

FEDERAL CRIMINAL DEFENSE TRAINING

Sponsored by

**the Office of the Federal Public Defender
and the Charles F. Greevy, Jr. American Inn of Court**

**Monday, July 20, 2020
Harrisburg, PA**

Ethical Decision Making for appointed Criminal Defense Lawyers

**presented by
Tony Gallagher
Federal Defender for the
District of Montana**



**Don't tell my mother
I'm a Public Defender.**

**She thinks I'm a piano
player in a whorehouse.**

NOTES ABOUT THIS PRESENTATION

- The Ethics Rules discussed during this talk are from the Pennsylvania Rules of Professional Conduct and the ABA Code and Model Rules of Professional Responsibility
 - Advisory Ethics opinions are from the Pennsylvania Bar's Legal Ethics and Professional Responsibility Committee
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NOTES ABOUT THIS PRESENTATION

- Questions regarding ethics issues, opinions and Rules?
 - Contact the PBA Legal Ethics and Professional Responsibility Committee.
 - To reach the State Bar Ethics Hotline, call 800-932-0311 or 717-238-6715.
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NOTES ABOUT THIS PRESENTATION

Film clips and cartoons are used for educational purposes under the 'fair use' exception to the copyright laws of the United States, and are not displayed or presented for any other reason.

CONSUMER WARNING

No ethics opinion can guarantee a safe harbor in difficult cases. In close cases lawyers should proceed carefully, with full knowledge of the applicable ethical rules, and ideally with the advice of counsel



**Everyone charged with
a crime needs a lawyer**

GENERAL ETHICAL DUTIES OF CJA COUNSEL

- Local Rules for the Middle District of Pennsylvania, LR 83.23.2
 - CJA Plan for the MDPA, Part VIII.B.
 - eligibility for representation CJA Plan § IV.D.1
 - Receipt of other payments 18 U.S.C. § 3006A(f)
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APPOINTED COUNSEL REPRESENTATION

- One month after appointment your client comes to you and tells you he lied on the affidavit, i.e., that in fact he did and does have assets not listed on the affidavit, and he wants to give you some money because you're doing such a good job on his case. Should you tell the Court?
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APPOINTED COUNSEL REPRESENTATION

- Should you indicate to the Court that the defendant may now be able to pay, in whole or in part?
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APPOINTED COUNSEL REPRESENTATION

- Immediately prior to trial you learn from the defendant's sister that he has a savings account with \$10,000 in it. Should you inform the Court?
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EXPLAINING MATTERS

- The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.
-

ANATOMY OF A MURDER

Jimmy Stewart introduces his new client, Ben Gazzara, to the classic defenses for murder

EXPLAINING MATTERS

- In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.
-

THREE QUESTIONS (+)

- Plead guilty or proceed to trial?
 - Trial before a jury or just the judge?
 - Testify or remain silent?
 - [Whether to Appeal?]
 - [With some limitations, whether to act as her/his own advocate?]
 - See ABA Rules Prof. Cond. 1.2, Comment
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NUTS

1987 American drama directed by Martin Ritt and starring Barbra Streisand and Richard Dreyfuss. The screenplay by Tom Topor, Darryl Ponicsan, and Alvin Sargent is based on Topor's 1979 play of the same title.



“Remember when I said I was going to be honest with you? That was a big fat lie.”

