



Implementing Best Practices & Educating Lawyers: Teaching Skills and Professionalism Across the Curriculum

Workshop
ID

**Alternative Teaching Methods:
Using Simulations to Enhance
Substantive Courses**

Deborah Young
Cumberland School of Law, Samford University

Deborah Young received her law degree at the University of Michigan and then clerked for Judge Thomas Clark on the U.S. Court of Appeals for the Eleventh Circuit in Atlanta. Professor Young practiced law as an assistant United States Attorney for the District of Columbia for seven years, with her last assignment in the International Crimes section. She then taught at Emory University School of Law where she was co-director of the trial advocacy program.

In 1997 she joined the faculty at Cumberland School of Law at Samford University. Professor Young teaches courses in evidence, criminal procedure, and trial advocacy. She also serves as director of Trial Advocacy and Clinical Education.

Professor Young is a coauthor of *Federal Sentencing Law and Practice*, published by West. In 2007 she spent the fall semester as a Fulbright Scholar, teaching at Xiamen University Law School in southeast China.

Alternative Teaching Methods: Using Simulations to Enhance Substantive Courses

This workshop will enable teachers to efficiently and easily incorporate skills activities and simulations into their courses. Teaching materials are provided here for advocacy simulations on authentication in Evidence; a writing simulation on sentencing in Criminal Law; and role-playing simulations on stops and seizures in Criminal Procedure. Additional materials for other simulations (beyond the eight pages permitted here) will be distributed at the workshop in paper and electronic format. Demonstrations of the simulations will show how they are effective for teaching substantive material, assessing student knowledge, and raising ethical issues in the context of substantive learning. Principles of designing quick simulations for other courses will also be discussed.

Using simulations in substantive courses accomplishes several goals at once. Student learning is enhanced, particularly for students for whom kinesthetic learning is most natural. When students are actively participating, their attention is necessarily heightened. For those observing, the novelty of watching classmates creates great interest. Alerting students that they will have to actually perform a task in class also greatly increases preparation. Simulations allow for immediate feedback, both internal and external. Using knowledge in a simulation requires that the principles be fully understood and students become aware of their weaknesses. At the same time, the professor can immediately assess how thoroughly the students understand the substantive law. Misunderstandings can be addressed promptly, ensuring that the building blocks of the subject are solid before moving on. Finally, as students actually carry out the role of an attorney, judge, officer, or suspect, ethical concerns naturally come to light, leading to discussions in the context of substantive learning.

Criminal Law Simulation:

This simulation is designed to complete the study on justifications for punishment: retribution, deterrence, rehabilitation, and incapacitation. Students act as judges issuing a one page written sentencing order. After completing readings and class discussion about punishment, I assign the sentencing drafting exercise below. Students are explicitly asked to refrain from discussing the sentencing exercise with anyone. Unbeknownst to the students, half of the students have the female defendant Sandra and half have the male defendant Sam. Otherwise, the circumstances are identical. The facts are based on a case I had as an Assistant United States Attorney in the District of Columbia. I give the students a deadline to submit the memos before the next class so I have time to calculate some statistics.

The subsequent class discussion is usually fascinating as we explore: (1) what justifications for punishment were utilized with what consequences, (2) which facts were most significant, and (3) what personal biases influenced individual sentencing decisions. Before this class I calculate the average sentence imposed and whether there are differences for male and female defendants or male and female “sentencing judges.” Students readily see how disparate discretionary sentencing can be. Students often comment on how difficult it was to actually determine a sentence. We also discuss whether some “judges” found there was significant assistance to the government and whether this conclusion had a factual basis. I then lead students through an analysis of the Federal Sentencing Guidelines recommended sentence for the

offense. (At the workshop I will hand out the sentencing guidelines worksheet that corresponds to this case). Students are often surprised that facts that were significant to them, such as parental responsibilities, do not alter guidelines sentences. Throughout the discussion, we consider ethical concerns, including the complex issue of judges bound by laws with which they may disagree. If I have the available time, I may begin class by having the students discuss the sentencing with a neighbor and then report what sentence they would give. This time for consultation usually reduces the number of outlying sentences.

This exercise cements the students' understanding of the justifications for punishment, clarifies the difference between discretionary sentencing and guidelines sentencing, places students in the role of judges, and raises ethical issues including gender bias. Done early in the semester, this exercise also gives me a quick glimpse of my students' abilities at legal analysis and writing so I can provide support where necessary.

