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At the Lectern

Flipping the Classroom to Teach Workplace ADR in an Intensive Environment

Martin H. Malin and Deborah I. Ginsberg

Introduction

Introducing simulations to doctrinal based classes can be challenging, but such courses are increasingly important considering recent ABA requirements for incorporating experiential learning to law school curricula.¹ Moreover, our students and graduates expect—and need—more hands-on training. Alumni focus groups strongly encouraged us to add more practical skills to our labor law classes. However, introducing practical skills for labor and employment arbitration and mediation best occurs through simulations, which are not easily integrated into traditional semester-long courses.

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1. The course meets the requirements of an experiential course under ABA accreditation standards. Standard 303(a) provides, “A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: . . . (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must: (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302; (ii) develop the concepts underlying the professional skills being taught; (iii) provide multiple opportunities for performance; and (iv) provide opportunities for self-evaluation.” Standard 304(a) provides, “A simulation course provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following: (i) direct supervision of the student’s performance by the faculty member; (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and (iii) a classroom instructional component.” AM. BAR ASS’N, *Standard 303: Curriculum*, in STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017-2018 16 (2017) [hereinafter ABA STANDARDS], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017_2018_aba_standards_rules_approval_law_schools_final.authcheckdam.pdf [https://perma.cc/54E6-GLTB].

The two most commonly used models for using simulations were not ideal. Some faculty add simulations to their traditional courses. Professor Martin Malin simulates a National Labor Relations Board investigation of an unfair labor practice charge in Labor Law. The simulation is a useful exercise that the students appreciate, but also is inherently undervalued because most of the grade for the course is based on a traditional final exam that tests doctrine and theory. Students may be distracted by other courses, co-curricular activities, job responsibilities, and other competing commitments. Additionally, when used in a semester-long course, intensive simulations may take more than one class meeting, disrupting the exercise's continuity.

The second model is a semester-long skills-based course that emphasizes simulation, such as trial advocacy. But these courses are often perceived—not necessarily accurately—as giving theory and doctrine short shrift. Moreover, any simulation will be broken up over weeks and students may lose focus.

When working with complex or intensive simulations, a more ideal solution is to offer simulation-based courses in a concentrated week-long session. We have now offered an ADR simulation course four times during our winter “Intersession,” a weeklong period set aside for intensive courses just before the spring semester starts. To integrate the in-class simulations with relevant legal theory and doctrine, we had students begin the class online before the in-person portion began. This article discusses the development of the intensive simulated course, the challenges faced, and the students' responses. We offer it as an alternative model for integrating theory and practice in the law school curriculum. We also reflect on continuing challenges faced in this type of course.

Preparing for Class

The intensive nature of the course requires extraordinary commitment from both the students and the faculty. As for the students, faculty must set expectations well before class begins. In the ADR class that Professor Malin taught, students were informed that the class would focus on simulations, would require total commitment for the week, and that they should free that week of any outside distractions. They were also advised that the simulations were set up to handle a set number of students. Because the course required a set enrollment, students were informed several weeks before the start of the class that there was a hard deadline to drop the course and were advised that attendance at every class was required.

Faculty also need to prepare extensively for simulation classes. Professor Malin had to carefully consider which simulations would be used and how they would be structured. And what of the concern that a class built around developing practice skills through simulations would give theory and doctrine short shrift? Enter the flipped classroom.

In recent years, the flipped classroom has received a great deal of attention in the STEM disciplines (science, technology, engineering, and mathematics).

In a traditional STEM class, instructors deliver basic content primarily by lecturing. They expect students to apply that content to complete homework assignments—often problem sets—outside of class. The students submit their completed assignments which the instructor grades and may return with comments or other limited feedback.

In the flipped STEM classroom, students learn the basic content outside of the classroom, often through podcasts or video lectures. They receive problem sets and similar assignments in the classroom where the instructor is available to assist, critique, and help the students apply the basic content to solve the problems.²

While still a relatively new tool in graduate education, the flipped classroom has become a popular tool in law school classrooms.³ Many law school faculty have incorporated flipped-classroom methods into their courses, providing their students with instruction outside of class (usually videos) together with an interactive in-class teaching experience. Faculty have used the flipped classroom to teach legal research,⁴ legal writing,⁵ civil procedure,⁶ and white-collar crime,⁷ among other courses.⁸

