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Simulations in Clinics, Contract Drafting, and Upper-Level Courses

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SIMULATIONS IN CLINICS, CONTRACT DRAFTING, AND UPPER-LEVEL COURSES

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HELEN S. SCOTT²	SIMULATIONS IN UPPER-LEVEL COURSES
CAROLE HEYWARD³	SIMULATIONS IN CLINICS
DANIEL B. BOGART⁴	SIMULATIONS IN A COMMERCIAL LEASING COURSE

DANNY BOGART

Introduction

My name is Danny Bogart. I'm from Chapman University in Orange County, California. It is my pleasure to participate here. I was very pleased that Tina Stark asked me to help with plan this program. This is one of the first panels, so I get to kind of relax a bit when this is done. Let me introduce the other panelists. Sitting to my right is Helen Scott from N.Y.U. And sitting next to her is Carole Heyward from Cleveland-Marshall College of Law. And finally on my far, far right is a David Epstein from New York Law School. We are all going to be participating and discussing the same topic, which is simulations in clinics, contract drafting, and upper level courses.

We have an hour and a half. We're going to have 15 minutes per person to present, and the remaining time we will allocate to questions. We'd like to have a good fruitful question period. And let me just tell you at the beginning that the panelists talked for a bit before we created our own materials. We thought there would be some questions we would each try to answer to give some consistency to this program. But we don't necessarily have to stick to script. We may focus on one thing or another as we move through. We will focus on the following questions: What is the purpose of simulation? What is the source of the simulation? What are the mechanics of the simulation? What kind of students do you get? What kind of students do you look for? What are the prerequisites of the course? Do you employ anonymous or non-anonymous grading? What is the mechanism for

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assessment? Is the work product anonymous or non-anonymous? What is the mechanism for assessment in grading? And how do we deal with ethical issues, if at all? And with that I'm going to turn it over to David Epstein.

DAVID M. EPSTEIN

SIMULATIONS IN CONTRACT DRAFTING

Introduction

When you teach a class on drafting, obviously the students are going to do a lot of drafting. This is the kind of class where students learn by doing and by getting feedback. And of course we have to give them something to write about—something to draft. Most of the time I think we create our own little hypotheticals. We sit back, brainstorm with ourselves, and come up with some kind of a fact pattern. Then we give them something to draft that is going to be based on that fact pattern—that hypothetical.

Using Simulations to Provide Fact Patterns

I found that an alternative that seems to work well is to use simulations to provide the students with the fact patterns that they will use in their drafting. The students find this method more interesting. It gets the students a little bit more invested in what's going on. I am suggesting that you use the simulated client interview or negotiation to allow the students to get the facts the way they would in a real case. They will not simply be given a piece of paper and told: "Here's all of the stuff. Can you please draft this particular document for us?"

Client Interviews, Negotiations, or Both

The first thing you have to decide is whether you want to use both client interviews and negotiations. It is the kind of decision that you have to make early because it affects the way you will do things. If you have a client interview and a negotiation, they are going to feed into one another. For one thing, it means that you're going to need more than one client, because you have to have someone to negotiate with. You're going to need two sides: at least two make-believe clients in order to provide the facts. You'll conduct the client interviews, and that will feed into the negotiations.

If you're not going to have the negotiations, then it may not be worth the trouble of having more than one client. You may just decide to make the topic the actual drafting of something that can be done without two sides. For instance, representing a landlord in creating some kind of a form lease. If you don't have a client interview before hand, you are going to have to create some facts just for the negotiation. Otherwise, the facts would already have been produced as a result of the client interviews.

Client Interviews

We will start with the client interview,⁵ and I will touch on different aspects as they apply if you will be doing the negotiation as well. First of all, you have to pick a topic like

⁵ David Epstein, *Simulations in Contract Drafting* (Conference Handout), http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Epstein/Epstein_Conference_Handouts.doc

you would with any drafting project. I found that you actually don't write less using this approach. You actually end up writing more. For example, you may need long background materials. I did a problem where a couple of people were involved in a prep course for college applications. One person had started the business. They had brought somebody in to teach the course. They had never resolved their exact duties in relation to what they were doing, and it turned into a fight. Are we partners? Are we employer, employee? Are we independent contractor and owner? It turned into a conflict, at least in this make believe little world.

But in order to put something like that together, what I ended up doing was preparing pages of background materials that we would give to the clients, because these are obviously not real clients. They used these materials in order to be able to answer whatever questions they were asked as part of the interview. You have to decide how much detail you want. How much imagination do you want to allow your make believe clients to have? It is a good idea to know whom you are using to stand in as clients. How much imagination do they have? How much time, if you give them something that's very detailed, will they spend learning this background stuff?

You also have to decide whether or not you can have more than one possible result come of these interviews. For example, just taking the particular hypothetical here, let's say that one client is the person who started this test prep business. The students interview him and they start talking with the client about what kind of a business the client would like this to be. What would the client like the relationship to be? And let's say the client decides the best relationship, based on what he's been given, would be as an employee. If you've decided that the class has to learn how to write a partnership agreement, this is not going to work. Therefore, you have to decide whether you care what kind of a document will result from this initial interview. Is it okay with you that it's an employment agreement or must it be a partnership agreement or can it be an independent contractor agreement? You have to make that kind of decision as much here as you would if you were just giving a hypothetical that you wrote up yourself.

Finding Clients

You also have to find people who will act as clients. Obviously, unless it is a clinic of some sort, these are not real clients. These are people who are essentially actors. Sometimes you can actually get an actor. One of the advantages I have had being in New York is that it is not terribly difficult to find unemployed actors. These actors will, given the budget that we have to spend, work for what we can pay them, which is nothing. I had a lot less trouble getting people than I thought I would. You also have to make sure that they will be prepared and read the materials that you give them. One of the actors I brought in did not, which is something you have to consider. Sometimes you can use your friends or colleagues. They don't necessarily have to be lawyers because they aren't supposed to be lawyers; they are clients.

You can also use students. They could be students from the class or they could just be other students from the school. There are obvious problems with using students from the class, because you have to have more than one set of interviews going. Some students will be preparing things that the others didn't. So if you're going to use students, it probably should not be the ones in the class. Frankly, I found that the actor's model does seem to work best.

