

# Simulations: An Introduction

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The symposium of which this article is a part is only one example of the tremendous interest among law professors in using lawyering simulations as part of their teaching. Simulations are touted as a low-cost means of teaching the skills and values called for by the MacCrate Report,<sup>1</sup> a vehicle for illuminating and synthesizing the doctrines in basic substantive law courses,<sup>2</sup> a motivational device,<sup>3</sup> and an ideal method for professional training.<sup>4</sup> It seems a fair generalization that virtually all law teachers would agree that simulations are valuable for some purposes, at least in some settings in the law school curriculum.

There is a voluminous literature on lawyering simulations, mostly arguing their virtues as teaching tools and illustrating their use in particular courses.<sup>5</sup> But more general aspects of the nature and use of simulations have not been addressed so often.<sup>6</sup> As an introduction to the other articles in this symposium, I want to present a general framework for developing and using simulations, in the hope that doing so will improve our thinking about the topic and help teachers who wish to use simulations.

## I. The Attributes of Simulations

A simulation resembles something but is not the thing itself. In law school, a simulation resembles the activity of lawyers; the essential attribute of a simulation is that students do something like what lawyers do. More specifically, in a simulation students are presented with a situation that might

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1. Curtis J. Berger, Teaching "S&V" Beyond the Live Client Clinic: We Can Do Far More Without Spending Far More, in *The MacCrate Report: Building the Educational Continuum*, eds. Joan S. Howland & William H. Lindberg, 69, 70–72 (St. Paul, 1994).
2. Stacy Caplow, Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law, 19 *N.M. L. Rev.* 137, 140 (1989).
3. Philip G. Schrag, The Serpent Strikes: Simulation in a Large First-Year Course, 39 *J. Legal Educ.* 555, 557 (1989).
4. Myron Moskovitz, Beyond the Case Method: It's Time to Teach with Problems, 42 *J. Legal Educ.* 241 (1992).
5. For citations, see Caplow, *supra* note 2; Schrag, *supra* note 3.
6. A notable exception is Suzanne Kurtz et al., Problem-Based Learning: An Alternative Approach to Legal Education, 13 *Dalhousie L.J.* 797 (1990).

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confront a practicing lawyer. In dealing with the situation, they perform in role and attend to the goals and interests of their clients; they are result-oriented.

The concept of a lawyering simulation should be familiar. To define it simply, contrast a simulation with two other activities at different ends of the spectrum of law school experiences: the typical doctrinal hypothetical and a clinical program. In a hypothetical, the student is presented with a problem that requires the manipulation of doctrine largely divorced from context or client concerns; the archetypical client is *A* of the Restatement illustrations (“*A* offers to sell *B* his horse, intending to sell his cow . . .”), a client who places no demand on the student other than to apply the rules of law to the facts of the problem. In a clinical experience, contrarily, the doctrinal issue involved may be the least important concern, because the student must deal primarily with the concerns of an actual client.

In between these two extremes lie simulations—more complex than doctrinal hypos, but lacking the intense reality of a live-client experience. A continuum of simulations includes the following.

- *Doctrinal problems* are more complex than simple classroom hypos. While these problems focus on the manipulation of law, they can include the beginnings of concern for the lawyer’s role (“Argue on behalf of the buyer”) and for client goals (“Advise Jones”). Doctrinal problems for which sufficient time is available also can include complex client facts.
- *Single-experience exercises* add the element of performance in role to the manipulation of doctrine. As its name suggests, a single-experience exercise is limited in time and scope to one performance of no more than moderate complexity—writing an opinion letter, drafting a shareholders’ agreement, responding to a complaint. Robert Vaughn’s essay provides examples.
- *Extended exercises* are of longer duration and involve several performances of different types—interviewing a client to gather facts about a transaction, negotiating with the other party’s simulated counsel, drafting a contract that embodies the terms of the agreement.
- *Continuing exercises* grow out of the same set of facts and recur at different points throughout a course. Early in a civil procedure course, students might draft a complaint; later they can engage in a discovery exercise and argue a summary judgment motion. Lynne Dallas offers illustration in her discussion of simulations concerning closely held corporations.
- *Simulation courses* are built entirely around lawyering activities, unlike traditional courses, in which simulations enrich didactic learning. For example, in the advanced corporate practice course described by Karl Okamoto students represent the participants in a leveraged buyout transaction.