In ADR and the Workplace, classroom time was devoted almost entirely to conducting and debriefing simulations. In a class like this, students must learn theory and doctrine outside of the classroom, with the expectation that they come to class prepared to apply and discuss it in the context of the simulation

2. See Dan Berrett, *How 'Flipping' the Classroom Can Improve the Traditional Lecture*, CHRON. HIGHER EDUC., Feb. 19, 2012, <http://www.chronicle.com/article/How-Flipping-the-Classroom/130857> [<https://perma.cc/X2M7-J2BA>].
3. Many articles describe the theory and practice of the flipped classroom. For an excellent summary of the history and practice of flipped classrooms, see Alex Berrio Matamoros, *Answering the Call: Flipping the Classroom to Prepare Practice-Ready Attorneys*, 43 CAP. U. L. REV. 113, 118-23 (2015).
4. For example, Catherine Lemmer experimented with a flipped-classroom approach when teaching legal research to LL.M.s. See Catherine A. Lemmer, *A View from the Flip Side: Using the "Inverted Classroom" to Enhance the Legal Information Literacy of the International LL.M. Student*, 105 LAW LIBR. J. 461 (2013).
5. Professor K. K. DuVivier notes, "[f]or example, some legal writing classes are already using the flipped approach." K.K. DuVivier, *Goodbye Christopher Columbus Langdell?*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10475, 10480 (2013).
6. See William R. Slomanson, *Blended Learning: A Flipped Classroom Experiment*, 64 J. LEGAL EDUC. 93 (2014).
7. See Sandra D. Jordan, *Putting Students First: Engaging Students in Teaching White Collar Crime*, 11 OHIO ST. J. CRIM. L. 781 (2014).
8. For those who do not want to start from scratch, communities like LegalEd offer videos for classroom use. LEGALEd, legaledweb.com (last visited Dec. 2, 2016). Law school vendors are also providing tools for flipped classrooms. Lexis-Nexis has created "Lexis Learn," a series of videos and scenarios to help students learn legal research. LEXIS LEARN, <https://www.lexisnexis.com/lawschool/> (sign in with law school password and click the "Lexis Learn" hyperlink in the top navigation menu).

exercises. One way to provide the basic content is to assign reading. The ADR class used a casebook for its assignments.⁹

But reading isn't sufficient to pull together all the concepts the students need for the simulation exercises. Lectures are vital for clarifying important theory and doctrine. Additional materials may be needed to provide the "real world" context for the law. In the ADR course, students were required to watch online videos prior to the first day of class. Each video was paired with reading assignments in the casebook.

The students were assigned several types of videos. One, *The Art and Science of Labor Arbitration*, provided students an excellent background of the history of labor arbitration and demonstrated how arbitrators practice and decide cases.¹⁰ Other videos featured labor and employment arbitration lectures by Professor Malin, and on-screen interviews between Professor Malin and expert labor and employment attorneys. These videos addressed the cases and concepts the students had read about and provided the context the students would need to conduct simulations.

When working with other doctrinal subjects, faculty should select from a variety of materials to create a flipped experience that best suits the needs of their students. For the ADR course, we used a casebook that provided a lot of the necessary background information and included packaged simulations. However, casebooks may not be the best option for other courses. Students are often reluctant to purchase a casebook for a week-long intensive course, even if they receive several credit hours.

As in the ADR course, videos are often vital for providing the context needed to integrate the readings into the in-class simulations. Faculty can produce their own videos (more information about creating videos is provided below), or use videos others have already created (see LegalEd, cited above). Some faculty integrate other materials such as narrated slide shows.

In-Class Simulations

As related previously, the classroom component of the course was delivered in an intensive "Intersession" week. This allowed students to concentrate on the simulations in a more realistic setting than a semester-long course with shorter class meetings would allow. Mediations and arbitrations are generally held in single sessions, not over the course of several weeks.

What follows is a day-by-day breakdown of the course. This provides a framework for a typical simulation class. Faculty teaching simulation courses that focus on other areas of the law can adapt the schedule to their own purposes.

9. LAURA COOPER ET AL., *ADR IN THE WORKPLACE* (3d ed. 2014). In addition to providing outstanding material for teaching theory and doctrine, the book has an excellent instructor's manual with well-thought-out simulation exercises for labor arbitration, employment arbitration, and employment mediation, many of which we used in this course.

10. *THE ART AND SCIENCE OF LABOR ARBITRATION* (2013).