Here are the memos I distribute:

Memo 1, female defendant:

If you were the judge in the following case, what sentence would you impose and why? Write a brief (one page) memo stating your sentence and explaining your reasons.

United States v. Sandra Johnson

Sandra Johnson was convicted of possession with intent to distribute 600 grams of cocaine in powder form in Washington, D.C. on January 19, 2009. On that date, officers of the Washington, D.C., task force watched passengers leaving the Amtrak train which had just arrived from New York. Officers noticed Ms. Johnson because she looked nervous, had no luggage other than a large tote bag, and proceeded immediately to a pay phone. A plain clothes officer stood at the next phone and heard Ms. Johnson describing her own clothing and agreeing to meet someone just outside the station in thirty minutes. The officer identified himself to Ms. Johnson and asked to search her bag. Ms. Johnson began trembling, but handed the officer the bag. The officer opened the bag and found the 600 grams of cocaine.

The officer placed Ms. Johnson under arrest. When asked to cooperate in an ongoing investigation, Ms. Johnson gave the officers two nicknames of persons she had picked the cocaine up from in New York. She said she could provide no other information. Ms. Johnson is twenty years old. Ms. Johnson is not married. She has a one-year-old son and a three-year-old daughter. She completed the eleventh grade. From June 2008 until November 2008, Ms. Johnson was employed as a waitress. She lost her job when the restaurant closed. She has no previous arrests.

After losing a motion to suppress the physical evidence, Ms. Johnson pleaded guilty to one count of possession with intent to distribute 600 grams of cocaine. The statutory mandatory minimum penalty is five years in prison. The maximum penalty is forty years in prison. A judge can sentence a defendant to less than the statutory minimum only if the court finds that the defendant gave substantial assistance to government authorities to aid a criminal investigation.

Memo 2, male defendant:

If you were the judge in the following case, what sentence would you impose and why? Write a brief (one page) memo stating your sentence and explaining your reasons.

United States v. Sam Johnson

Sam Johnson was convicted of possession with intent to distribute 600 grams of cocaine in powder form in Washington, D.C. on January 19, 2009. On that date, officers of the Washington, D.C., task force watched passengers leaving the Amtrak train which had just arrived from New York. Officers noticed Mr. Johnson because he looked nervous, had no luggage other than a large tote bag, and proceeded immediately to a pay phone. A plain clothes officer stood at the next phone and heard Mr. Johnson describing his own clothing and agreeing to meet someone just outside the station in thirty minutes. The officer identified himself to Mr. Johnson and asked to search his bag. Mr. Johnson began trembling, but handed the officer the bag. The officer opened the bag and found the 600 grams of cocaine.

The officer placed Mr. Johnson under arrest. When asked to cooperate in an ongoing investigation, Mr. Johnson gave the officers two nicknames of persons he had picked the cocaine up from in New York. He said he could provide no other information. Mr. Johnson is twenty years old. Mr. Johnson is not married. He has a one-year-old son and a three-year-old daughter. He completed the eleventh grade. From June 2008 until November 2008, Mr. Johnson was employed as a waiter. He lost his job when the restaurant closed.

After losing a motion to suppress the physical evidence, Mr. Johnson pleaded guilty to one count of possession with intent to distribute 600 grams of cocaine. The statutory mandatory minimum penalty is five years in prison. The maximum penalty is forty years in prison. A judge can sentence a defendant to less than the statutory minimum only if the court finds that the defendant gave substantial assistance to government authorities to aid a criminal investigation.

Criminal Procedure Simulations:

In criminal procedure, simulations bring to life key issues of stops and seizures. Two classic cases that work well for in class student simulations depicting police stops are the initial seizure in *US v. Mendenhall*, 446 U.S. 544 (1980), and the stop and frisk in *Terry v. Ohio*, 392 U.S. 1 (1968). In *Mendenhall*, DEA agents approach Ms. Mendenhall after she disembarked in the Detroit airport from a flight from Los Angeles. The agents take her license and ticket, but return them and then ask her to accompany them to their office. Ultimately they ask for a consent search and Ms. Mendenhall consents and heroin is found on her person. To set the scene for *Mendenhall*, I like to show a one minute clip of an airport scene from “Catch Me If You Can.” Students today are so accustomed to the high level of scrutiny at airports that they can hardly conceive of how open airports were at the time of the *Mendenhall* case. Of course one also has to explain why an agent holding one’s plane ticket had such significance, since most students have only had electronic tickets. The student playing the defendant, Ms. Mendenhall often comments about how she did not feel free to refuse the agent’s request at each step and

how she did in fact feel “seized,” contrary to the Supreme Court’s conclusion that a reasonable person in Ms. Mendenhall’s situation would have felt free to leave. The students playing the agents sometimes comment on how fine the line seems to be between what is permissible police conduct and what is not.