Structuring the Client Interview

You have to structure this as well. And again, in part that will be affected by how big the class is. Are you going to have a negotiation afterwards? How many sets of interviews do you have to have? I almost always have two. And that, itself, does create certain difficulties. For example, obviously in the real world, after Client A is interviewed, the adversary is not being interviewed while Client A's lawyers are sitting there. If you're doing the interview in a classroom, does that mean that half of the students can't be there during one set of interviews? To some extent I think it does mean that. But this can go on for a while. With any interview you probably want to tape the interview so you can talk about the interview and give some feedback. There is a limit to how long you can have only half of the class present. At some point, students will not be getting enough class time unless you've got the urge to double the time you spend. This is okay for a while, but it can get a little difficult.

You probably want panels of students interviewing each time unless it is a very small class. You have to decide how you want to set that up. Can you just pick them? Do they volunteer for a panel? And you do want a certain amount of preparation beforehand? You do want to talk a little bit about interviewing, although not with the depth that would be appropriate if this was a class that was emphasizing that skill. Here it's a skill being used with another purpose in mind. But you do want to talk about it a little bit beforehand. As I said you probably want to record it. I think one of the most effective ways of having people learn about what they are doing is to let them see what it is that they did later on. You want to give them some feedback.

Grading the Simulation

Should you grade this simulation, the client interview? I always find that a tough decision to make. I have done it with grading and without grading. I've never had a class so small that I could only have one or two people on a side at a time. And I have found it difficult to grade if I've got, say, five people on a side interviewing someone once. I find the interview goes reasonably well, better than I would have expected. But it's so hard to grade those people individually. Some students may just be a lot more aggressive. They won't necessarily be brighter, as we all know from some of our classes. The ones who talk the most don't always know the most. So what I have done, when I do grade, is grade each group as a group. And that seems to work better than trying to grade them individually. Sometimes I won't grade them at all.

Negotiations

It's easier to set up negotiations than the interview. For one thing, you don't need actors. For another, if you have both the interview and the negotiation, the negotiation just picks up where the interview left off. The interviews will establish what the facts are. You will have the two different sides. The two sides will negotiate and base what they write on the negotiation.

The other approach, if you don't want to have the interview, is to give the students a very basic fact pattern. They read it and talk about it. Then, they meet in teams that they have been assigned to, do their negotiation, and draft whatever product they've negotiated.

HELEN S. SCOTT**SIMULATIONS IN UPPER-LEVEL COURSES****Introduction**

I'm going to talk about two things. The most detailed part of my remarks has to do with a course that I designed—that I no longer teach—15 years ago, when I was much braver and probably also more foolish or at least less savvy. I designed the course because I felt that there was a gap in our curriculum. I felt that students were not getting this kind of thinking, teaching, or studying outside of the seminar part of our clinical program (as many of you know, NYU has a highly regarded clinical program). But at that time and until last semester, it was entirely litigation oriented. So, I thought there was a real gap in our transactional education.

The course was called business transaction planning because, I couldn't come up with a better name. And the syllabus for the course is actually available on—here is my plug—the Kauffman Foundation web site.⁶ There is free access to all academics.

Goals and Purpose of the Course

The goals and the purpose of the course were really to focus on negotiation and drafting. It was not intended to be a substantive law course. I made a number of decisions in connection with the course, which I probably would make differently now. There were things I didn't realize were going on until they were actually happening. Take teamwork, for example. How do the students work in teams? How do you evaluate their teamwork? This is something business schools tend to do a lot better than law schools. Teamwork, and the ability to evaluate it, seems to have tremendous value on its own, which I was not aware of then. The course was focused on entrepreneurship. So, the simulation I used was of a start up business. Having had lots of connections to this business, it was a business that I knew well. And ultimately, I would have to say, that much of the value of my connection to this business ended up being in the classroom materials that resulted rather than in the investment that we had actually made. The company no longer exists, but it was a great company at the time. I reverse-engineered this company. I had access to all of its papers; all of its business plans at various stages; and all of its placement memoranda. I had as much information as I could possibly ask for. Just as a footnote, I have started exploring another business to use as a model. People have been remarkably forthcoming and willing to let their businesses be used even though it requires the disclosure of an awful lot of material.

Structure of the Course

The reverse engineering was pretty dramatic. First of all, I wanted to cut out all issues of which I have no expertise. I cut out issues dealing with real estate, intellectual property, and technology. And the students had to form a corporation, because that is all I was prepared to deal with at the time. I put real limitations around the material. One of the things I learned from designing and then teaching the simulation several times was, of course, less is more. There is so much there that even cutting it back as much as I did—

⁶ Entrepreneurship Law, KAUFFMAN FOUNDATION, <http://www.entrepreneurship.org/en/Entrepreneurship-Law/Topic-Introductions/Operating-Clinics-Introduction.aspx>.

which frustrated some of the students who were technology types—there ended up being much more richness and material than I could get to or explore with the students.

The class was designed on a two-track system. The students registered for three hours. Two of those were in-class hours and one was an out-of-class hour. As I am sure you all know, upper class students have remarkably complicated schedules. No one student has the same schedule as any other student. So, arranging for them to be able to meet outside of class to conduct negotiations and work with each other was logistically quite hard. Adding this third hour, which was not an in class hour, facilitated out of class work. It also made it impossible for students to say “I’m sorry, I’m not available at that time.” It ended up being extremely helpful.

The course was also structured in two pieces. The students were on two different teams, and I had two versions of the simulation. One version involved three characters and the other version involved four. This depended on how many students signed up for the course, because I had to have a number that was either divisible by three or divisible by four. Either way I was ready to go. There ended up being four characters in the simulation: the visionary, the chief technology officer, the financial person, and the investor. Although each was bringing more than one talent to the table, those were their principal roles.