Monday

Students were immediately immersed in arbitration and mediation. Following a brief introduction to the course, students were divided into groups and sent to separate rooms, first to arbitrate and then to mediate a simple dispute between a professional employee and the employee's supervisor. Students were given their assignments and relevant information for the arbitration before the class. Students took on the roles of employee, supervisor, and arbitrator or mediator. In each group, one student played the employee, one played the supervisor, and one the arbitrator or mediator. After each simulation, the arbitrator wrote a brief decision or the mediator described the outcome.

During the second part of Monday's class, students debriefed the morning's exercises. Students discussed the differences between arbitration and mediation including the pressure in arbitration caused by its being a win-lose process and the flexibility in mediation for devising solutions to the dispute. The arbitrators' decisions varied and the differences in the decisions fueled discussion about the extreme deference that courts give arbitration awards and whether the variation in the awards justified or called for reevaluation of that deference. Through the debriefing of the mediation, students came to understand why there is much less legal doctrine about mediation than arbitration.

The content for the third part of the day was changed from the course's first year. The current version of the course involves students watching a video of a typical arbitration. The students then discuss how they would decide the case, and identify good and poor advocacy techniques displayed in the video simulation.

The structure used in this first day ensured the students "hit the ground running." Students were immediately immersed in simulations, emphasizing the hands-on nature of the class. The students were able to debrief their work right away, and then apply what they had learned earlier to a new setting.

Tuesday

Tuesday was devoted to two simulated labor arbitrations, both of which were recorded so the videos could be used for later debriefing and student review. In the first part of the day, the class arbitrated a grievance over a hotel's discharge of a housekeeper. Professor Malin ran the hearing. Half of the students were assigned as arbitrators and at the conclusion were required to write brief awards deciding the case. Other students were lawyers for the union or for the hotel. Some students were union witnesses or hotel witnesses.

In the second part of the day, the class arbitrated a grievance over the way a factory scheduled holidays. Those students who were lawyers or witnesses before now served as arbitrators, and vice versa.

The students debriefed the two earlier sessions in the third part of the day. The debriefing helped the students understand the importance of the

selection of the arbitrator. They explored the application of the legal doctrine that the source of arbitrator's authority is derived from his or her mutual selection by the parties. The holiday scheduling arbitration clearly brought home the legal theory that grievance arbitration is an extension of the parties' collective bargaining process, and that point was explored further through the discharge arbitration and discussion of the reasons parties tend to use broad, vague language requiring just cause for discipline and discharge, giving the arbitrator tremendous discretion to define the term. Debriefing also focused on advocacy techniques and discussion of the challenges that each advocate faced.

The structure of these simulations allowed students to play different roles. This allowed students to appreciate that different perspectives were needed to understand the course content. Running the debriefing session immediately after the simulation helped students analyze their own performances.

Wednesday

No class was scheduled on Wednesday because the students were expected to spend the day preparing for their work later in the week. First, students needed to research arbitrators. On Monday, a librarian visited the class to showcase resources for researching arbitrators. Because the information is not available to students, the American Arbitration Association (AAA) generously agreed to supply information about ten arbitrators, one panel of five for a labor discharge arbitration and one panel of five for an employment arbitration. After the first year the course was offered, in response to student suggestions to make this exercise more realistic, the students were also provided with the e-mail addresses of several law school faculty and staff, who agreed to serve as "colleagues" whom students could e-mail for additional information about the arbitrators. The colleagues replied with canned responses prepared by Professor Malin.

The students were expected to research the arbitrators and rank them in the order in which they would strike them in the arbitrator selection process. They also had to prepare memos detailing how they researched the arbitrators, what they found, their rankings for striking, and their rationales. The exercise focused the students on strategies in selecting arbitrators but also brought home the legal theory that the arbitrator's authority emanates from the parties' mutual selection.

Students also spent Wednesday preparing for the simulated employment arbitration scheduled for Thursday and the simulated employment mediation scheduled for Friday. The arbitration and mediation concerned a claim that a hospital had violated the Americans with Disabilities Act (ADA). Students were assigned roles that they had not previously served in (e.g., students who had been witnesses or arbitrators earlier now served as lawyers).

Even in week-long courses, classes do not need to meet in person every day. In the ADR course, students worked on assignments that emulated the real-life preparation that lawyers handle in their offices.

Faculty should take advantage of their schools' resources to assist with simulations. Librarians can provide instruction about the research real lawyers would do when working with the simulated content. Also, other law school colleagues are often happy to assist with the various roles simulations might require.