In *Terry v. Ohio*, the very experienced Detective McFadden stopped and frisked three young men he thought were casing a store. The student playing Detective McFadden often comments on how difficult it is to imagine how to control three potential defendants, when you suspect they are armed and might harm you. Seeing the facts demonstrated heightens the discussion of how the Supreme Court must craft rules of criminal procedure that can be applied in daily settings. Students readily see there was no arrest to justify the searches, and understand why the Court created the stop and frisk doctrine based on reasonable suspicion to protect officers.

To demonstrate various car and container searches, I use a Barbie car and three dolls. I usually have a Barbie driving, Ken as a male passenger, and a Barbie police officer. Driver Barbie has a purse with her. Passenger Ken has a suitcase in the trunk. There are little tiny packets of white powder (baking soda packaged in small pieces of ziploc bags) in various locations throughout the car, including in the purse, in a pocket, and in the suitcase. As a variation, there can be weapons in the car or on the persons. Driver Barbie commits some traffic error such as failing to use a turn signal which can be the beginning of a traffic stop. I have students carry out various traffic stops and car searches with the dolls. As with other simulations, it is easy to spot where students understand the law and where they do not. An outline of significant cases and their key facts will be distributed at the workshop to make this a quick and easy simulation project. Faculty can then choose which cases to use, depending on what is covered in the course text.

All of these criminal procedure simulations assist the students in seeing the implications of constitutional law from the perspective of suspects and the perspective of police, reminding students of the human factor, as urged by the *Carnegie* report. Students better understand why courts try to establish bright line rules that can be readily followed in the field. Often students raise the issue of whether police might lie about how a stop occurred to make it appear legal, thus demonstrating the fundamental concept of criminal procedure that courts alone do not guarantee constitutional rights. In reviewing exactly what occurred after a simulation, students also experience the role of witness and recognize how perceptions and memory can vary, even under ideal conditions with perfect lighting.

Evidence Simulations:

Evidence is a natural subject for incorporating simulations, but many faculty do not do so because of concerns of use of class time, need for preparation of materials, or lack of actual experience in advocacy. I begin the semester with authentication. I have found authentication to be an easy first topic in Evidence that quickly teaches students something they expected to learn: how to introduce evidence in court. I preview the simulations with the text assignment and a very practical power point that I also use in a basic trial advocacy class. Here is an outline of the powerpoint presentation:

Authentication of Documents and Exhibits

Authentication:

You must show the item is what you say it is.

Who decides?

Under 104(b) judge decides if there is enough evidence for jury to find that the item is what you say it is

Authentication:

Providing sufficient evidence for the judge to decide that a jury may conclude the evidence is what you say it is.

Steps to lay the foundation for any exhibit

1. Have item marked for identification.
(Do in advance).
2. Show exhibit to opposing counsel for inspection; note on record or note on record counsel has previously examined.
3. Ask court's permission to approach witness. (Optional-dependending on judge's preference.)
4. Show exhibit to witness.
"Witness, I show you what has been marked for identification as plaintiff's Exhibit 1."
5. Ask witness to identify article.
 - "Do you recognize plaintiff's exhibit A for identification?"
 - "How do you recognize plaintiff's exhibit A for identification?"
6. Lay basis for foundation-authentication (may take more than one witness).
7. Move exhibit into evidence.
"Your Honor, I move government's exhibit A for identification into evidence.
8. Respond to any objections.
9. Obtain court ruling.

10. Use Exhibit.

- Can have witness use exhibit in testimony.
- Can have witness mark the exhibit, or you may mark exhibit pursuant to witness' testimony.
- Can ask court's permission to "publish" the exhibit to the jury.

