

Criminal Defense Investigation and Discovery
Fall 2010

Introduction

In teaching law students how “to think like lawyers” most law school curricula focus on the application of legal principles to a given set of facts. Very little attention is given to the importance of developing the facts of the case. In the real world of practice, however, mastery of both the law *and* the facts is essential to effective advocacy.

But what are the “facts” of a case? How are they investigated and developed? What is “brainstorming”? What ethical constraints do lawyers face when developing facts? Is ascertainment of the truth the goal of our legal system?

This class will attempt to answer these and other questions in the context of defending a criminal case. Why the focus on criminal defense? There are two basic reasons. First, the disparity in resources that typically exists between the government and the accused, places a premium on creativity and resourcefulness in all aspects of the defender’s representation of her client, especially during the investigation and discovery phase of the case. In no area of the law is “hard work” more important to ultimate success on behalf of the client.

Second, and more practically, your instructors, as two lawyers who have spent the bulk of their practice as criminal defense lawyers, are constrained to teach from the perspective they know. Notwithstanding the criminal defense focus, the information taught in this class, particularly the emphasis on thinking creatively about fact development will have widespread usefulness regardless of the type of law practice you pursue.

The class is taught from the perspective of being an effective and zealous advocate for the accused. Students must be conscious of, and work within, the limitations imposed by a fundamental principle governing criminal defense work: **Do no harm to the client.**

This is one of the few classes in law school where you are encouraged and expected to be an advocate for your client, Approach the class as if the life and freedom of another human being depend on the course of action you take, because in the real world of criminal defense, it often does. “Law school” answers are not expected nor encouraged. **Be an advocate** for your client.

To make this class as realistic as possible, to the extent possible, students will participate in including mock client and witness interviews. While there is not a casebook, *Cross Examination: Scene and Technique*, by Posner & Dodd is an excellent resource you can keep and use in practice if you do any type of litigation. If you are

interested in such a book, there is also a new book by Posner and Dodd, *Cross Examination Skills for Law Students*, which is also a very good book much cheaper than Science and Technique. In addition to select chapters from Posner & Dodd, there will be reading assignments, which may or may not be directly discussed. It is unlikely you will ever be asked for the "facts", "issue(s)", and the "holding" of a given case. However, you will be expected to understand the assigned cases and how those cases impact the cases you are currently defending. So while direct discussion of a case may not occur, you may be asked and expected to apply a given case to the facts under discussion in class. You will also need to understand the cases in order to successfully complete the final project.

As in real life practice, you will need to do your own research, as it relates to the reading assignments. Often times as a criminal defense lawyer, you will hear of a case which may "help" or may be of some assistance to one of your cases. You must then locate the case. The same will apply to cases assigned for class. We will provide the case cite, you will have the responsibility of locating, reading, and making an effort to understand the case.

Instructors

This course will be co-taught by: Jay Clark and Bill Gallagher. Since graduating from law school, both Bill and Jay have represented criminal defendants in both state and federal courts. Both of their practices include trial and appellate level representation. Among numerous activities both serve on the Board of Directors of the National Association of Criminal Defense Lawyers.

Please do not hesitate to contact either of us if you have any questions, comments, or suggestions. We have incorporated many suggestions made by students into the class.

Jay: 513-587-2887 or notguilty14@aol.com.
Bill: 513-651-5666 or wrg35@aol.com.

Syllabus

The reading is posted on the TWEN with the syllabus posted separately. For the first week be sure to read and understand the 2 hypos, *Sage* and *Lewis*, posted on TWEN under "Syllabus and Other Material." Be prepared to discuss the hypos in light of the assigned reading. We will be working with these hypos through out the semester.

Grade

Your grade will be determined as follows: 40% class participation and preparation, and 60% final project.