

Robert M. Krivoshey: Friend and Teacher

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Bob Krivoshey was a friend and teacher to everyone. Students flocked to his office, seeking help on classwork, clinic cases, and life decisions. Graduates returned year after year, eager to share their successes and tap more of Bob's wisdom. Judges, prosecutors, and defense lawyers welcomed him to their courthouses, happy to learn from Bob. Faculty colleagues perched in Bob's office, swapping stories, seeking advice, and debating politics.

For me, Bob was a very special friend and teacher. In 2008, he invited me to co-teach the Criminal Defense Clinic with him. This was a gutsy move (for both Bob and me) because I had no experience with criminal law, trial practice, or clinical teaching. But Bob's experience and mentoring abilities were so vast that I happily accepted his invitation; I knew that Bob would turn me into a criminal defense lawyer and clinician, all while guiding our students on their own journeys.

And what journeys they were! Together with the students, I learned new meanings for words like "slated," "pocket," and "flop."¹ I discovered how many common household items qualify as "drug paraphernalia." I cultivated the ability to describe clients' alleged sexual acts without embarrassment. And, of course, I learned to cuss—in one of our first conversations, Bob warned me that the language of criminal defense is not "polite."

More important, the students and I learned to talk with criminal defendants and witnesses to gain their trust and understand their perspectives. We learned the injustices that mar our policing and criminal justice systems. We discovered the ways in which those systems trap poor and nonwhite defendants in cycles of petty crime and disadvantage. We found that some clients are innocent of the charges against them, but that defense counsel bears a heavy burden of proving that innocence in plea bargaining.

Most significantly, Bob taught us that we could help our clients despite the long odds against them. For some clients, we persuaded the prosecutor to dismiss charges. For others, we found drug treatment programs, supported their attempts to gain employment, and successfully argued for probation. For every client, we listened to and respected their life stories.

Bob was a master of this work; he saw every criminal defendant as richly human. Bob appreciated each client's individuality, talking with each one about their children, challenges, and dreams, rather than just about their alleged misdeeds. He counseled clients with clear eyes but a gentle heart; clients felt

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¹ A suspect who is detained in jail is "slated." The "pocket" is the folder in which the prosecutor maintains documents related to the case. When a parole board denies parole, the "flop" is the time it sets until the prisoner will next be considered for parole.

Bob's concern no matter how harsh their prospects. Under Bob's tutelage, decades of law students learned to do the same.

Bob applied the same approach to his teaching. He saw each of his students as a rounded individual, not just a future prosecutor, public defender, or corporate lawyer. Students talked freely with Bob about their triumphs and setbacks, both personal and professional. Those conversations helped students prepare for their challenging work as licensed lawyers. The discussions also drove home a key principle of successful law practice: clients' problems are never just about the law.

In the classroom, Bob often used stories from his personal experience to illustrate his points. But these weren't traditional "war stories." The classic war story features the teller as superstar. Bob's stories focused on the client or legal context, rather than on his personal victories. Often, Bob would tell a story by first posing a question. "Suppose this happens," Bob would say, describing a client interview, plea bargaining session, or courtroom exchange. "What would you do?" As the student answered the question, Bob's story would gradually emerge. Sometimes the student's response was more effective than Bob's reaction had been, a fact that Bob would readily admit. More often, Bob's story offered an elegant solution to a client problem, ethical challenge, or evidentiary quandary.

A common thread explains much of Bob's success as friend, practitioner, and educator: empathy. He had an uncanny ability to place himself in the shoes of other people. He would slip quietly into the shoes of a client, witness, student, or colleague and offer counsel from that perspective. That is why clients embraced Bob's advice and students remembered his lessons—Bob left a piece of himself inside each of them.

