

PLEA BARGAINING

LAW 708B-001

INTRODUCTION:

Plea Bargaining is a practical course designed to enrich students' understanding of the pre-trial criminal process of negotiating a guilty plea in a criminal case. The vast majority of criminal convictions -- more than ninety percent -- come not from a public trial verdict, but rather after a closed negotiation process ending in a guilty plea. In this course, we will examine plea bargaining and guilty plea jurisprudence, theory, and practice. We will explore the role of the prosecutor, defender, and judge in plea bargaining, including ethical considerations for these institutional actors. Other topics include the collateral consequences of guilty pleas; client intake and interview; bail and detention hearings; and negotiation theory in the criminal context.

In order to fully understand the steps of a plea negotiation, the class will learn and simulate various pre-trial processes including client intake, arraignment, plea negotiations, and the actual guilty plea itself. In addition to these simulation exercises, the course will have an instructional component and a courtroom observation requirement. The simulation exercises, which will be followed by instructor and peer critiques, will introduce students to the criminal pre-trial process with an emphasis on plea negotiations and guilty pleas. Students will master the preparation of a criminal case for trial and gain an appreciation of the steps necessary to negotiate a guilty plea that satisfies all parties involved.

INSTRUCTORS:

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COURSE REQUIREMENTS:

<i>Class Size:</i>	16 Students
<i>Number of Credits:</i>	3 credit hours (Tuesdays, 6:00pm-8:50pm)

COURSE STRUCTURE:

A substantial amount of out-of-class preparation is required for in-class exercises. Grading is based on following:

In class simulations, class participation, and assignments	65%
Court observation and class presentation	10%
Plea negotiation simulation/Final exam	25%

COURSE MATERIALS:

Course materials will be provided electronically through MyWCL or are available at the websites as indicated.

ASSIGNMENTS:

Assignments will be explained further throughout the semester but will include the following:

- **Client Intake & Interview and/or Law Enforcement Screening & Interview** – Play defense attorney in a client intake and interview simulation. Play prosecutor in a law enforcement screening and papering interview. You will be assigned a certain subject areas to question the client or police officer.
- **Detention or Bail Hearing** - Play either a prosecutor or defense lawyer in a detention/bail hearing simulation. This will consist of an argument for or against pre-trial release and bail during a pending criminal case.
- **Plea Negotiations** - Play either a prosecutor or defense lawyer in a recorded negotiation simulation. This will consist of reviewing role instructions, preparing for the negotiation (including any necessary research), negotiating in a recorded session, and reflecting in class. More detailed instructions on this simulation will be provided.
- **Sentencing Exercise** – Class will be divided into groups to determine the federal guidelines in a sample case.
- **Plea Discussion with Client and/or Plea Discussion with Victim/Officer** - Play a defense lawyer in conveying a plea offer to the client or play prosecutor in discussing the office decision to offer a plea to a victim/officer.
- **Observation of Guilty Plea in Court** – Observation of either state court or federal court guilty plea. Based on that observation, a short in-class presentation on what was observed.

Course Outcomes and Assessments

Outcomes	Assessments
Students will develop the skills necessary to effectively conduct in an initial interview prior to a court hearing.	In-class simulation exercises. Skill drill. Written self-critique and by peers.
Students will develop the skills necessary to effectively advocate for the detention or release of a defendant.	In-class simulation exercises. Skill drill. Written self-critique and by peers.
Students will develop the skills necessary to effectively convey a plea offer to a defendant or explain the offer to a victim.	In-class simulation exercises. Skill drill. Written self-critique and by peers.
Students will develop an understanding of the federal sentencing guidelines and strategies for effective negotiation regarding these guidelines.	In-class group exercise and group presentation. Self-reflection assignment.
Students will engage in negotiating a potential pretrial disposition in a case.	In-class final assessment.

CLASS SCHEDULE AND ASSIGNMENTS

Class One – Tuesday, January 14, 2020: Introduction to the Course; History of Plea Bargaining; Discussion of Client Intake and Interviews, Ethics & Roles of Counsel

Readings:

- John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979)
- Gay Gellhorn, *Law and Language: an Empirically-Based Model for the Opening Moments of Client Interviews*, 4 Clinical L. Rev. 321 (1998)
- Jim Skuthan, *Navigating the Client Interview*
- Edward L. Wilkinson, *Ethical Plea Bargaining Under the Texas Disciplinary Rule of Professional Conduct*, 39 St. Mary's L.J. 717 (2008).

Assignments:

- Read materials provided for interview with defendant and/or police officer;
- Prepare intake and interview of client for Class Two. Each group of 2 students will be given approximately 15 minutes for the interview, followed by an in class critique.

Class Two – Tuesday, January 21, 2020: Client Intake and Interviews

- In class intake and interview of client followed by an in class critique.

Class Three – Tues, January 28, 2020: Discussion of Initial Appearances, Pretrial Detention, and Bail

Readings:

- Federal Rule of Criminal Procedure 5
- The Bail Reform Act, 18 U.S.C. § 3142
- Geoffrey A. Hansen, *Pretrial Release and Detention*
- Francisco Morales, *The Bail Reform Act: Getting and Keeping them out*

Assignments:

- Prepare as a prosecutor or defense attorney for the detention/bail hearing for Class 4.