All these types of simulations are useful in different contexts. The following discussion of the design of simulations addresses issues that arise in any of the

types. I focus on the middle of the continuum, especially single-experience exercises and to a lesser extent extended and continuing exercises. In that region of the continuum, simulations serve well a number of important goals. They motivate students, provide a significant degree of experiential learning along a number of dimensions, and can effectively introduce or teach skills as well as substance. Further, these are the types of simulations that can be easily introduced into the large courses (first-year or upper-level) most law professors teach with the resources ordinarily available.

## II. Design Issues

Designing and administering a lawyering simulation in a law school course is challenging because of the complexity of the process and because simulations require a different focus from ordinary classroom teaching. Organization makes the task easier. To provide that organization, this section identifies and discusses the issues involved in the design of a simulation. These range from the crucial (what goals the simulation is designed to accomplish) to the mundane (how the flow of paper and performance will be administered). Ultimately, all these issues are important; failure to attend to the most trivial detail can wreck an otherwise well-planned simulation.

### A. Goals

The key to a successful simulation is to define its goals. There is a real temptation to define them only vaguely: "Having the students draft a contract will give them a taste of the real-world context of the cases." This temptation should be resisted. The careful definition of goals is essential in any teaching project, but it is especially important when a simulation component is added to an otherwise traditional course.<sup>7</sup>

In a well-designed simulation, goals drive the design; at least in theory, the teacher must specify the goals before developing the other design elements. The practice often departs from the ideal, of course. Sometimes it is better to plunge ahead with a limited idea of the objectives than to avoid the whole enterprise because one cannot define the goals in detail in advance. The goals will often develop and change during the planning process and during the exercise itself, and they can always be refined the next time one teaches the course.

To the extent that the teacher has defined the goals of an exercise, it is important to communicate those goals clearly to the students. People generally learn better when they know what they are supposed to be learning. And explicitly specifying the goals helps avoid two common, conflicting reactions. Students are wont to regard a lawyering simulation as something added on the periphery of a traditional course—more work, not central to the experience,

7. By "traditional course" I mean a course mostly organized around a body of doctrine and taught through discussion, as opposed to simulation. "Traditional" suggests the way things usually have been done in the past, but I do not mean to imply that simulations are unusual. To the contrary, it is increasingly apparent from the literature, from conferences, and from discussions on electronic lists such as Lawprof that simulations are quite common—if not yet the norm—in many law schools.

not as important as the substantive material that will be on the exam. Conversely, students can view an exercise as the best thing in the course for the wrong reason: that it is the only practical or meaningful part of the course. If the objectives of the exercise are made clear and explicit, either reaction is less likely.

A version of the customary taxonomy of educational objectives can help specify the goals.<sup>8</sup> Educational objectives are of three kinds: cognitive, performative, and affective, concerned respectively with what students know and how they think; what students can do; and how they feel and experience a situation. Cognitive skills range from simple recall of facts, through the ability to apply prior knowledge to solve new problems, up to the ability to evaluate the use and implications of one's knowledge. In law school, these skills involve the understanding of substantive law, legal process, and related matters such as professional responsibility. Performative skills in law are increasingly defined by the MacCrater Report's catalog of skills beyond legal analysis and reasoning, including legal research, factual investigation, counseling, and the management of legal work. Affective skills include personal and professional issues: how students feel about their competency as lawyers, how they relate to the client, how they respond to problems of professional responsibility, and how their values inform their role.

A typical single-experience simulation, extended exercise, or continuing exercise can have all these types of objectives in different combinations and at different levels. Cognitive skills at a relatively high level—such as problem-solving, analysis, and synthesis—often constitute the major element. A simulation is an effective vehicle for requiring students to integrate different bodies of knowledge and to apply legal reasoning and problem-solving abilities to a complex situation.