Negotiation and Drafting of Formation Documents

At the beginning the students met in teams, each representing a particular character. All of the founders’ lawyers met. All of the technology persons’ lawyers met. They were devising a strategy for the formation of the company. Then each one of those lawyers would go off and negotiate with the other characters’ lawyer. If there were 16 students, there would be four lawyers representing the founder. Each of those lawyers would negotiate against one lawyer for the technology person, one lawyer for the finance person, and one lawyer for the investor. In all cases, I had given them background information on the clients, including some secret facts, which remarkably stayed secret. I acted as liaison. I didn’t choose to go the actor route, but I thought about it. Some of my clinical colleagues had done so successfully. I simply said that I would relay all questions to the clients and their responses, which I did. I have thick binders of e-mails explaining all of the personal quirks that the different students came up with. And so that part of the course was part one: the negotiation and drafting of formation documents. How did the students decide what each person’s contribution was going to be? How much it was going to be worth? What did the papers look like? And they had to draft a shareholder’s agreement, a certificate of incorporation, and a set of bylaws. Those were really the formation documents.

Negotiating with Outside Investors

I split the groups differently in the last third of the semester, because it took much longer than I had originally anticipated the first time through. The last third of the semester, students formed teams of one lawyer representing each client. And four of them now represented the company. The company was in negotiations with a venture capitalist, an outside investor for the firm’s first outside investment. They were now in different teams than they had been before.

I created a canned term sheet that supposedly had been sent in by the investor, which was full of onerous and powerful things. Their job was to plan the negotiation of this term sheet, figure out what arguments they were going to make, how it was going to go, and then they were to suit up and go to the investor’s office. For this purpose, I recruited alumni, and I’m going to come back to the use of alumni in these circumstances for a couple

of different reasons. They couldn't have been happier to have these students come to their offices and do this negotiation. I told them they could, if they would—and they all did—do a negotiation for a couple of hours, then break out of role to give the students some feedback and talk about tactics. These were uniformly valuable experiences. The students raved about them and so did the outside investors.

Materials

When it came to materials, there weren't really any available. Certainly, fifteen years ago there were very little. The few materials available were scattered. I didn't want the students to have to purchase all these different books to read a chapter here, and a chapter there. So, I created a library. I bought a couple of copies of each of the books I was going to use. I think there were five or six of them, and I made them available to the students in the library. This is before the days of all this electronic access. So, they were literally on reserve in the library. I created libraries of form documents I thought they would probably want to use, and they did make extensive use of them. I also used, particularly in the classroom, a number of business school case studies to demonstrate some of the things that I was talking about including: some of the theories of negotiation, some valuation issues, and one international cross-border negotiation problem.

Cross-Cultural and Cross-Border Issues

I had students who were both JDs and LL.M.s, which gave me an excellent opportunity to explore some of these cross-cultural, cross-border issues. They didn't come up often, but when they came up, they came up powerfully. There was one class in which one of the teams virtually fell apart over a cultural misunderstanding that had to do with humor. It was a tremendous experience for all of the students, for us to talk about how this had happened. The misunderstanding had arisen from an offhand joking comment. The student from the U.S. tried to diffuse the situation by using more humor. The student from Spain, who was a very proud lawyer, reacted worse and worse rather than better and better. He was very formal. His training had been different. It was a very interesting opportunity. That was a fortunate result of the student body at N.Y.U., which contains quite a few foreign LL.M. students.

Assignments and Grading

I asked them to write weekly reflective memos and instructed them as to what I wanted them to talk about. What surprised them? What didn't surprise them the prior week? How were their inter-team dealings with each other? In the courses I teach now, I've been using much more rigorous evaluation sheets for team projects, which I developed with a co-teacher from the business school. But these were just reflective memos. They were very useful. They were completely anonymous and confidential to the other students. And I really got a good sense of what was going on.

The students had to submit their formation documents, which were group projects. Generally one student would take the lead on the documents, and they had to tell me that. They had to submit the revised term sheet that they produced after their negotiation with the investor and a closing list. In addition, there were several points in the semester where they had to present, as a team, the structure they had come up with for the formation. They had to explain why they had structured the corporation and why this corporation had seventeen classes of stock and this other corporation only had one. They had to present, as well as critique each other. They also had to present the results of their negotiation with the investor. Each of the student groups would do the presentation, then they would critique

each other's presentations. All of this went into the grading. I found I was able to really identify each student's performance from a base line at the beginning of semester, all the way up to the end.

Conclusion

I have a couple of final points just about the course. I stopped teaching it because the simulation went way out of date and in a tremendous entrepreneurial setting that mattered a lot. The business model made no sense any more. I am looking for something that I think will be more durable, but you never know. As the economy goes, so go the entrepreneurial endeavors. The business school case studies were a real find and I continue to use them, in part because they forget all about law and lawyers. They pay no attention to what a lawyer would be looking at in the transaction they are discussing. This makes an excellent teaching vehicle for law schools and lawyers. One of my favorite ones has to do with a lawyer giving advice in the middle of a negotiation who is conflicted up one side and down the other. The case study pays no attention to this whatsoever. It doesn't even mention it, not at all. Those are kind of a secret source for us. They were an unintentional, but very rich and useful source. They are easy to find by subject matter and substantive area.

I just want to say a few words about what I'm doing now. I am using a very different kind of model. Actually, I feel quite privileged in what's going on at N.Y.U. now. I head something called the Jacobson Leadership Program in Law and Business. This is a program that is focused primarily on interdisciplinary transactions-based courses with our business school. When I designed the simulation course, Business Transaction Planning, I thought I was riding the crest of a wave. My colleagues all thought I was paddling around in some pond in the back hills. Now, of course transactional—institutionally transactional—teaching has become a very hot button. Schools are increasingly interested in it, which brings me back to the alumni.

To make my program work, you need commitment from the law school dean and the business school dean. They are obviously very important to getting the cooperation between faculties and the curricular participation and so forth. But also key to all of this was the alumni. The alumni—and people from other schools have confirmed this—love to get involved. And deans who love to raise money, love alumni who have an interest in what's going on at the school. So, I would say another secret weapon for people who are looking to increase transactional teaching at their law schools is to reach out to the alumni population. That will enhance the institutional commitment and make the road a lot easier.

