigate this information in multiple states across the United States. Additionally, it may be beneficial to compare large cities and small municipalities, and urban and rural areas. Researchers could more closely examine the effects of demographic factors such as age, race, and gender on ethical decision making and perceptions. Finally, future research could also attempt to gain an understanding of the types of behaviors attorneys find ethical or unethical through scenario based questions.

## REFERENCES

- Dare, T. (2010). *Philosophical Legal Ethics And Personal Integrity*. University of Toronto Law Journal, 1021-1030.
- Etienne, M. (2005). *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*. SSRN Electronic Journal SSRN Journal.
- Fisher, M. T. (1988). *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*. Columbia Law Review, 88(6), 1298–1324.
- Frieling, L. *Why Do We Defend Guilty People?* The Docket May (2006) Denver Bar Association.
- Joy, Peter A. (2006). *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*. Wisconsin Law Review, Vol. 2006, p. 399-429
- Pollock, Joycelyn M. (2012). *Ethical Dilemmas and Decision in Criminal Justice*. Wadsworth Cengage Learning.
- Rivera-López, E. (2014). *Is it Morally Wrong to Defend Unjust Causes as a Lawyer?* Journal of Applied Philosophy, 177-189.
- Tennis, B. (2010). *Uniform Ethical Regulation of Federal Prosecutors*. Yale Law Electronic Journal.
- Thielens, W. (1969). *The Influence of the Law School Experience On The Professional Ethics of Law Students*. Journal of Legal Education. 587-601
- Travis, M., & Tranter, K. (2014). *Interrogating absence: The lawyer in science fiction*.

International Journal of the Legal Profession, 23-37.

*Uniform Federal Rules of Attorney Conduct: A Flawed Proposal.* (1998). Harvard Law Review, 2063-2063.

Shultz, M. M., & Zedeck, S. (2011). *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions.* Law & Social Inquiry, 36(3), 620-661.

Webb, J. (1998). *Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education.* J Law & Society Journal of Law and Society, 134-150.