It is more difficult to teach performative skills at a high level, because students are likely to have less background to draw on and because few teachers are willing to devote much time to teaching those skills in a doctrinal course. It is usually impractical to try to develop significant drafting or negotiating skills in a typical simulation, and attempting to do so can denigrate the importance of skills training generally, by suggesting that skills are best learned by imitation and practice without reference to a significant academic content. In a large basic course, a reasonable performance objective is to make students aware of the importance of skills in the lawyering process and of the possibility of treating skills learning as a subject requiring the same kind of conceptual generalization that helps one understand other subjects in law school. With this introduction, students can proceed to advanced courses that are more appropriately skills-focused.

A simulation is also a good setting for sensitizing students to the affect of lawyering, particularly sensitivity to client concerns, recognizing and resolving issues of professional responsibility, and "feeling like a lawyer." A reasonably complex fact situation easily raises issues—often central issues—of client

8. See 1 *Taxonomy of Educational Objectives: Cognitive Domain*, ed. Benjamin S. Bloom (New York, 1956); 1 Michael S. Josephson, *Learning and Evaluation in Law School* 58 (Washington, 1984).

values, including noninstrumental values, and of ethics. Grappling with them makes evident the links between doctrine, skills, and values. A classic scenario (see the Dallas essay) is the representation of entrepreneurs: two or three persons seek the lawyer/student's advice on a form of business organization. The scenario raises clearly the need to understand the clients' noneconomic motivations and potential sources of conflict, and to deal with the potential conflict of interest in representing parties with different interests. Responding to the scenario also requires students to explore how they deal with typical lawyer feelings such as uncertainty, or the conflict between a lawyer's own views and those of the client.

### *B. Format*

The "format" of a simulation could encompass all elements of its design. For convenience, this section focuses on a few basic issues related to the depth of the students' experience in the simulation and leaves other issues to later sections.

#### 1. Facts

Facts are crucial to a simulation. There are two issues here: how rich and complex to make the facts, and how much uncertainty to introduce. The two issues are related: uncertainty tends to increase complexity.

The basic guideline for complexity is simple to state and harder to implement: enough but not too much. Facts that are too simple make the exercise little more than a doctrinal hypo. Typically, though, apparently simple facts conceal much complexity. In the entrepreneurs scenario, a short statement of the clients' interests potentially raises a myriad of issues. It is important to anticipate the facts raised by an initial statement of issues and not to create unnecessary difficulty for the students. Unless the primary goal of the exercise is to develop skills of fact investigation—an unlikely goal for a simulation in a doctrinal course—one is likely to create more problems by introducing too many facts, intentionally or unintentionally, than by confining the scenario.

The degree of uncertainty in a problem is usually a major source of challenge and interest for students. First, there is the uncertainty about the facts themselves, particularly in a simulation in which students must do some fact investigation (as through interviewing). Second, there is the uncertainty about which doctrines apply to a problem, or which doctrines should apply. A business dispute can be viewed as the basis for either an antitrust claim or an unfair competition action; in a transactional setting, students can choose partnership, corporation, limited liability company, or S corporation as the form of business organization. Third, the law and the facts can give rise to uncertainty about how to apply a doctrine once it is identified; this is a richer version of the typical classroom situation in which students argue different sides of a question. The difference here is that they must make a judgment about the relative merits and take action based on their judgment.

All three types of uncertainty are beneficial, at least in moderate amounts. Some uncertainty teaches important lessons about doctrine, lawyering, and legal process, and it forces students to exercise judgment—usually a primary

objective of the simulation. But students must have a reasonable basis for exercising judgment. When facts become so uncertain that students have no rationale for choosing among them or using them as a basis for applying the law, frustration and paralysis will inhibit learning.

## 2. Role

The role students assume will be determined by the goals of the simulation. The skills goals have an obvious effect on role, but so do the cognitive goals. In a contracts course, a desire to teach the importance of planning to reduce risk leads to a counseling or drafting role; a focus on the manipulability of doctrine favors a litigation role.

