Gus Solomon Inns of Court – January 29, 2009
Presentation of "Anatomy of a Murder"

INTRODUCTION - Brief explanation of characters and movie plot and topics to be presented for discussion (Rick Saturn – 5 minutes**)**

TOPIC # 1 – LAWYER CONSULTATIONS & CONDUCT
(Chris Larsen, Steve Sherlag, Kendra Matthews – 20 minutes)

MOVIE CLIP: Paul Biegler's (Jimmy Stewart) meeting with Lt. Manion (defendant, accused of murder), in which they discuss possible defenses and/or Attorney Biegler suggests a defense.

OREGON RULES OF PROFESSIONAL CONDUCT:

Oregon Rule of Professional Conduct 1.2(c) - Scope of Representation and Allocation of Authority Between the Client and Lawyer:

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyers knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope meaning or application of the law."

Oregon Rule of Professional Conduct 1.1 – Competence:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Oregon Rule of Professional Conduct 1.4 – Communication:

"(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

ABA STANDARDS FOR CRIMINAL JUSTICE

The United States Supreme Court articulated the standard for effective assistance of counsel under the Sixth Amendment in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, 466 U.S. at 688, the Court noted that "[p]revailing norms of practice as reflected in American Bar Association standards and the like...are guides to determining what is reasonable [representation.]"

The Defense Function - Standard 4-3.2 - Interviewing the Client

"(a) As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts."

JUSTICE BYRON WHITE ON THE DEFENSE FUNCTION:

Justice Byron White, in dissent, in *United States v. Wade*, 388 U.S. 218, 257-58 (1967):

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.[5] To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.[6] Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe[] but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, 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.

FN5. The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314. * * *

FN6. One point of view about the role of the courtroom lawyer appears in Frank, Courts on Trial 82-83. 'What is the role of the lawyers in bringing the evidence before the trial court? * * *, an experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. * * * If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. * * *

Chris to invite discussion of whether Biegler's conduct violates this rule or is otherwise appropriate by posing the following questions:

(1) Should the lawyer discuss possible defenses before asking the client what happened? How far can counsel go in suggesting a defense to a client who hasn't a clue?

(2) Once the client has told the attorney his or her story, does that "freeze" the cleint's version of the facts making it too late to mold the facts to fit a particular defense?

Kendra and Steve to discuss different approaches to interviewing client

TOPIC #2 – GENDER, EVIDENCE & ETHICS ISSUES
(Kate Joseph, Patrick Rowe – 20 minutes)

(A) GENDER – Kate

MOVIE CLIP: During the trial, the missing "panties" of Mrs. Manion, rape victim, become an issue because they are a possible source of proof that she was raped. The judge anticipates an audience reaction to testimony and admonishes the courtroom to "get their giggles out" now about the term "panties" because this will be a serious topic – in the process, contributing to the film's statement about society's view of the crime of rape in 1959. Mrs. Manion is cross-examined about what she did and what happened to her that night. Note the questions, choice of words, demeanor, tone and body language of the cross-examining attorney. And is Mrs. Manion trapped by an unspoken requirement that she appear desirable, as part of her husband's "excuse" for the murder?

(B) ETHICS/EXCULPATORY EVIDENCE – Patrick

Candor Toward the Tribunal & Special Responsibilities of the Prosecutor

MOVIE CLIP:
During the trial, the lawyers meet in chambers with the judge. Prosecuting attorney Claude Dancer (George C. Scott) suggests that Lt. Manion does not have a defense because he has acknowledged that he knew that what he was going to do was wrong. Attorney Paul Biegler (Jimmy Stewart) then draws the judge's attention to a case from the late 1800's (People v. Durshey) that indicates Michigan honors the irresistible impulse defense, in which a defendant argues that they should not be held criminally liable for their actions that broke the law, because they could not control themselves. The camera then shows the prosecuting attorney, who reveals by his expression that he was aware of this defense but had hoped that opposing counsel and the court were not.

Oregon Rule of Professional Conduct 3.3 - Candor Toward the Tribunal
(a) A lawyer shall not knowingly: . . .
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

Does this rule require an attorney to disclose case law that is favorable to the other side or, at a minimum, refrain from arguing a position that the attorney knows may be undermined by legal precedent in the jurisdiction?

Oregon Rule of Professional Conduct Rule 3.8 - Special Responsibilities of a Prosecutor
The prosecutor in a criminal case shall: . . .

(b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Does this rule require a prosecutor to disclose to the defense case law that favors the defense? Does case law constitute "information" under this rule?

TOPIC #3 – EXAMPLES OF WHAT A LAWYER SHOULD NOT DO

(Dayna Christian – 10 minutes)

Did the attorneys conduct themselves in a professional manner during the trial when addressing each other and/or the witnesses?

Did the Judge conduct himself in a professional manner during the trial?