CAROLE HEYWARD

SIMULATIONS IN CLINICS

Introduction

I teach in a transactional clinic called the Urban Development Law Clinic. In my Clinic, we represent non-profit tax-exempt organizations that engage in real estate, economic and community development. Some of our clients include Greater Cleveland Habitat for Humanity and Karamu House, which is a theater and community arts center. We serve as general counsel for some clients and provide legal advice on an as needed basis for others. The Clinic provides legal advice on real estate matters, corporate governance, transactions

and tax issues. The complexity of matters that we handle ranges from drafting a code of regulations to representing clients in large development projects such as a \$5.1 million community center for seniors.⁷

Structure of Clinic

The Clinic is a two semester class; students may take a third semester. I prefer that students start the Clinic in the second semester of their second year and finish in the summer or fall.⁸ Students attend one class per week, which is 75 minutes long. The first semester and second semester classes meet separately. In addition to class, students are also required to attend a weekly supervision meeting with either of the clinical professors and complete client assignments.

Goals of Simulations

I use simulations in the Clinic to: 1) explore the differences between transactional and litigation attorneys; 2) assist students with identifying and developing the knowledge and skills of a transactional attorney, and 3) introduce students to the laws which govern most of our clients' transactions and activities.

During the first semester of the clinic, I explore the differences between transactional attorneys and litigators which I believe is very important because so much of the law school curriculum is litigation oriented. Explicit discussion about the differences between litigators and transactional attorneys permits students to better identify and develop the knowledge and skills of transactional attorneys. For instance, we explore the fact that litigators discover historical facts and apply rules of law to those facts to persuade a third party decision maker while transactional attorneys must decide how we can lawfully accomplish our client's goals within the framework of relevant law. We also explore the differences between negotiation that occurs in litigation versus transactional matters.

Constructing Simulations

Three simulations that I currently use are included in your materials.⁹ I use many sources to construct simulations. Some are from past client questions, others arise from laws governing our clients' activities; others are from notorious drafting errors.¹⁰ When I construct simulations, I pay particular attention to the concepts of self-regulated learning and the importance of formative assessment.

Self-regulated learning shapes the learning process by making students deliberately choose their learning and problem-solving strategies and monitor the success of those

⁷ In that matter, Clinic students spent three years assisting with various aspects of the development including 1) assembling land for the project; 2) negotiating and drafting construction contracts; and, 3) advising on contractual and wage disputes.

⁸ I have found that most students become better law students after a clinical experience because the clinical experience shows them how the legal doctrine learned in class impacts businesses and people. In other words, the clinical experience provides context for the remainder of their law school careers. Students also report that a clinical experience in the second year prepares them to be more successful summer associates.

⁹ Carole Heyward, *Heyward Handout*, http://www.law.emory.edu/fileadmin/Translaw/ConferenceMaterials/2010_Conference_Speaker_Materials/Heyward/Heyward_Handouts.doc (last visited Oct. 4, 2010).

¹⁰ Ken Adams posts news reports of and case developments relating to drafting errors on his web site. ADAMS DRAFTING, <http://www.adamsdrafting.com/> (last visited Oct. 4, 2010).

strategies for the purpose of becoming better learners and practitioners.¹¹ When I lead class discussion on a simulation exercise, we spend a significant amount of time discussing the strategies employed by students to answer the questions posed in the simulations.¹² Typically class discussion includes: 1) how long a student should continue to pursue a research strategy that is not bearing fruit; 2) whether more appropriate research resources were available; 3) why a search of case law might be unsuccessful; and, 4) the best way to locate appropriate resources in an unfamiliar area of law.

I also construct simulations so that they provide formative assessment to the students.¹³ For instance, I require students to email me their answers to the first assessment in a rich text format. Upon receipt of their answers, I remove anything which identifies the student and I group all responses into one .rtf file which I then send to the students prior to class accompanied by discussion questions. I circulate the students' answers for two important reasons. First, in many law school classes, students are assessed in isolation and do not know how their peers performed on exams and other forms of assessment. Permitting students to review their peers' work permits them to assess their performance in relation to their peers. Often the review leads students to expend more time and effort. Second, students learn from reviewing the work of their peers just as practicing lawyers learn from their peers. Class discussion of students' answers focuses on the process of problem solving more than identifying the best answer.

Three Simulations Used

I use three simulations during the first semester of my clinic. Students receive the first simulation on the first day of class and must complete it within a week. The first simulation requires the students to review a client's code of regulations and answer basic questions about corporate governance which can be resolved by a careful review of the Ohio Revised Code. The first simulation is designed to: 1) provide me with an immediate work product to assess each student's ability; 2) provide an example of the type of question that a transactional attorney handles; and, 3) illustrate how the problem solving engaged in by a transactional attorney is different from that of a litigator.

The second simulation asks the students to evaluate a real estate purchase agreement used by one of our clients. The second simulation is designed to: 1) illustrate how practitioners can use forms as a learning tool; 2) show how to evaluate a form; and, 3) illustrate how important it is to read and draft with precision.

The third simulation asks students to evaluate a draft development consulting agreement provided to our client by the other party. The goal of the third simulation is to: 1) demonstrate the importance of drafting with precision; 2) compare the process of evaluating a form with evaluating a draft from opposing counsel; and, 3) illustrate how an attorney can suggest changes which make the contract more advantageous to our client.

¹¹ I believe that the most successful practitioners are self-regulated learners whether they use that term or another to describe the process of developing expertise at learning what they don't know.

¹² For example, the first simulation that I use can be answered by carefully reading the Ohio Revised Code. When discussing that simulation, at least one student will usually confess to doing an immediate and unsuccessful search for case law. Others may confess to similarly unsuccessful internet searches.

¹³ Formative assessment occurs during the course and provides students (and their professors) information on how well students are learning a subject matter. Formative assessment is significantly different from the summative assessment that law students usually receive from final examinations at the end of a course.

Ethics

The panel agreed that each of us would discuss how we deal with ethical issues. Ethical issues arise with some regularity and are discussed in class as they are presented. I also discuss the fact that the ethical issues faced by transactional attorneys may be different from those faced by litigators.

