



Judges in the Classroom

Plea Bargaining

Source:

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Objectives:

1. Define plea bargaining.
2. Identify the prevalence of plea bargaining in the American criminal justice system.
3. List advantages and disadvantages of plea bargaining from the viewpoint of the prosecutor, defense attorney, defendant, and judge.
4. Identify limits on plea bargaining.
5. Apply plea bargaining concepts in role-play activities.

Grade Level:

Grades 9-12

Time:

One class period (approximately 50 minutes)

Materials:

One copy of Handout 1 (Prosecutor Sheet Role-Plays) for one-half of the students
One copy of Handout 2 (Defense Sheet Role-Plays) for the other half of the students

Procedures:

1. **Begin the class by introducing yourself** and setting the students at ease. Tell students that today's topic is plea bargaining and that they are going to have the chance to do some plea bargaining later in the class and to give their views about whether plea bargaining is a good process or not. Spend 15-20 minutes discussing the plea bargaining concepts prior to the role playing.

2. **Write the words "Plea Bargaining"** on the board and brainstorm a definition. Plea bargaining is any process in which benefits are offered in exchange for a defendant pleading guilty to a crime or crimes.
3. **Explain the legal authority a prosecutor has** to make charging decisions and to offer pleas. The Sentencing Reform Act (SRA) gives express approval on the plea bargaining process. Under the SRA, the prosecution may "do any of the following" with respect to plea agreements: (1) Move for dismissal of other charges or counts; (2) Recommend a particular sentence within the sentence range applicable to the offense or offenses to which the offender pled guilty; (3) Recommend a particular sentence outside of the sentencing range; (4) Agree to file a particular charge or count; (5) Agree not to file other charges or counts; or (6) Make any other promise to the defendant, except that in no instance may the prosecutor agree not to allege prior convictions. RCW 9.94A.421.
4. **Ask what benefits** a prosecutor might offer to a defendant. Spend about five minutes on this activity.

Explain that: The prosecutor and defense counsel bargain over the charges and sentences. They may bargain about what crimes the defendant will be charged with at the beginning, or they may bargain over a later decision to reduce the charges. This, in turn, impacts the sentencing because the sentence will be imposed based on what charge the defendant is found guilty. Counsel may bargain over not bringing charges that the prosecutor has a right to bring.

Give an example: Mary is charged with robbery in the first degree. In exchange for pleading guilty, the prosecutor reduces her charge to robbery in the second degree, which carries a lesser penalty.

The prosecutor and defense counsel may also bargain about the sentence, the amount of time in prison or the length of time on probation. When the prosecutor and defense counsel reach a plea bargain on sentencing, and the defendant agrees to it, they recommend this to the judge at the hearing where the defendant enters a guilty plea. The judge, however, is not required to follow any recommendation on sentencing. The judge is entitled to sentence the individual to a sentence within the "standard range" set by the Legislature for the particular crime, based on the individual's applicable "criminal history." Prosecutors fulfill their part of the bargain when they have recommended a sentence; the bargain is not violated if the judge ignores the recommendation and imposes a higher sentence. Reference separation of powers and judicial discretion.

Give an example: Defendant Arko pleaded guilty to one count of second degree possession of stolen property in exchange for which the prosecutor agreed to recommend that Arko's sentence be within the standard range of imprisonment based on Arko's criminal history, between two and five months. The prosecutor recommended three months, but after Arko failed twice to appear at sentencing, increased their recommendation to four months, still within the standard range. The trial court ignored the recommendation and sentenced Arko to an exceptional sentence of 24 months. In appealing the sentence, the Court of Appeals ruled that the State fulfilled its obligation under the plea bargain when it recommended a sentence within the standard range, even though the State supported the trial court's right to make an exceptional sentence on appeal. *State v. Arko*, 52 Wn. App. 130 (1988).