Class Four – Tuesday, February 4, 2020: Bail Hearings and Initial Appearances

- Play the role of the prosecutor or defense at a detention/bail hearing.

Class Five – Tuesday, February 11, 2020: The Roles of Prosecutors, Defense Attorneys, & Judges and the Specific Types of Plea Agreements

Readings:

- Federal Rule of Criminal Procedure 11
- American Bar Association Criminal Justice Section Standards, Sections 14-3.1 through 14-3.4 found at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk.html#3.1
- David Shannon, *Making your Deal with the Devil: Plea Agreements Under the Federal Rules, Federal Sentencing Guidelines, and Department of Justice Policies*, Section 3: Specific Types of Plea Agreements, pgs. 10-27, found at <https://www.fd.org/docs/select-topics/pleas/making-your-deal-with-the-devil-plea-agreements-under-the-federal-rules-federal-sentencing-guidelines-and-department-of-justice-policies.pdf?sfvrsn=4>
- <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>
- <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-convict-enhancements-in-certain-drugcases.pdf>
- <https://www.justice.gov/opa/press-release/file/965896/download>
- David Shannon, *Making your Deal with the Devil: Plea Agreements Under the Federal Rules, Federal Sentencing Guidelines, and Department of Justice Policies*, Section 2: General Law of Plea Agreements, pgs. 2-10
- *United States v. Saena Tech Corp.*, 140 F.Supp.3d 11 (2015)

Class Six – Tuesday, February 18, 2020: Practical Application of Plea Agreements

Field Trip – Class to be held in U.S. District Court for the District of Columbia

Address: 333 Constitution Avenue, N.W., Washington, D.C.

Details provided in Class Five

Class Seven – Tuesday, February 25, 2020: Factual Basis of the Plea & the Guilty Plea Colloquy

Readings:

- *Brady v. U.S.* 397 U.S. 742 (1970), excerpt on MyWCL
- *Blackledge v. Allison*, 431 U.S. 63 (1977), excerpt on MyWCL
- Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations “Voluntary” Waivers of Constitutional Rights*, Criminal Justice, Volume 23, Number 3, 2008
- Review sample colloquy and guilty plea provided
- Federal Rule of Criminal Procedure 11

Class Eight – Tuesday, March 3, 2020: Sentencing Options and Sentencing Guidelines

Readings:

- *United States v. Booker*, 543 U.S. 220 (2005)(Majority Opinion only)
- Henry J. Bemporad, *An Introduction to Federal Sentencing*.
- In class sentencing exercise & discussion

Assignments:

- Prepare self-reflection assessment after completion of in-class sentencing exercise

Class Nine - Tuesday, March 10, 2020: Collateral Consequences of Guilty Pleas and Ethics

Readings:

- *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010)
- *Lee v. United States*, 137 S.Ct. 1958 (2017)
- *State of Maryland v. Andre Henry Nolan* (Court of Special Appeals, No. 1163, September Term, 2013), Unreported.
- *Missouri v. Frye*, 132 S.Ct. 1399 (2012)
- *Lafler v. Cooper*, 132 S.Ct. 1376 (2012)
- Bruce Green, *The Right to Plea Bargain with Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process “Too Long, Too Expensive, And Unpredictable...In Pursuit of Perfect Justice?”* 51 Duq. L. Rev. 735 (2013)
- Ken Strutin, *Truth, Justice, and the American Style Plea Bargain*, 77 Alb. L. Rev. 825 (2014)
- *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018)

Assignments:

- Review and be prepared to convey a plea offer to a defendant during Class Ten.
- Be prepared to present summary of court observations

Class Ten – Tuesday, March 17, 2020:

Spring Break – No Class

Class Eleven – Tuesday, March 24, 2020: Conveying Plea Offer to Client Exercise and Presentation of Court Observations

- In class performance of conveying plea offer to a defendant
- In class presentation of court observations

Class Twelve – Tuesday, March 31, 2020: Plea Bargaining and Innocence

Readings:

- *North Carolina v. Alford*, 400 U.S. 25 (1970)
- *U.S. v. Ruiz*, 536 U.S. 622 (2002)
- <http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf>
- <http://www.takepart.com/feature/2015/11/20/houston-drug-war-exonerations>
- Jed S. Rakoff, *Why Innocent People Plead Guilty* (2014), found at <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>
- *Plea Deal Punish the Innocent, Hide the Guilty in Baltimore Police Scandal*, found at <https://apnews.com/889693b1a5d74bcbb2d98e6743416b>

Class Thirteen – Tuesday, April 7, 2020: Plea Negotiations

Readings:

- Rebecca Hollander-Blumoff, *Getting to “Guilty” Plea Bargaining as Negotiation*, 2 Harv. Negotiation L. Rev. 115 (1997).
- Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 Stan. J. Civ. Rts. & Civ. Liberties 213 (2016)
- <http://www.negotiationtraining.com.au/articles/next-best-option/>

*Discussion of how Final Assessment is conducted – demonstrate mock exercise for students

Class Fourteen – Tuesday, April 14, 2020: In class Plea Negotiations/Assessment for Final Examinations

Class Fifteen – Tuesday, April 21, 2020: In class Plea Negotiations/Assessment for Final Examinations