DANIEL B. BOGART

SIMULATIONS IN A COMMERCIAL LEASING COURSE

Introduction

Well I guess I am last. I am going to talk to you about my commercial leasing course. This is a course I've been teaching for a very long time. I am in my twentieth year in teaching. I was given an opportunity early in my teaching career to create this course. Actually my first exposure to using simulations in teaching was a simulation course that was created by Professor Lynn LoPucki called the "Debtor, Creditor Game." It was a really innovative program. It was a simulation for the basic debtor/creditor course that was PC based. That was my first attempt at using simulations in teaching. When he ceased keeping that program up to date, I started the leasing course.

Goals of Course

There are a lot of ways to approach this and I want to give us enough time to have questions and answers. But what I will do is go through some of the questions that we've generated to provide some consistency.

Let me tell you the goals of the course for me. First of all I have a huge, huge chip on my shoulder. My leasing course allows me to expose students to an important area of practice that is otherwise overlooked. It amazes me that commercial leasing, which comprises a significant portion of what real property and real estate lawyers do across the country and generates millions upon millions of dollars in billable hours, is barely taught at law schools. Many schools maintain a huge staff of intellectual property professors where only a small number of those students will actually go on to practice in that area. But I guarantee you out of my first year property course, many of those students will negotiate commercial leases at some point during the course of their careers.

I can't explain the absence of commercial leasing from the law school curriculum. I will tell you that the American College of Real Estate Lawyers, at its annual meeting, devotes 30 to 40 percent of its time to the discussion of leasing topics.

Commercial leasing also provides an opportunity to begin training students in transactional practice in a neatly compact area. One of the things you've been hearing as my colleagues have been speaking is that transactional practice is document driven. That is a problem for us in my mind. Litigation professors can divide their materials up by subject matter and topic area, but our practices are document driven. So, if you are teaching a mergers and acquisitions course, my god, you've got a lot of documents. Well, in the commercial leasing area, although there are many documents, there is still primarily one – the lease. I can expose students to what they need to know about transactional practice using one document. That's a real advantage.

The next goal I have is to make clear to students the necessary connection between successful lawyering skills and the substantive law. There is a disconnect in the ethos of some law schools, (many law schools in fact), that lawyering skills and a knowledge of the substantive law are somehow separate. This is a terrible mistake, and it one that is generated in many ways. As I said earlier, I have a very big chip on my shoulder. I have written about this misunderstanding of the connection between skills and legal knowledge (in an article in the Pittsburgh Law Review in 2000), and this problem continues to frustrate me.

The ability to negotiate is obviously is critical skill for transactional lawyers and this skill is taught in law schools. Traditional negotiations courses are survey courses. They are useful because they teach a student how to employ more than one strategy or style. However, these courses typically jump from one practice area to another (for example, from family law one week, to real estate law the next week, to some litigation practice the following week). A student taking a Negotiations course of this kind does not really have to know a lot about the substantive law. However, what I know and what you know is you can't be a good commercial leasing lawyer if you don't understand the law. And these courses typically are not document driven. In actual transactional practice, though, you can't understand and negotiate, and be a good lawyer unless you understand every provision in that document.

My last goal is to help students to appreciate what it means to master a practice area. There is no way in law school that we can achieve this thing call "mastery" for our students. I did not achieve what I considered to be real mastery as a sophisticated transactional lawyer while in practice. (I think that only a minority of law professors do). Where does mastery in transactional practice come from? Well, I will tell you right now. This is the secret: it is repetition. Lawyers work on the same type of transaction but see multiple and different documents. If you are a real estate lawyer, for example, you will do commercial leasing because you are going to do landlord/tenant work. Let's say you are doing specifically retail work. You are going to see, if you are representing a tenant, multiple mall lease forms. But your job is always the same. Although these transactions will involve different forms you will look for the same legal issues that concern your client and the same traps.

Mastery does not come after the first, second, or third time you work with a lease. It is after you have reviewed and negotiated multiple lease forms on behalf of your client. I want students to understand this and I can do this in a commercial leasing scenario.

Sources

What are the sources for my simulation course? Well there are tons of sources out there. I have to tell you that when it comes time to finding commercial office lease forms and commercial retail lease forms, there is an endless supply.

In my course, I use my own book.¹⁴ I promised Tina that I wouldn't shill my book too much, so I will keep this behavior to a minimum. But actually, it's appropriate because Tina was talking about books. There are relatively few books truly aimed at teaching transactions, at least compared to the total of all the books available for law school courses. Most courses and most books are litigation oriented. This means that many faculty teaching transactional courses are using their own materials. However, there is a real value in creating and pushing adoption of a book.

¹⁴ DANIEL B. BOGART & CELESTE HAMMOND, *COMMERCIAL LEASING: A TRANSACTIONAL PRIMER* (Carolina Academic Press 2007). The second edition of this book is forthcoming in the spring of 2011.

For one, it helps you. If you have been teaching a course for a long time, there is nothing like writing the book that makes you refine and resolve your own problems. Second, it validates the area of law. I can now say to my law school and to other schools: "Well, there is a book here."

It is hard to get books written and published. Books take tremendous amounts of time and they often earn the author relatively little. To make an impact on what is taught, you have to get the book adopted. If you want to create a book for a transactions based course, you must convince a publisher to pick up the book. What the publisher says is, "show me that it will be adopted, and I will give you the book." And you say "I have a whole area of law, you give me the book and I will get it adopted."

What were the sources for the commercial leasing course? We went to the ABA and obtained permission to use their forms and their promulgated formbook. We used two of their forms in the book. One is their basic office lease. It's not tenant friendly, but it overly pro landlord. Then we use a form that the ABA calls the "Killer Lease." It is egregiously pro landlord and one of the most obnoxious examples of one sided drafting I have ever seen. At the end of each chapter, we have an application. We ask the students how they would modify this awful killer lease provision to address a particular concern of the tenant against the backdrop of a set of facts. If this is the charge you have been given by your client, what are your concerns? What language needs to be changed? These are some of the goals that we have and the sources that we use.