At the same time, Bob relished courtroom combat. When we began teaching together, I asked him why he chose to represent criminal defendants. He told me that he liked to win hard contests, and that defending a criminal defendant in a jury trial is one of the greatest challenges law practice offers. Winning a case under those circumstances, Bob thought, was a triumph worthy of the name. When Bob taught students trial techniques, his competitive instincts rose to the fore. He taught them both the science and art of courtroom victories, from authenticating essential pieces of evidence to crafting persuasive closing arguments.

But Bob drew a firm line between informed, aggressive advocacy and unprofessional conduct. He valued his reputation among lawyers and judges—and taught his students to do the same. "Know the rules of evidence better than the judges and opposing counsel," he counseled. "And know the facts, testimony, and evidence better than anyone else. Use those tools to tell the best story to the jury. That's how you win cases—not through unprofessional tricks."

Bob frequently posed ethical conundrums to our students. Some puzzles arose from cases we were handling. One year, a student's mother accompanied her to the courthouse and overheard the complainant saying "something interesting" to the prosecutor. Could the mother relay that information to our

student?² Another time, a judge asked our student whether his client had any prior convictions. The student knew of several prior convictions that the prosecutor had not identified; did he have to disclose his own client's convictions to the judge or could he decline to answer?³

In addition to addressing these real-time issues, Bob maintained a storehouse of ethical dilemmas for class discussion. His class notes from fall 1991, one of the earliest times he taught the Defense Clinic, include a list of twenty "Problems in Legal Ethics" to discuss with the students.⁴ Some raised fundamental issues of our clinical practice, such as:

Assume you have been assigned to represent an indigent accused of crime. May you discuss the case with the other students or with a clinical supervisor? May you discuss it with the Dean or other faculty members?⁵

Others addressed the special challenges of a criminal defense attorney:

You represent an indigent charged with a minor offense. He will probably receive probation if he is convicted. You determine that he was legally insane at the time he committed the offense. If he is found not guilty by reason of insanity he will be committed to a mental institution for an indefinite period of time. If he does not receive psychiatric aid promptly, he will probably commit other offenses of the same nature. What should you advise him? What should you do if he desires to plead guilty?⁶

Twenty-six years after Bob drafted these questions, we are still discussing them in class.

Bob's concern for ethical practice spurred development of our Prosecution Clinic. Bob spent his early years as a defense lawyer, but he saw the potential for improving the criminal justice system by educating ethical, thoughtful prosecutors. Our colleague Lou Jacobs had established the Prosecution Clinic two years before Bob joined the faculty, but Bob brought the program to fruition

²Of course. If the prosecutor speaks to a complainant in an open hallway with people nearby, the conversation is hardly confidential. The mother had not hidden herself to eavesdrop; she was sitting in the hallway when the prosecutor and complainant stopped to talk openly in front of her. Caveat accusator.

³The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility suggests that defense counsel may refuse to answer—unless the defendant has lied about his record to the judge. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 353 (1987). Judges, however, sometimes hold a different view. Cf. Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105, 1113 n.48 (2016) (noting the possibly contrary view of judges, as well as their power to impose duties under their supervisory authority).

⁴Leroy Pernel & Robert Krivoshey, *Juvenile/Criminal Defense Practicum Course Materials 9* (Fall 1991) (unpublished class materials) (on file with author).

⁵*Id.* at 9–10.

⁶*Id.* at 10.

and maintained its excellence. We remain one of the few law schools to offer students clinical opportunities in both prosecution and defense.⁷

Bob's notes from his very first Prosecution Clinic session illustrate his approach to both clinics. According to his notes, Bob centered that class on Kafka's novel, *The Trial*.⁸ He reminded the students that people sometimes refer to a criminal trial as "Kafkaesque" or "something out of Kafka." What does that mean, he asked? Do defendants in American courtrooms suffer the kind of mysterious, unfair prosecution that Josef K. suffered in Kafka's novel? Not literally, Bob's notes suggest: American defendants enjoy numerous constitutional and statutory rights.⁹ At the same time, though, criminal defendants often feel that they are pawns in a "mysterious, inaccessible" proceeding.¹⁰ Why does that happen?