5. **Ask students** what percentage of criminal cases are decided by trials. Tell students that it is estimated that 5 to 10 percent of all criminal convictions are a result of trials – a full 90 to 95 percent are the result of guilty pleas. It is also estimated that between 70 and 85 percent of all felony convictions are by guilty pleas.*

**Brady v. United States*, 397 U.S. 742 (1970).

6. **Explain to students** that a guilty plea is different from a confession. The plea is itself a conviction, just like the verdict of a jury.
7. **Ask students** what it takes to make a guilty plea.

The United States Supreme Court has required that guilty pleas be made voluntarily and intelligently, and that the record affirmatively shows that the guilty plea was made both voluntarily and intelligently. Guilty pleas that are unfairly obtained or given through ignorance, fear, or inadvertence can generally be withdrawn.

8. **To accept a guilty plea**, the judge must personally talk to the defendant and determine that the guilty plea is made voluntarily and with an understanding of the nature of the charge and of the consequences of the plea, and that there is a factual basis for the plea.
9. **Ask students** why defendants plead guilty.

Answers include: because some people believe that when they break the law they should admit their guilt, others plead guilty in reaction to the government's threatening acts of charging them, others plead guilty because all the evidence the prosecution has gathered convinces a defendant and counsel that a trial is not worth the agony and expense to the defendant and family, and others plead guilty because of the benefit the prosecution offers.

10. **Write** "Prosecutor," "Defense Counsel," "Defendant," and "Judge" on the board or a docu-camera. Brainstorm the advantages of plea bargaining to each. Spend about 10 minutes on this brainstorming activity. Make sure students identify the following:

Prosecutors have very high case loads and rely on defendants to plead guilty in order to be able to handle their work. A speedy trial rule requires that defendants have trials within a certain period of time. Without guilty pleas, trials on these charges could not occur within that time frame, and many defendants would be free because the prosecutor could not try them within the required time. In some cases, plea bargaining also reflects the fact that the prosecutor has a weak case, perhaps because of some police procedure that makes the admission of certain evidence questionable or other reasons. With plea bargaining, the prosecutor ends up with a conviction, even if to a lesser crime. The prosecutor may also want to reduce the impact of a trial on a victim or victim's family, depending on the nature of the crime and the underlying facts.

Defense counsel favor plea bargaining because the process many times helps them achieve a favorable outcome for their client, such as a reduced charge, a lesser penalty, or other charges dismissed or not brought. It also involves less effort than a criminal trial would require. Public defenders appointed to represent defendants who cannot afford to

hire attorneys have high case loads too.

Defendants favor plea bargaining because it results in some favorable benefits to them (reduced criminal charge, lower penalty, etc.), is less expensive (for those who pay for their own counsel), is less time-consuming, and can reduce the emotional impact on both the defendant and on any victim or victim's family.

Judges understand that plea bargaining reduces their caseloads and forces the defense counsel and prosecutor to discuss the relative strengths and weaknesses of their cases. After all, in very few cases does the defense or the prosecution have an "airtight", 100 percent case. Plea bargaining also allows individuals who choose to plead guilty to take accountability for their actions. **At this point, you might add any other advantages to judges that you experience.**

- 11. Brainstorm the disadvantages** to prosecutors, defense counsel, defendants, and judges. Spend about 10 minutes on this brainstorming activity.

Publicly-elected prosecutors may be strongly criticized by the public for plea bargaining, especially in notorious cases. Even today, the 2003 plea bargain with Gary Ridgeway, the Green River serial killer, causes controversy. He pleaded guilty to 48 counts of aggravated murder and agreed to provide information to help locate the bodies of the 48 women that he murdered in exchange for prosecutors agreeing not to seek the death penalty.

Defense counsel may negotiate a plea arrangement with the prosecutor that the judge does not accept (though this is rare), which results in the client pleading guilty and not obtaining the benefit expected.

Defendants may feel pressured to accept a plea bargain. Defendants may not obtain the benefit they expected from the plea bargain. Defendants may come to believe that the system is unfair and their attorney is incompetent. Defendants may come to believe that the criminal justice system is not about justice, but about deal making.