Structure of Simulation

Now, what is the structure of the simulation in my leasing course? Well, it's usually limited. The first thing that's difficult about a simulation course is that you cannot have an unlimited number of students. Even if we got Tina's wish -- that these courses were more common and students signed up -- we'd have to have a whole lot of teachers. Even sixteen people is a lot for this type of course. My commercial leasing course requires a ton of drafting and a ton of teacher critiquing. I have sixteen to twenty students in my leasing course, divided into teams of two. This may sound like it is easy work, given the small class size. However, in this two hour class that I routinely put in several hours worth of work or more for each hour in class.

There are five assignments. The first three assignments are drafting assignments. They are very straight forward, and move along a spectrum from simple drafting to difficult drafting. Initially, I ask the students to draft an expansion right for the tenant. Then I ask the students to draft an extension—a renewal of lease provision—for the tenant. The third assignment is a little more difficult: I ask students to draft a provision allowing the tenant the right to an accounting from the landlord. The landlord will present a bill at the end of each year that says, "Here is your share of operating expenses for the building, pay it." You want a right, if you are the tenant, to look at the landlord's books to see if he's charging the right amount. This is typically drafted by landlord's lawyer. The lawyer has to decide where to put this provision in the lease. How should it be written? What language will reflect the understanding of the parties while protecting the client?

The fourth assignment requires a huge amount of student time and effort. The fourth assignment is a review of the lease for a tenant. Here is where students first begin to sense what mastery means, although students only get a taste of it. In this assignment, students see and work with an entirely new form. It is an industrial tenancy agreement. (This lease resembles both a commercial office lease and a retail lease. It is a hybrid.) I present

students with a form that they haven't seen before. I give students instructions as though I am the client. I instruct students that they represent a new business with a young owner and that the lease will form the basis for the students' negotiation with the landlord. I then ask students to evaluate the lease and write a letter to tenant. The letter is just the kind of assignment a lawyer will be confronted with in practice. In the letter, the student will take the lease apart provision-by-provision. What are tenant's concerns, rights and worries? What are his priorities? Students often spend fifteen hours writing this thing, and they will write a ten page letter. During our in class discussion, when the project is finished, I always ask how much the students planned on charging for their efforts. I am blunt and ask "Did you think the client was going to pay you for investing that much time?" An experienced lawyer will do the work of the students in much less time and much more efficiently.

That assignment is the first time they represent the tenant and they are forced to think about the tenant's goals. In our transactional courses, we should start with contractual language. Then we should be thinking about the objectives or motivations of the parties. Then we should think about terms of art, because in every lease provision there are terms of art that have particular meanings. And finally, and only then, will we get to some substantive law. And then we should really, really work with it.

That fourth assignment makes them work through all of these steps. Students review a lease on behalf of a tenant with specific goals and objectives in mind. To do a good job, students must understand all of the terms of art in the lease with which they are working. By this point in the course, we have gone through about a third to a half of the course. So, they only know about much of the substantive law that they need. Of course, they do not know all of the law that is necessary to help their client, and will have to read ahead to gather necessary knowledge. Students routinely tell me at this point that they have this distinct feeling that they are flying by the seat of their pants.

Now I want to you remember your first two years of practice. Do you remember that nervous feeling that did not know exactly what you were doing? Students feel this when doing the lease review or drafting assignments. Students always come to me and say the same thing: "I need an example to work with." Now, in practice you might find an example or template, but my answer is always: "No, I'm giving you nothing."

By the way, all of their work is non-anonymous. Their work is loaded online. Every last piece of work is loaded online, because they are told in practice there is no such thing as an anonymous exam. It's online, and then I critique it. The only thing that is anonymous is the grade.

I wish I had time to explain the fifth and final assignment, but I am running out of time. The last assignment is a full-blown lease negotiation. Half of the student teams are assigned the landlord's side, and half of the parties are assigned the tenant's side. And guess what: they are presented with a new lease form and a new set of facts. In this case, it is an office lease. It was the lease form that was used for many years in a major urban market, and I suspect, in some form or fashion, it is around today. In this last assignment, I ask tenant teams to review the lease and then turn in their work product. Landlord teams turn in a lease amendment memorializing the negotiated changes. We do not have time in a two hour course to allow teams to meet and discuss the initial amendment. The grading is all based on the work product.

Conclusion

There is one last more general objective for a course like commercial leasing. I apologize for adding to the list. Do you know how little students have in terms of written product when they leave law school to get a job? This is a very serious question I'm asking now. Do you know what they present to prospective employers in terms of written product? When a lawyer says: "What have you written? Show me your writing capability." Many students use their first year writing samples. In short, they have nothing. And if students have anything at all, it is likely a research memo. They have a research memo written for a law professor who wants them to produce something like a law review article, which they will not be doing in transactional practice.

My students leave with a review of a lease, which is often fourteen pages or longer. It does not matter that it's not quite as good as full time real estate associates produce. I will tell you right now, my students get jobs with these more realistic samples. I have gotten calls from lawyers saying that they have never seen anything like this before, because they didn't do it in law school.

Forcing students to produce written work product that helps them secure a job should be a goal of what we do. That is a legitimate and necessary end product for law professors. We should be thinking about what our students do from here on out. The written product is something they should leave with.

So, I have been talking and now I am done. We have time for questions, but only one long one. All right. And may I ask before you begin, we have been told you that should identify yourself and your school.

QUESTION AND ANSWER SEGMENT

QUESTION

This is for Carole. I am fascinated by the idea of throwing them into research and drafting with no particular set of references to forms and guidance. I recall when I started practice that was pretty darn difficult. When I was in law school it would have been impossible. What do you teach them about how to search for useful materials?

CAROLE HEYWARD

During the first class of the semester I give a brief overview of the federal, state and local laws that affect our clients.¹⁵ The students have the benefit of that overview when they receive the first simulation. Practitioners are regularly confronted with legal issues about which they have little knowledge; the sooner students develop good problem solving skills to address those issues, the better. When we discuss the simulations in class, we spend a great deal of time discussing where students started to look for answers and why they picked a particular starting point. We also spend a significant amount of time discussing the best strategies for problem solving.

¹⁵ The Clinic's clients are all Ohio corporations that are tax exempt under 501(c)(3).