One important point to consider is the extent of students' experience across the curriculum. It was once true (and may still be) that the curricula of many law schools exhibit a pronounced bias toward litigation, from the predominance of argumentative roles in classes to moot court as the primary cocurricular lawyering experience. In such a curriculum, it would be particularly useful to engage students in a transactional simulation to expose them to the variety of lawyer roles.

## 3. Collaboration

Whether students work alone or together depends on the goals of the simulation and on practical constraints. If one goal is to focus on a skill or a context that requires interaction (negotiation is the prime example), collaboration necessarily will be built into the simulation. Group work serves other objectives: by working with others, students learn the importance of interpersonal skills in law practice; by collaborating on written work, they improve their editing skills and often their own writing as well.

If such objectives are to be achieved through group work, the instructor must actually teach whatever skills are to be practiced. If interpersonal skills are one goal of the simulation, there should be some prior instruction and subsequent feedback about those skills. Often law schools claim to teach skills by placing students in a situation in which they must exercise them—teaching time management by giving students too much work, for example—but such teaching by indirection is seldom as effective as directed instruction, practice, and feedback.

Collaboration also has the considerable practical benefit of reducing the number of student performances that the teacher must observe or evaluate. It is obviously easier to review the product of fifty pairs or twenty-five groups of four than that of 100 individual students.

The size of the groups can vary from two to as many as eight students. For complex tasks, larger groups may be appropriate. For a single experience, a group of two or three may be better. Groups can be combined: pairs of students representing different parties to a transaction or litigation can interact with each other. Or, instead of working in a large group, students can work individually or in small groups and then review each other's work; peer review is a different type of collaboration.

A common problem with collaborative work is the free rider. When one student does much less work than the other teammates, they have to pick up the slack or suffer any grading consequences. Although the problem occurs less often than economists might predict, it does occur and there are two ways of dealing with it. One can ignore it, especially if the simulation is ungraded or the grade is not a major part of the course grade. The effect on the students' final grade will be small, and the free-rider issue is one more element of a simulated real-world experience that students must cope with. Or one can ask the students to report individually how they and their teammates did the work; a consistent pattern of reporting which singles out a free rider can be a reasonable basis for reducing that student's grade on the project.

#### 4. Product

The product of a simulation depends on the role assigned to students. In a small class, the teacher can observe student performances; in a large class, that is more difficult. Especially in the large class, a written product is useful both for the teacher to evaluate the students and for the students to analyze and reflect on their experience. Sometimes the writing will be the product itself—a contract, a brief, a letter. Other times it will be a description of the process and the product—a memorandum explaining the steps in research and analysis or describing the group process. Students typically can use the writing practice, especially in an unfamiliar format like a contract, and subjecting them to the discipline of writing sharpens the experience.

#### C. Time

Experience suggests that a good single-experience simulation requires at least six to eight hours of student work. Extended and continuing simulations require more time, but not proportionally more. Most student work on a simulation is done outside class, though it is important to devote some class time to the simulation, to provide instruction and feedback, perhaps to view and critique sample performances, and to validate the experience as an integral part of the course. For a short simulation, the class time likely will come at the beginning and the end of the project; for a longer simulation, it is helpful to have discussion during the process. While students are doing the simulation, other class work often proceeds at a slower pace than usual. Students' attention and energy naturally will be drawn to the more active experience, so reading and discussing unrelated material may be difficult.

Time spent on the simulation raises the question whether course coverage is diminished and, if so, whether and how to compensate. The issue can be addressed in three ways. First, the simulation itself can be used to convey substantive material. As necessary preparation for performance of any kind, the students can be required to learn a relevant body of material; the learning here is immediate and intensive, because students need to solve a particular problem. Particularly in a short simulation with a relatively confined body of law, students can efficiently identify what they need to learn and master it. They can use the casebook as a resource, the teacher can provide other materials, or students can find and use sources on their own.

Second, the teacher can make up for lost time by using more efficient means than classroom discussion, such as lectures or readings. This learning can be either tied to the subject matter of the simulation or done on another topic.