Judges may feel that justice was not delivered. Elected judges may also feel that the public unfairly blames them for "deals" made by the prosecutor. **Add here any disadvantages of plea bargaining that you experience.**

- 12. Role-play a series of plea bargaining sessions.** The class should be divided in half, with one half playing prosecutor and one half playing defense counsel. Those students who role-play prosecutors should receive Handout 1, and those who role-play defense counsel should receive Handout 2.
- 13. Divide all the prosecutors** into small groups of up to five students and divide all the defense counsel into small groups of up to five students. Give them 10 minutes to prepare their strategies and explain that each student will role-play a plea bargaining session with one other student. Assign fact patterns. Tell students that each side has a handout sheet that describes their role as a prosecutor or defender and includes "secret facts" the other side does not have.
- 14. Instruct students** to think about what facts might help them persuade the other side to agree to their proposition. For example, weak evidence may help a defense attorney to get a better plea bargain. Also, inform the prosecutors they do not have to plea bargain

in any specific case, but they will not be able to take all three cases to trial.

15. **Pair one prosecutor with one public defender.** (If the class number is uneven, have one team made up of two defenders or two prosecutors.) Ask students if they understand the assignment.
16. **Enact the role-plays** in pairs simultaneously around the room. Have students report back to the large group what "deal," if any, was negotiated for each of the three cases. Inform students that it is not necessary, although it is desirable, that they achieve agreement. Allow 10 minutes for enactment of the role-plays.
17. **Debrief the role-plays** by commenting on the variety of outcomes that could be achieved in plea bargaining. Allow 15 minutes for debriefing the role-plays and the remaining discussion.
18. **Explain to students** that negotiating a plea agreement is only the first step. The client (the defendant) must agree to it voluntarily, intelligently, and with understanding of its consequences.
19. **Comment on the acceptability** of the plea arrangements that were negotiated. Are any illegal, for example, agreeing to terms outside the penalty permitted by law? Are there any ones that you as a judge might refuse to accept?
20. **Ask students whether and when the judge should reject a plea agreement** that they disagree with. Discuss separation of powers. The judge can reject a plea agreement if the agreement is inconsistent with the interests of justice or with prosecuting standards. RCW 9.94A.431(1). Although RCW 9.94A.431 authorizes judicial oversight of prosecutorial standards in the context of plea agreements, such oversight "must be exercised with due regard for constitutional separation of powers." *State v. Agustin*, 1 Wn. App. 2d 911, 916-19, 921- 22, 407 P.3d 1155 (2018). In September 2019, in a split decision, the Division Three of the Court of Appeals held that "once the State articulates a tenable basis for justifying a plea agreement under RCW 9.94A.450, the court cannot reject the plea agreement as inconsistent with prosecutorial standards." *State v. Westwood*, No. 35792-9-III (Sept. 12, 2019). *But see State v. Lazcano*, 198 Wn. App. 1016, review denied, 189 Wn. 2d 1021, 404 P.3d 487 (2017) (unpublished) (the Court of Appeals upheld the trial court's exercise of discretion based on interests of justice to refuse to accept the State's proposed amended information reducing first degree murder charges to second degree manslaughter pursuant to a plea agreement).
21. **Conclude with a discussion** of whether students agree or disagree with plea bargaining. Would plea bargaining offer advantages or serve a purpose if "resources" were not so limited? In other words, would plea bargaining still play a role if there were unlimited prosecutors, defenders, judges, and courtrooms?

Plea bargaining is very controversial. Critics say it allows dangerous criminals to get off with light sentences. Others argue that the government should be forced to prove guilt beyond a reasonable doubt. You should consider expressing your views on plea bargaining.

Handout 1

Prosecutor Sheet Role-Plays

You are the prosecutor and represent the government in enforcing the criminal laws. You have a very high case load. At most, you can go to trial in one of the following three cases. Therefore, you must work out plea bargains for at least three of the defendants in the cases below.