Thursday

On Thursday, the class met for five hours for an employment arbitration, which was recorded. The students who were not lawyers or witnesses served as arbitrators. After the hearing concluded, the student arbitrators wrote brief decisions.

Thursday concluded with a debriefing of the arbitration. Students discussed the differences between the issues in the employment arbitration and the two labor arbitrations we had conducted on Tuesday. The discussion recalled the legal theory and doctrine surrounding employment arbitration, particularly the premise that the claimant had not waived substantive rights but merely had agreed to seek vindication of those rights in an arbitral rather than a judicial forum and the high level of judicial deference to arbitral decision-making. Students discussed whether such doctrine, developed initially in the context of labor arbitration, applied similarly in employment arbitration.

As the week progressed, the simulations and the issues they presented became more complex. Students were able to apply what they learned previously and test their new skills. During the debriefing, students discussed the legal issues linking the earlier simulations to that day's work.

Friday

On Friday, the class conducted a mediation of the same case that was the subject of the previous day's arbitration simulation. The mediation also required additional information provided after Thursday's class. The mediation was conducted by a professional mediator and was recorded. Students who were not participants in Friday's mediation were required to observe and, at its conclusion, prepare written evaluations of the attorneys and the mediator.

During the second part of the day, the students debriefed the mediation exercise. In debriefing the mediation exercise, students commented on the challenges of discerning and meeting the conflicting interests in play. They discussed their reactions to the mediator's style and the different styles that mediators might use. We again noted the relative lack of legal doctrine surrounding mediation and discussed whether this facilitated or inhibited the mediation process. We came full circle back to the opening simulation and the differences between arbitration and mediation. Students were able to

evaluate the legal doctrine they had studied through the online classes in light of their experiences with the labor arbitration, employment arbitration, and employment mediation processes.

During this discussion, students also debriefed the course itself. This allowed the students to revisit some of the earlier simulations, reflect on the skills they had learned, and share their observations on how well the legal theory and doctrine worked in practice.

After Class

Students had one final assignment: a memo reflecting on the arbitrations and mediation. Students could use their notes and review the videos of the in-class simulations to prepare their memo. This memo included their analysis of the processes, their performance as counsel, and the performances of other counsel and the neutrals.

Reflections can be an important part of skills learning. In this course, the reflection was assigned after the class. Some faculty are experimenting with having students reflect on their expectations before the students start assignments along with postassignment memos.¹¹

Students also were asked to complete two evaluation forms. The students were given a standard law school evaluation along with a customized form in which they were asked more specific questions about course content and the course technology. These evaluations were used to improve the course over time. For an intensive course, a supplementary evaluation is especially important for continually developing new content and ensuring the students have the best experience possible for working with the simulations.

Technology Considerations

Recording and Sharing Videos

The class used several lectures and interviews featuring Professor Malin and other experts. Recording the lectures involved extensive collaboration among several law school departments: The AV department, IT staff, and library staff. Each department brought its expertise to the project, and the class would not have been successful without the work of all.

Many higher education institutions now use lecture-capture systems for recording classes and other videos for students. Faculty can use these systems to record themselves in a classroom, from any computer, or even from a mobile device. These videos can be easily shared with students. For the ADR course, we used the Panopto video management system.¹²

11. See Daniel M. Schaffzin, *So Why Not an Experiential Law School . . . Starting with Reflection in the First Year?*, 7 *ELON L. REV.* 383 (2015).
12. Panopto is common in law schools. The system is easy to use, generally reliable, and affordable. Recent improvements include tools to easily edit videos and a quizzing feature. Other common systems used in higher education include MediaSite and Echo360. Some of

For law schools that don't offer a lecture-capture system, faculty can use free and low-cost resources to create recordings. Most laptops, for example, include a camera and microphone. Faculty can use free products like Jing¹³ or ScreenCastOMatic¹⁴ to record their screen and voice. In many cases, a simple recording from a mobile phone would be adequate. Faculty who wish to create more sophisticated videos can use video editing software like Camtasia.¹⁵ These videos can be hosted at sites like Screencasting.com, YouTube, or even course websites like Westlaw's TWEN system.

As with the simulations, faculty should take advantage of their institutions' resources when creating videos for the flipped classroom. Many law schools employ an instructional technologist, educational technologist, or librarian who would be more than happy to assist with planning and recording the videos.