Third, it is possible to see the coverage issue as not a problem at all. No course completely covers its subject matter. Some material is always undervalued or ignored, and the problem is not made much worse by time spent on a simulation. And if, as is frequently claimed, legal education has more to do with developing analytic skills than absorbing a body of knowledge, the concern for coverage is chimerical. Using simulations provides more effective skills training—including training in legal analysis—so the time tradeoff produces a net benefit.

#### *D. Adjuncts and Teaching Assistants*

Most often the course instructor will devise and conduct the simulation, but it is possible to bring in a practitioner or use student teaching assistants. An adjunct teacher may be more familiar with the context or the performance elements of a problem, and may add an important practice dimension, besides saving professorial time.

An adjunct can provide more instructional contact for students by supervising performances, playing roles, or simply working with the professor in evaluation and discussion. Adjuncts tend to be more effective as supplement than as substitute. When an adjunct comes in and takes entire responsibility for a simulation unit, it is hard to integrate the simulation effectively with the rest of the course. Instead, students are reinforced in their tendency to see “practical stuff” as distinct from “academic stuff,” and they may feel burdened with extra work not clearly related to the course. Moreover, anything beyond a single, fairly short exercise requires extended student contact of the kind that an adjunct probably cannot provide.

Teaching assistants can helpfully perform specific tasks in a simulation. They can handle those administrative details that are tedious for the teacher but extremely important, such as monitoring deadlines and managing the flow of paper. With appropriate training, they can also take part in role plays and review student work.<sup>9</sup>

#### *E. Research*

Simulations may involve no research at all beyond the casebook or other materials provided to students; or the teacher can allow research within defined limits, or can make open research a central part of the simulation. The choice depends on the extent to which the development of research skills is a goal of the simulation. If research skills are not the goal, a problem should have only a modest research component, if any, unless a significant amount of time is allotted for the simulation, as in a simulation course. Adding a major research component significantly complicates a limited simulation without adding proportionally to its benefits. Students may go off in different direc-

9. See Jay M. Feinman, *Teaching Assistants*, 41 *J. Legal Educ.* 269 (1991).

tions in their research, losing track of the primary focus of the simulation. For a large class there is also the problem of limited library materials.

Simulations with a primary focus on research are extremely valuable. Even where the basic legal research and writing course provides a good grounding in research skills, students need further practice. Advanced research simulations can serve two purposes: developing students' abilities to figure out what the issue is in a problem, and giving them experience with specialized research. Often students do not get adequate exposure to specialized areas of research, particularly areas in which statutory and administrative materials are core sources.

Research problems can take several forms. Students can be given initial instruction in the sources and then given a problem to research and respond to. Or they can be given a problem and a packet of research sources demonstrating how to approach the problem (which can be discussed or not), and then can be assigned another problem to do on their own.

#### *F. Prior Preparation*

One of the most interesting design choices in a simulation is how much to give students in advance. What prior exposure do they need—to the substantive law or to the skills required in performance?

There can be considerable advantage to presenting none of the substantive material before students encounter the simulation. When students are given a problem without direction or prior instruction, they encounter not only the problem but the learning process in an immediate way. They must assess what knowledge they already possess that is relevant to the problem, and what they do not know. They have to develop strategies for defining issues, acquiring knowledge, and reasoning through a problem. When they acquire the knowledge, they will be able to store it and make better use of it than knowledge acquired didactically.<sup>10</sup>

The same rationale applies to learning performative skills, but less strongly. Students can plunge into a drafting or negotiating problem without prior instruction in those skills, but they are likely to be less effective in doing so than with the substantive and analytic components of the problem. In the typical law school context, skills other than legal analysis are taught less extensively and less systematically. While students have the experience from other settings to do an initial job with skills such as negotiating and drafting, the sources to enhance their skills are less readily available and it is less likely that they will have their rudimentary efforts refined and placed in a conceptual framework by feedback and later instruction.

#### *G. Reflection*

An important element of any simulation is an opportunity for students to reflect on the cognitive, performative, and affective elements of their experi-

10. This is the problem-based approach that has recently become popular in medical education. See, e.g., Howard S. Barrows & Robyn M. Tamblyn, *Problem-Based Learning: An Approach to Medical Education* (New York, 1980).

ence. Whatever the goals of the simulation, students' learning will be enhanced by reflecting on what they have learned and how they learned it. Opportunities for reflection can be provided throughout the simulation (when it extends over time) and especially at the end. These can take the form of class discussion after the simulation or a written journal or response to particular questions; the two usefully interact when the discussion heightens students' awareness of some of the issues involved and the writing requires that each student actively reflect.