As a prosecutor, you are able to decide what the criminal charges are against defendants, whether to even bring criminal cases against defendants, whether to dismiss criminal charges, whether to reduce a criminal charge to a lesser charge, and what recommendations you might make to the judge – to impose an exceptionally high amount of imprisonment or to impose a sentence in the standard range set by the state Legislature. When there is more than one count or charge, each charge may receive a separate term of imprisonment. You can recommend that these terms of imprisonment run at the same time or back-to-back. (For example, if two terms of three months imprisonment are imposed by the judge. If they run together, the defendant serves three months in jail. If they run back-to-back, the defendant serves six months in jail.)

Directions: In the cases that follow, you will be approached by the public defender to negotiate about the charge and/or the sentence. Negotiate as you deem is necessary.

Case One: Ward has been charged with first degree robbery. He was arrested for robbing a furniture store after an informant notified the police that Ward had told him he had committed the robbery. Ward has no prior history of criminal activity.

Case Two: While being held for shoplifting at a Thriftway store by two store employees, Chester pulled a knife and stabbed both of them. The two employees had several stab wounds that were life threatening and required surgery and several days in the hospital. Chester is charged with two counts of first degree assault. The knife has never been recovered as a piece of evidence.

Case Three: Watson committed at least five burglaries in January and February. She is charged with two counts of burglary in the first degree. The search of Watson's apartment turned up items that had been taken from the two burglaries. There is a possible question as to whether or not the search was done legally.

Handout 2

Defense Sheet Role-Plays

You are a public defender and your job is to represent persons charged with crimes who cannot afford to hire their own attorney. You are assigned to a very high number of cases. Your salary does not change because of the number of clients you serve.

You realize that plea bargaining is an extremely useful process for obtaining benefits for your clients that they may not receive if they go to trial. You also know and advise your clients that no plea bargain between you and the prosecutor is valid until the client has voluntarily and intelligently agreed to it after understanding the consequences. The clients, however, want to know your recommendation and generally, but not always, follow it.

You know that the prosecutor has the authority to decide what criminal charges to bring against defendants, whether to even bring criminal cases against defendants, whether to dismiss criminal charges, whether to reduce a criminal charge to a lesser charge, and what recommendations to make to the judge – to impose an exceptionally high amount of imprisonment or to impose a sentence in the standard range set by the state legislature. When there is more than one count or charge, each charge may receive a separate term of imprisonment. The prosecutor can recommend that these terms of imprisonment run at the same time or back-to-back. (For example, when two terms of three month's imprisonment are imposed by the judge. If they run together, the defendant serves three months in jail. If they run back-to-back, the defendant serves six months in jail.)

Directions: In the cases that follow, you will approach the prosecutor to negotiate about the charge and/or the sentence. In each of the fact patterns below, the wishes of the client have been set out. However, the client may agree to some other proposal. In none of the cases does the client want to go to trial.

Remember that you, as the public defender, need to give a rational argument to the prosecutor as to why the charges should be reduced or dismissed or sentencing recommendations be given. The prosecutor will not just grant a request to dismiss charges or make a sentencing recommendation without a good reason for doing so.

Case One: Ward has been charged with first degree robbery. He was arrested for robbing a furniture store after an informant notified the police that Ward had told him that he had committed the robbery. Ward has no prior history of criminal activity.

Defendant's wishes: The client wants the charge lowered to second degree robbery and a prosecution recommendation for six month's imprisonment (the middle of the standard range).

Case Two: While being held for shoplifting at a Thriftway store by two store employees, Chester pulled a knife and stabbed both of them. The two employees had several stab wounds that were life-threatening and required surgery and several days in the hospital.

Chester is charged with two counts of first degree assault. The knife has never been recovered as a piece of evidence.

Defendant's wishes: The client wants the charges dropped to second degree assault and the imprisonment time to be served for both charges at the same time. He believes that without the knife the prosecutor will have a hard time proving first-degree assault.

Case Three: Watson committed at least five burglaries in January and February. She is charged with two counts of burglary in the first degree. The search of Watson's apartment turned up items that had been taken from the two burglaries. There is a possible question as to whether or not the search was done legally.

Defendant's wishes: Watson wants the counts reduced to burglary in the second degree, an agreement that the prosecutor will not bring charges on the other three burglaries, and a recommendation that the times of imprisonment for each charge be served together.