Below are some examples of improper conduct:

Attorney-to-Attorney conduct:

- Suggesting an objection was made after an important question to give the witness a chance to think of a “good” answer
- Suggesting the prosecution was withholding evidence or had an ulterior motive for narrowing the evidence offered to the jury
- Blocking the view of the attorney when his witness is on the stand and suggesting the attorney needs to see the witness to send “signals” to the witness while testifying

Attorney to Witness conduct:

- Leaning into the witness box and dressing down the witness with his eyes
- Suggesting by the attorney’s body language and expressions that the witness is lying or withholding testimony
- Expressing contempt for a witness by asking objectionable questions designed to suggest something about the witness and commentary under his breath or as returning to counsel table that expresses the attorney’s opinion about the witness

Evidentiary issues:

- Making speaking objections to comment on the value or weight of the evidence offered
- Asking objectionable questions then withdrawing the question and apologizing with full knowledge the jury can't "disregard" what they've heard
- Offering a document without limiting it's purpose without realizing the document contains material that the attorney had been trying to keep out of the case, such as the medical examiner's report

Judge conduct:

- Threatening to restrict the theatrics of the attorneys but not following through
- Commenting on the effectiveness or counsel such as "you're batting 1,000" or "you've already done enough damage"
- Telling the gallery they were not to laugh at the use of the word "panites" because two men's lives were at issue, without regard for the rape or the rape victim present in the courtroom
- Allowing counsel to argue rules of law or relevance of evidence in the presence of the jury

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment;

(d) engage in conduct intended to disrupt a tribunal; or

(e) fail to reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of their families, of which the lawyer has knowledge.

*** Anna Brown will be our timekeeper and provide concluding remarks**

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FILM, CAST AND PRODUCTION NOTES for ANATOMY OF A MURDER

Film: Anatomy of a Murder (1959)

In the Upper Peninsula of Michigan, small-town lawyer Paul Biegler (James Stewart), a prosecuting attorney who lost his re-election bid, takes the case of loutish Army Lieutenant Frederic Manion (Ben Gazzara), charged with first degree murder for shooting a barkeeper who allegedly raped Manion's flirtatious wife, Laura (Lee Remick). Matched against a high-powered big city prosecutor (George C. Scott) sent by the Governor to help out the local D.A. (Brooks West), Biegler and his alcoholic colleague Parnell McCarthy (Arthur O'Connell) and sardonic secretary Maida Rutledge (Eve Arden) try to win Manion's freedom with a defense of irresistible impulse -- a claimed part of an insanity defense. Biegler's folksy speech and laid-back demeanor hide a sharp legal mind and a propensity for courtroom theatrics that have the visiting judge (real life lawyer Joseph N. Welch, of Army-McCarthy hearings fame, in his only film role -- he took it only after Preminger agreed to let Welch's wife be on the jury)[3] busy keeping things under control.
The original murder that inspired this occurred at Big Bay Point Light at a time when it was being used to house Army personnel; but in the book and screenplay takes place in a 'Yooper' bar.

Production

The movie, inspired by a 1952 Big Bay Lumberjack Tavern murder trial in Michigan's Upper Peninsula, was adapted by Wendell Mayes from the novel by Robert Traver (pen name of John D. Voelker, a Michigan Supreme Court judge from 1957-1959).
It was filmed in Big Bay, Marquette, Ishpeming, and Michigamme, Michigan. Some scenes were actually filmed in the Thunder Bay Inn in Big Bay, Michigan, one block from the Lumberjack Tavern, the site of a murder that had inspired much of the novel.
The movie was directed by Otto Preminger, and was noted for featuring unusually frank dialogue for 1959. It was among the first Hollywood films to challenge the Hays Code, along with Billy Wilder's *Some Like It Hot* (1959) and Alfred Hitchcock's *Psycho* (1960).
The role of the judge was offered to both Spencer Tracy and Burl Ives, but ultimately went to Joseph Welch, a real-life lawyer who had made a name for himself when representing the United States Army in hearings conducted by Senator Joseph McCarthy. It was Welch who famously asked of McCarthy, "Have you no sense of decency, sir? At long last, have you left no sense of decency?" It is to be noted that the judge is a self-effacing and modest arbiter, who strives to work in the community to which he is transplanted, respecting its customs and folkways, while trying to keep the case on an even keel toward a reasonable (not necessarily perfect) resolution, based upon the record presented and the mandates imposed by law.

Cast

James Stewart as Paul Biegler
Lee Remick as Laura Manion
Ben Gazzara as Lt. Frederick Manion
Arthur O'Connell as Parnell Emmett McCarthy
Eve Arden as Maida Rutledge
Kathryn Grant as Mary Pilant
George C. Scott as Asst. State Atty. Gen. Claude Dancer
Orson Bean as Dr. Matthew Smith
Russ Brown as George Lemon
Murray Hamilton as Alphonse Paquette
Brooks West as Dist. Atty. Mitch Lodwick
Ken Lynch as Det. Sgt. James Durgo
John Qualen as Deputy Sheriff Sulo
Howard McNear as Dr. Dompierre
Alexander Campbell as Dr. W. Gregory Harcourt
Joseph N. Welch as Judge Weaver

Cast notes:
Chicago newspaper columnist Irv "Kup" Kupcinet has a small uncredited role in the film, and Joseph Welch's wife appears as a juror, also uncredited. Duke Ellington appears as "Pie-Eye", the owner of a roadhouse, with whom Jimmy Stewart's character plays piano.