QUESTION

I am curious about the size of each of your classes and, in particular, in the clinical setting what the student-teacher ratio is for you and other people that teach the class? And also, in each case, whether any of you have particular prerequisites that you require for your classes? I was thinking, particularly during your presentation, but it strikes me that it actually applies to every class.

CAROLE HEYWARD

In my clinic we have two full time professors and eight students per professor. There is no prerequisite but I prefer students to have taken Corporations.

DAVID EPSTEIN

For drafting concepts, I guess the maximum we have is twenty, which is a bit on the large side. And that will usually be the maximum. It has occasionally been higher, but not for a while. No prerequisites, except obviously they have taken first-year contracts. On occasions involving a business organizations practicum simulation sort of thing, same size. But there will be some sort of obvious prerequisites. Specifically, the student will have taken a business organizations type class like corporations.

HELEN SCOTT

In my simulation course, the maximum number of students I've ever admitted was eighteen. Six teams of three was horrific. More often it was sixteen—four teams of four. Prerequisites included corporations and the basic income tax course. But since they were admitted by permission of the instructor, I also had the opportunity to kind of add some expertise here and there among the students. In the law and business courses that we now teach, there are equal numbers of law students and business students. The maximum size of those classes is twenty-four of each, because they are also team projects.

DANNY BOGART

In my commercial leasing course it is capped at twenty. I prefer it when it is a little bit less. They work in teams of two. With regard to prerequisites, I think the catalog said: "Real Estate Transactions strongly recommended." However, there have been times that I've needed to take Commercial Leasing students even though they haven't had Real Estate.

QUESTION

My question has to do with when you include drafting assignments. I think some of you said you assign students to work in teams. I am curious how it is that you make sure that each student is getting experience across the board in all of the assignments that they are given? And then, how do you evaluate the assignments and give students feedback? In other words, how do you make sure that each is doing the same amount of work and getting the same experience?

HELEN SCOTT

Well, there are a couple of ways to deal with that issue, which is a hard issue. One is to have a number of different drafting assignments or pieces of drafting assignments. Another, which I have used successfully, is to have an on-going monitoring system, which is really a reporting system. The students give me anonymous reports on an on-going basis. In the case of the seminar, it was a weekly basis. In the courses I teach now, I use an actual grid where the students put down their views of the percentage that each student is

contributing. It's interesting that they don't always over-weight themselves—sometimes they do. And that turns out to be on an on-going basis. But most of the time it is a remarkably accurate measure. There are some students who are going to free ride. The hope is that the assessment mechanism will reveal that, and the students know that it will be taken into account, since the team projects represent a certain percentage of the grading rubric.

QUESTION

Can I just follow-up. I think, was it Carole? You mentioned that in your first assignment one student may work on by-laws. Another student may work on articles. But if you want both students to get experience in both areas, how would you address something like that?

CAROLE HEYWARD

The simulations are individual work projects because I want to be able to assess each student's answers and ability. I also want students to be able to measure their performance against their peers. In addition to simulations, the students also complete client assignments during the first semester. The client assignments are often group assignments. When there is a group assignment, the members of the group fill out an assessment form.

DANNY BOGART

I'm going to kind of give my own take. I think I come at this a little bit differently. I'm actually unsympathetic to some degree to the students who are unhappy that they are doing more work than their colleagues, and I don't listen a lot to it. I give the same grade to both students no matter whether one student does one hundred percent and the other does zero. Now that may seem a little harsh. What I will tell you is that I put on screen, right there for the whole class to see in a small intimate setting, the work product for these two people. And you know, one of the things you discover in actual law practice is that when something goes out under someone else's name but you produced the work, the lawyer whose name is on the product gets in trouble, then you get in trouble. And it's amazing what an incentive that is to both parties to participate. Because in a two person student team, each student is, in a sense, labeled with the quality of that other individual's work. I have found it is very difficult personally to assess who was really working hard because you hear two sides to a story every single time.

QUESTION

I just want to follow-up on his question. When you have groups in simulations, how do you form the groups? Do you shuffle them? Do you let them pick their partners? I have had problems in my land transaction development class. I allowed students to work in groups of two to three and I noticed there was a tendency to leave some out.

CAROLE HEYWARD

Again, I don't use group simulations. I do give client assignments to groups of students that I choose (in law firms you don't get to pick your group). I try to balance the groups as far as strengths and weaknesses so that all of the strongest students are not in the same group.

DAVID EPSTEIN

I tend to do the same thing. I won't let them group themselves. I think all kinds of things go wrong. I assign people to groups and then try to make them have a certain

amount of balance. I try to have some kind of grade spread in each group if I am near the end of the semester. I also try to have some kind of personality spread. In other words, I will try to make sure that I don't have all the strong personalities in one group and all the shy people in another group. That has some drawbacks also. If you have a Type A and a laid back type in the same group, the A type may dominate, I won't let the students pick their own partners or groups.

HELEN SCOTT

I have done it both ways. In the simulation seminar, I form the groups. I knew the students' backgrounds. They had to apply for the course. I didn't want one group to be overweighed with people that know a lot about finance and another that was underweighed. I have also allowed students to form their own groups with very slight constraints. That is usually in the law and business courses. They don't really know each other. So, the interpersonal dynamics are very minimized when there have to be students from different populations forming teams. And to my surprise, since I was really skeptical about it, it worked out very well

DANNY BOGART

I really have jumped back and forth over the years. Each year that I do it I say, boy, I should assign teams next year. And then after I assign them I say, I should have let them pick among themselves. Lately, what I have been doing is allowing them to choose their partners, because I've discovered, on the whole, that they work harder when they are working with a partner that they like, and with fewer disagreements. The problem, of course, is they may pick like-minded individuals and what you want is a kind of rapport but also disagreement so they learn from one another. And so I go back and forth. I see weaknesses to each side and strengths. I don't think it is ever going to be perfect and that is the problem with simulation classes. My teams stay the same throughout the assignments. I have never tried the "to change them around." They need to develop a sense of trust and understanding. It's a very compact, intense two-hour course.

QUESTION

Have you had concerns about plagiarism and just simply lifting materials off the web? And how do you really assess whether the students are drafting their own pieces or just simply lifting the things off the web?