Remember you should not display an exhibit to the jury or otherwise use the exhibit until it is admitted

Position in courtroom while using exhibits:

jury must see

witness must see

judge not required to see—but some want to

Know there are alternatives to authentication

Inclusion of documents in pretrial pleadings pursuant to FRCP

Stipulations

Statutory schemes

Once students have learned the basic principles of authentication, I assign them items of evidence to introduce including:

a photograph-any photo will suffice, but students really enjoy a photo of an intersection near campus

a gun-I use a cardboard cutout with a serial number on it

a tape recording

"cocaine"-baking soda in an FBI heatseal lab bag

and a document, usually a contract

For each simulation we have at least four roles: judge, witness(es), and two students as co-counsel introducing the evidence. I initially take the role of judge, but switch to witness for the "cocaine" case unless I have someone in the class knowledgeable enough to play the officer's role. The rest of the class acts as opposing counsel when it is appropriate to object.

With each of the exhibits, the observing students and I watch to see if the critical foundation is laid. For the photograph, does the student attorney establish that the photograph fairly and accurately and represents the scene on the date in question? If the photograph was taken at a different time, has the witness acknowledged any changes from the relevant date? Does the student attorney erroneously believe that the photographer must be called as a witness?

With the gun, does the student realize how basic the foundation is if the officer who seized the weapon noted the serial number? Can the witness refresh the officer's recollection, if needed, for the serial number? Does the student attorney mistakenly think that a chain of custody is required?

With the tape recording, the student has several choices, the easiest of which is to have a witness who was present during the conversation and has reviewed the tape. Does the student attorney establish that the tape is an accurate recording of the relevant conversation? Does the student attorney have the witness describe the conversation and identify the voices?

For the cocaine, does the student attorney realize there must be a chain of custody established? Are the appropriate witnesses called?

For the contract I often vary the simulation by having a number of different students authenticate the contract in different ways, such as by lay handwriting testimony and eyewitness to the signing testimony.

I do not usually assign students specific problems in advance, although that expedites class. I prefer to have all students prepare all problems. At the beginning of class, I announce who will do which problems and give those students a few minutes to speak to their co-counsel while I prep the witnesses. We then begin the simulations. Doing simulations in class takes about the same amount of time as discussing the problems alone. At the workshop we will discuss techniques to make the most of these simulations and I will distribute sample question and answer scripts for each simulation.

The authentication simulations spur students to master the material in order to perform well in front of their classmates. They require students to tailor the basic authentication steps to fit the kind of evidence offered. The rest of the class can easily be engaged by having them make objections to admission if the authentication is inadequate or by having them suggest alternate approaches, particularly with the document which can be admitted in many different ways. This class serves as an icebreaker, usually in the second week of the semester. Once students become engaged and speak out in class, they tend to continue that practice. Students also begin to understand there is rarely just one way to accomplish a legal task.

Keys for designing simulations in any subject:

The simulations discussed in this workshop are designed to be quick and easy. They do not involve lengthy use of one case file which might become boring. Similar quick simulations can be designed for any class. The outline below can assist you in creating your own. Also, many law texts now have problems that can readily be turned into simulations.

- I. Consider what goals you want to achieve.
 - A. Sparking student interest.
 - B. Development of skills.
 1. Oral advocacy.
 2. Writing.
 3. Legal analysis.
 4. Factual analysis.

- C. Reviewing subject.
 - D. Augmenting substance of subject.
 - E. Understanding real world application of subject.
 - F. Recognizing the perspectives of various parties: judge, witness, officer, suspect and attorney.
 - G. Stimulation discussion of ethical issues.
- II. Consider how you want to assess the simulation.
- A. Class discussion.
 - B. Written comments.
 - C. Oral critiques.
 - D. Grades.
 - E. Peer review.
- III. Consider where, when, and how the simulation will occur.
- A. Use class time for part of or all of the simulation.
 - B. Have peer cooperative effort.
 - C. Assign roles or accept volunteers.
 - D. Necessary props.
- IV. Consider how students will perceive assignment.
- A. Change from the everyday routine.
 - B. Extra work.
 - C. Extra anxiety if uncertain about how to proceed (fear will be heightened if assignment is graded.)
 - D. Use care to avoid situations that may be too emotionally difficult.

I prefer to review, but not grade, in class simulations. This greatly lowers the anxiety level without markedly decreasing the level of performance. Particularly for in class simulations, students will strive to make sure they perform adequately in front of their peers. If you do decide to grade the simulations, provide a detailed rubric in advance alerting students to what will be considered.