#### *H. Evaluation*

Evaluation is part of the learning process. Student performance in a simulation needs to be evaluated, and the evaluation should count toward the student's grade in the course. Since grading, in most law schools, is a measure of the value of an activity, grading a simulation indicates that it is an important part of the educational program.

The evaluation can be a direct assessment of performance, a subsequent assessment of the knowledge or skills acquired through the simulation, or both. It is often most convenient to evaluate students' performance through a written instrument, which may include the performance itself (e.g., an agreement drafted by a team of students) and a written report on the performance, such as a description of the steps taken in analyzing and negotiating a problem or a self-assessment of the work done. The knowledge and skills learned can also be tested through another problem or on an examination, particularly a take-home exam that requires application of the competencies learned in the simulation. Both types of assessment reinforce the importance of the simulation while evaluating students' learning.

Some teachers give students standard letter or number grades on their simulation performance and weight those grades substantially in arriving at a final grade. In such a situation, it is important to articulate standards for grading, to communicate the standards to students in advance, and to apply the standards clearly and consistently. This is time-consuming, and it can have an impact on the affective environment of the course. If many students receive relatively low grades on a simulation during the semester, the teacher should be ready to provide opportunities for improvement—or expect to deal with disgruntled students.

One popular alternative is to use a simplified grading scale that cannot easily be translated into standard grades. For instance, a check grade, given to the large majority of students, might indicate good or acceptable performance; check-plus or check-minus grades, given to just a few students, would indicate exceptionally good or exceptionally poor performance (the latter usually arising from lack of effort). Then in the final grading of the course the simulation grades can be taken into account as a fudge factor in marginal cases or used to raise or lower a grade by a notch.

Another alternative is to assign standard grades but have them count minimally in the final grade. Since grades on a simulation are more likely than exam grades to bunch in the middle of a curve, using a simulation grade for 10 to 25 percent of the final grade may not materially alter the distribution.

*I. Institutional Considerations*

Any teacher's use of simulations occurs in an institutional context. The allocation of institutional resources and the design of the curriculum as a whole affect one's decision to use simulations, and one's design of them. Because this article focuses on designing simulations, I will do no more than highlight these institutional issues.

Simulations, especially complex simulations, require resources. One resource is the teacher's time. Planning and conducting a simulation—meeting with students, observing performances, grading papers, coordinating the process—often takes more time than running an ordinary class. Although the time demand lessens after the simulation has been repeated and refined, the day-to-day burden tends to be greater than the burden of teaching a class one has taught before. If the institution does not award some teaching credit for the added burden, a teacher is less likely to use extended simulations.

Another resource is money to pay practitioner adjuncts or student teaching assistants. Obviously, limited or unavailable funds constrain one's options. Sometimes there is a direct cost to the teacher: payments to adjuncts or, more commonly, teaching assistants may be charged against the standard faculty budget or the budget for research assistants.

A second set of issues concerns the fit of course simulations within the curriculum as a whole. Ideally, simulations in one course should fit within a formal or informal curricular plan. By informal agreement, continuing exercises in a basic business organizations course, for example, can provide a transactional lawyering experience to most students. Or the school may adopt a formal requirement that every student engage in one or more lawyering simulations available in a range of courses.

Of more immediate concern to a teacher who uses a simulation are the other concurrent demands on the students' time. If students have other major responsibilities, they will be less able to give the simulation the attention it deserves. If the simulation consumes a significant amount of time, it draws students' attention from other classes—perhaps to the dismay of both one's students and one's colleagues. A partial remedy is careful scheduling. In a first-year course, for example, it is wise to avoid doing a simulation when students have a major assignment due in legal writing.

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With simulations as with other forms of teaching, success depends in large measure on planning. This article can facilitate the planning process by providing a check list of key issues to consider.