CAROLE HEYWARD

I change my simulations slightly each time. Because we spend significant time in class discussing planning, process and resources, it would quickly become apparent that a student had not performed the assignment.

HELEN SCOTT

I think I have used the same combination of techniques, which is tweaking the simulation. When I taught it we didn't have the same kind of electronic posting ability, so the documents from prior seminars were not posted. But tweaking the simulation, moving, for example, from three characters to four is very effective. There are also the presentations, where students have to present what they did and explain their strategic decision-making and explain the legal constraints and be subject to critique. It is very difficult to explain that if you have no idea what you did. So that seems to have worked.

DANNY BOGART

For what it's worth, I think one of the good things about simulation courses is that they are small in size. It is actually very hard for students to plagiarize in the way we normally think about that in law schools. You would be amazed at how fundamentally flawed their first assignments are. In other words, the work product is so far from what it should look like as a finished product that if students are plagiarizing I am not sure where it came from. And you can see the natural progression in the quality of written work product by the end of the semester. I suppose the day will come that a student will find a way to take work from another student and I just don't catch it. But it doesn't seem to have been an issue. I have found other issues in teaching this course but that just hasn't been the one of them.

DAVID EPSTEIN

With my classes, I seldom found any problem with a student trying to take something from work that was previously done by another student, partly because of the things that have been discussed. There is always the problem, of course, of students—in drafting anything—going online or to a formbook and grabbing stuff. Frankly, I have never made much of a big deal about it, because I always thought it was his own punishment. There is so much crap out there that more than likely they are going to destroy themselves if they use it. If they know how to fix it and can make it good, fine. But I just generally find that it is the worst thing they can do to themselves and they end up with a bad grade.

QUESTION

Carole and Dan, you both mentioned that you put student work online so all the other students can see it. I'm wondering what do you do to make sure that they use that as a tool to assess their own work? How do you make sure that they actually look at other students' work? And by doing it, are you concerned about limiting your ability to reuse material in the future years?

DANNY BOGART

How do we make sure that they actually look at other students work? That's a great question. You want me to go first? Well, to me this is the most fun part of the course. In other words, this is what the commercial leasing course is built for.

In my class, the drafting exercises are staggered throughout the semester with some fairly easy projects at the start and harder and more involved projects toward the end of the semester. A lot of the really interesting work that we do in class is the evaluation of student work product on-screen. By the last third of the semester, only a little of our time is spent discussing the text. Instead, a lot of time is spent taking each student assignment apart one at a time. I post critiques online for all students to see. I have a copy of the critique in front of me, and I highlight their work on screen—provision by provision. For example, I will point out if there are two meanings to what a student team writes. I point out those instances in which there is another possible reading. The point, of course, is that if a transaction falls apart and looks back at the document, the other side is going to find the alternate reading.

This is the most engaging part of the course for them. One of the things I do is I ask students before they come to class is to read the work of the other teams. I ask students, almost like we were talking about cases in first year property, about other students' work. I will say “what did you think of the approach taken by “so-and-so” team?” I will then say,

“Their approach was to do Y, but you did X.” And then we will put both examples of student work product on screen at the same time.

There is an honor code requirement that they not share this work with anybody, that they not share their assignments.

CAROLE HEYWARD

I make small changes to the simulations each time so I am not concerned about future inability to use a simulation. Because we compare and assess answers in class, I know that the students perform some assessment of their work versus their peers. I also send discussion questions prior to class which helps students to focus their assessment.

QUESTION

Do any of you teach drafting exercises as a part of a course that's not dedicated to drafting? Like in your contracts class or payment systems or classes where clearly you're really teaching students how to draft, but by looking at documents that failed, you know, in the casebook? So I know that you also teach the drafting course and that's what the program is about, but do you have experience actually doing this in a doctrinal course? And how do you actually manage the time problems?

HELEN SCOTT

Well, I try to do some of it in Contracts. I will admit I don't do it very well, because of the size of the class. Basically, what I have them do is critique drafts of a couple of clauses. Their favorite is a covenant not to compete, which is a mess, and they are all over it. But because of the size of the class it's hard for me to have small teams or individualized projects. I do use my teaching assistants in Contracts to do, among other things, a variety of problems with the students. One of them is based on drafting, and the T.A.s' job is to do line-by-line critiques of the students' work product and to hold sessions with the students to go over it. So, while that's a big compromise, it is a way of trying to do some of it, at least

QUESTION

These are wonderful, multifaceted courses. Bottom line, how do you assess the students' product, process, holistic, etc.? I'm just curious. How do you balance those different goals?

DANNY BOGART

This will probably be the last question, and it is how do we engage student assessment, determine that they are doing a good job, grading and so on? How can we be specific? I will take this very quickly because we have very limited time. That's a great question. The answer is it's an extraordinarily subjective thing. The fewer students you have, the fewer you are comparing. You are having teams compete against one another. In the last assignment in my course, half of the teams are doing landlord assignment and the other half are doing tenant-oriented assignment.

I only assess *written* work product. I do not grade class participation. I get tons of it any way. The only product I care about is what would have arrived in the mail had I been an attorney. I'm not standing there during the student negotiations, although we talk about negotiation strategies and how successful they were. I look at the quality of writing. I determine whether students addressed the issues, because I ask for them to address specific issues or concerns of the client. I determine whether they were specifically addressed in

their work product. And I look for the typical drafting errors. And finally, we all know that certain documents need a certain structure. And by the end of the semester they know what that structure should be. And I look, for a lack of a better word, how eloquent it is. Does it look right? But in the end, it is subjective.

CAROLE HEYWARD

Assessment in a clinical course is subjective because each student joins the clinic with different strengths and weaknesses and grows at a different pace. While students don't receive a letter grade for any individual assignment they do receive substantial feedback. Students fill out a fairly lengthy self-evaluation form and schedule an evaluation meeting with me during final examinations. At that meeting, we discuss how the student believes that they have progressed. I also ask them what they believe that their grade should be. Because we spend so much time talking about the importance of self-assessment, most students pick the grade that I also believe is an accurate assessment of their work.