PLEA DILEMMA

- She repeatedly professed her innocence
 - Now she wants to take the deal
-

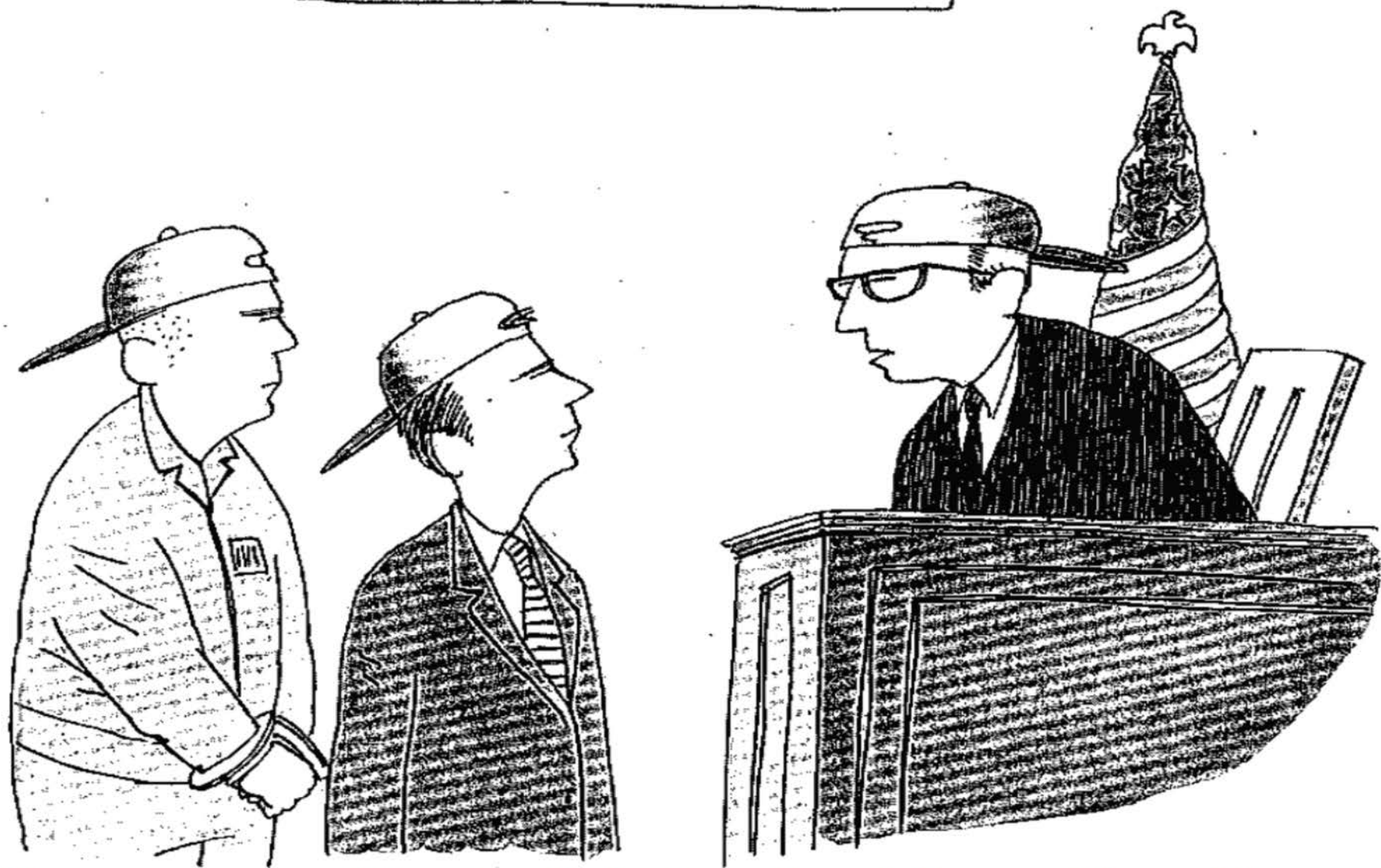
I received your letter and
maybe it's good that the trial
has been put off. I have
been keeping something from
you and I'm very sorry. I had
a talk with God and now I

I had
a talk with God and now I
need to talk with you.

and as soon as you can. Thanks for
your time.

Sincerely,

DUDE COURT



Does your client wish to plead 'sweet' or 'lame'?

Do you have a duty to
correct misleading or
false information?





***Its translated from French, so where it says
'Harvard Business School' it may mean 'jail.'***

THE ETHICS OF CROSS EXAMINATION

The goal of protecting the innocent at the expense of punishing the guilty, even to the detriment of the truth, is enshrined in the Constitution itself

Justice Byron White

Concurring and dissenting
in *United States v. Wade*,
388 U.S. 218, 87 S.Ct. 1926
(1967)

SO WE'RE OFF THE HOOK RIGHT?



Ethical Cross

- Whether the witness is perceived to be an ally, an enemy, or neutral, the cross-examiner should not pass up the opportunity to use leading questions to draw from the witness any bit of evidence that will support or corroborate the client's theory of the case, or contradict that of the prosecution.
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Ethical Cross

- The criminal defense attorney's job during cross examination is to fashion and present questions and try to elicit answers that convey a version of the truth – **the *client's* version.**
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Ethical Cross

- As part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.
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GOOD FAITH BASIS

DISCREDITING THE TRUTHFUL WITNESS

DISCREDITING THE SENSORY IMPAIRED WITNESS

**DISCREDITING
THE MENTALLY
DISTURBED
OR
EMOTIONALLY
DAMAGED
WITNESS**

A MORAL OR ETHICAL DILEMMA?

Presented by
Tony Gallagher