To answer that question, Bob urged his students put themselves in a criminal defendant's shoes. The defendant's liberty is on the line, but she rarely has the chance to speak formally on her own behalf. She consults privately with defense counsel, but rarely attends the plea bargaining sessions between her counsel and the prosecutor. In those meetings, the two lawyers dissect the defendant's character, crimes, and future—all without the defendant's presence. The lawyers may approach the judge to discuss possible sentences; the defendant, once again, sits on the sidelines. If the case proceeds to trial, defense counsel usually advises the defendant to stay silent rather than testify.¹¹

There are good reasons for these practices, and they often benefit the defendant. But from the defendant's perspective, Bob suggested, the proceedings often *do* look Kafkaesque. Lawyers swirl around the defendant, talking an unfamiliar language, while she stays silent on the sidelines. When you enter a courtroom, Bob encouraged future prosecutors and defense lawyers, take a moment to view the proceedings through the defendant's eyes.

On the other hand, Bob retained a healthy (and humorous) sense of realism about the defendants he prosecuted and defended. His notes for that first Kafka-themed class end with this Krivoshey pearl: "Still, don't you sense that 99% of defendants are arrested for doing the wrong thing in the wrong place at the wrong time—and know it[?]"¹²

⁷ To eliminate conflicts, we teach the clinics in different semesters and counties. The Prosecution Clinic operates out of the Delaware Municipal Court during the fall semester; the Defense Clinic represents clients in the Franklin County Municipal Court in the spring semester. Each year, Bob transformed from prosecutor to defense lawyer at the stroke of midnight on New Year's Eve.

⁸ Robert M. Krivoshey, Notes for Criminal Prosecution Clinic: Housekeeping and Kafka (Aug. 22, 1988) (unpublished class notes) (on file with author).

⁹ *Id.* at 1.

¹⁰ *Id.*

¹¹ *Id.* I have amplified Bob's words from his more cursory notes, but I heard this tale many times while teaching with him. Bob did not always refer to Kafka, but he frequently commented on the criminal defendant's muted voice in criminal proceedings.

¹² *Id.* at 2.

Bob's humor was an essential tool in both his prosecution and defense work. Humor, he explained to students, was a coping mechanism for everyone associated with the criminal justice system. For Bob, humor also expressed his empathy for defendants, complainants, and witnesses; his dry comments reflected the unique humanity he saw in every case. Bob developed humorous sobriquets for each case; these helped us recall the facts of the case as well as the parties' unique perspectives. Who could forget the "Defendant Who Wasn't Seen Driving," the "Woman Who Played Dice by Herself" (which was not a crime), the "Grinch Who Stole Christmas," or the "Man Who Cursed the Bus Driver"? Every case carried its own humanity.

Bob's spirit lives on within the clinic and among our graduates. His graduates work as judges, prosecutors, defense lawyers, and practitioners in every area of the law. They approach their work with more humility, empathy, and professionalism because of their time with Bob. They also understand the importance of mentoring new lawyers within their own workplaces, paying forward the wisdom Bob shared with them.

Back at the College of Law, our students still learn from Bob Krivoshey. He told his stories so effectively that I can retell them in his name. Students look up eagerly when I signal the start of a "Bob story." Our clinical program maintains Bob's commitment to educating both defense lawyers and prosecutors. And all of us who knew Bob try to embody his empathetic approach to teaching and lawyering.

But Bob's professional legacy extends far beyond these academic borders. He touched countless judges, opposing counsel, defendants, complainants, and witnesses. Some complainants felt safer because he secured convictions against offenders. Some offenders got sober, found jobs, and went back to their families. Many judges and opposing counsel learned a better, more professional way to approach their cases. When I remember Bob, I think of the thousands of people who share a piece of my memories. I never met most of them, but we all benefited from the magic of knowing Bob.