Recommendations for Sound

When creating any video, sound quality is vital. When recording lectures or interviews, basic microphones are generally adequate. Recording classroom simulations may need more sophisticated equipment. Some law schools feature in-class cameras and microphones that are set up to capture the entire classroom. In law schools where these aren't available, be sure to test microphones using scenarios as close to the simulations as possible before class. Many microphones do not capture group conversations very well. Our most successful in-class audio recordings used the Yeti microphone by Blue Inc.¹⁶

Monitoring

The videos were shared with the students before winter break began, but how could we be sure that all the students watched the videos before class? One of the issues that can arise in the flipped classroom is that sometimes students do not watch the videos, either because they experience technical issues or because they choose not to. For this class, however, it was vital that students complete their reading and video assignments before Intersession began.

these offer advanced features—such as Echo360's tool that allows students to link class notes to video captured in class. ECHO360, <https://echo360.com/platform/student-engagement> [<https://perma.cc/989H-PHVY>] (last visited Dec. 5, 2017).

13. See *Jing*, TECHSMITH, <https://www.techsmith.com/jing-tool.html> (last visited Dec. 5, 2017).
14. See *SCREENCASTOMATIC*, <https://screencast-o-matic.com> (last visited Dec. 5, 2017).
15. See *Camtasia*, TECHSMITH, <https://www.techsmith.com/camtasia.html> (last visited Dec. 5, 2017). Camtasia offers academic pricing. The free resources mentioned are easier to use than Camtasia, but Camtasia has a smaller learning curve than professional-level software like Apple's Final Cut Pro.
16. See *Yeti*, BLUE, <http://www.bluemic.com/products/yeti> (last visited Dec. 5, 2017).

We were able to track the students using Panopto's statistical tools. The library alerted Professor Malin if his students seemed to be having trouble or weren't watching the videos at all. Professor Malin then contacted those students to see what the issues were. He used an attention-grabbing e-mail headed "Big Brother is watching and you should be too." Students who received reminders responded quickly. In the end, every student watched the videos before the class began. When the students started their simulations on their first day, all were well-prepared.

Take-aways

In many respects, our ADR class experiment has been a success. In each of the four years we have offered the course, the students unanimously gave the course and the instructor the highest rating available on the school's standard student evaluation form. The concentrated, intense format and the absence of distractions produced an extremely high level of student engagement. That high level of engagement was also reflected in the memos discussing their performance in the class.

The flipped-classroom technique proved to be very effective at integrating theory and doctrine into a primarily simulation-based course. On their evaluations, all students commented favorably on the reading assignments and videos; none found them to be a waste of time. A few found some of the information repetitive from other courses, but that could occur in any class. Most significantly, the students appreciated the continual reference to the theory and doctrine during the simulation debriefings.

Many commented that preclass work really brought the material together in a coherent manner. In the 2015 evaluations, one student commented on being annoyed by the amount of work required prior to the start of the class, but once the class started began to appreciate the value of the readings and videos. We believe this approach would be effective in other settings, such as semester-long simulation courses. It can break down the artificial barrier between legal doctrine and theory and practical skills training.

We would love to see the students take greater advantage of the recordings of the in-class simulations, particularly when they are writing their final memos. However, we find students are often reluctant to watch themselves on video. Also, for the first two years we had sound problems with the in-class recordings. This was solved in the third version of the class.

One significant challenge is to make the course accessible for students with vision or hearing impairments. This is an issue whenever videos are used in a flipped classroom or otherwise. Visually impaired individuals depend on screen readers to speak aloud what is visually displayed on the screen. For the class to be accessible to visually impaired students, the videos must be compatible with screen readers. Panopto claims that videos made with its system are compatible with screen readers.¹⁷

17. *Accessibility Features*, PANOPTO, <https://support.panopto.com/articles/Documentation/>

For hearing-impaired individuals, videos should be captioned. Panopto includes an automatic captioning tool, but the speech-to-text feature is often inaccurate. Both Panopto and our university's disability center offer hand-typed closed-captioning services, but these are expensive. Despite the cost, we recommend adding captions whenever possible.

In conclusion, we found our experiment was largely successful at integrating legal theory and doctrine into a primarily simulation-based class and that the compressed intensive format facilitated the use of simulations. We are pleased to share our experience with our colleagues in the legal academy. We believe that our techniques are adaptable to other courses and welcome feedback from interested readers.