

BREAKING AWAY FROM MASS PRODUCTION

The American law school, throughout its existence, has been an instrument of mass production. Today, and from the beginning, the bulk of formal legal education has been passively acquired in large classes, with only limited opportunities to learn by doing, and few chances for extended one-on-one discussions between student and professor.

To be sure, some opportunities for individualized involvement in the learning process have been available, but they have been generally limited in kind and often open to only a small fraction of all law students. The Socratic method, for example, was intended to make legal education something more than a spectator sport. Participation on law review afforded a chance for individual and intensive efforts to define and seek answers to particular legal problems. Other individualized efforts included moot court participation, serving as a research assistant for a faculty member, or part-time employment with a practicing attorney.

Historical as well as practical reasons probably account for the fact that mass production remains the dominant characteristic of legal education: Legal training first entered college at an undergraduate level, where mass production was the order of the day. In practical terms, mass production of lawyers is much less expensive than any of the individualized alternatives. And, besides, the best of the mass-produced graduates are so very good that it is not easy to argue that the system does any lasting harm to those who survive it.

In the past two decades, however, there has been a sharp increase on the kinds and opportunities for learning by doing and the Wisconsin law student of 1984 has choices on this front that were simply not to be had a generation earlier.

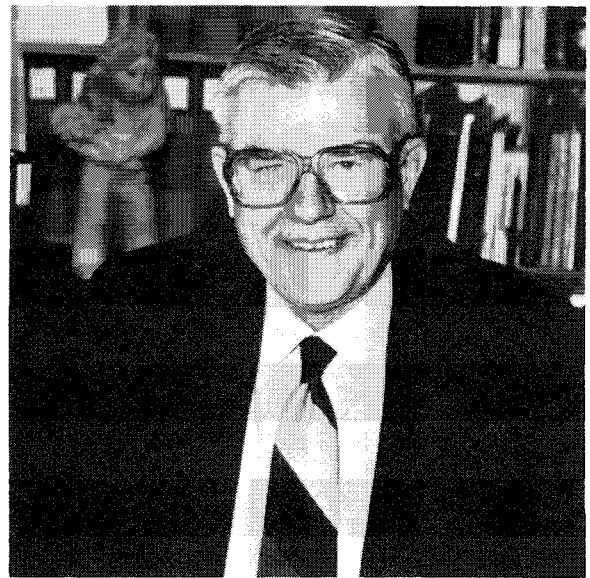
Two quite different approaches to learning by doing at the Wisconsin Law School are illustrated by the pair of articles which follow.

The first of these approaches involves learning by doing the real thing: As many as 75 law students annually participate in providing legal services to inmates of Wisconsin correctional and mental institutions by participation in the Legal Assistance to Institutionalized Persons Program (more commonly referred to as LAIP).

The second — and quite different — approach involves learning by doing a simulation of the real thing, as described in a speech by Professor Stuart Gullickson from which excerpts are reproduced in the last of the two articles.



Prof. Frank Remington: Mainspring of the Legal Assistance to Institutionalized Persons Program (LAIP) which enables 75 law students annually to learn by providing services to inmates of Wisconsin's institutions.



Prof. Stuart Gullickson: His students learn the real thing by functioning as attorneys in simulated situations.

LEARNING BY DOING THE REAL THING: Wisconsin's Legal Assistance to Institutionalized Persons Program

During the 1983-1984 academic year 70 or more students at the Wisconsin Law School were participating — for academic credit — in what by this time was known as the Legal Assistance to Institutionalized Persons Program (or LAIP as the program is more frequently called).

For undergraduate law students, LAIP participation involves learning by doing the real thing: providing legal services to inmates of Wisconsin correctional and mental health institutions. But LAIP objectives are broader than merely to provide high quality service to inmates, for the program exposes law students to a good, broadening educational experience stressing particular professional responsibilities, and LAIP's research product across two decades has added substantially to knowledge and understanding of the lives of institutionalized persons.

LAIP is the outgrowth of a research project launched at the Wisconsin Law School in the early 1960s which sought an in depth understanding of correctional institutions and of the inmates confined in them. A substantial grant from the American Bar Association funded the initial project and, under the guidance of Professor Frank J. Remington, law students became involved in the studies contemplated by the project. Soon after the program of study began, requests were made for help to inmates who had need for legal assistance. Legal services for inmates soon followed, spurred in part by the decision of the United States Supreme Court in *Johnson v. Avery*, 393 U.S. 483 (1968), which held that jail house lawyering could be prohibited only if alternative methods of legal assistance were made available. The Court suggested that a properly supervised law student program would suffice. Other pressures, too, shaped the development of the program. Inmates, particularly women, had family problems which required the attention of persons with legal training. Also, many inmates had questions about the ac-

curacy of their sentence (usually failure to credit accurately prior jail time). Other inmates had detainers resulting from pending criminal charges in Wisconsin or some other state, or resulting from failure to comply with an order to contribute to the support of the family.

While education of undergraduate law students remains the core objective of the Law School's involvement in the LAIP program, this is costly education when compared to the mass-production process embodied in the conventional law classroom setting. Students receive close and individual supervision and attention from staff lawyers and law professors associated with LAIP. Much student, staff and faculty travel is also involved, for LAIP today serves all the correctional institutions — state and federal — in Wisconsin, plus the Winnebago and Mendota Mental Health Institutes.

Funding of LAIP has drawn from a wide range of sources: grants from private foundations, support from the federal government, from the budget of the University of Wisconsin itself, from explicit support from the Wisconsin Legislature, and from continuing contracts with the Wisconsin Department of Health and Social Services and the United States Bureau of Prisons. It is a measure of the respect which LAIP has earned for itself that it has reached its present size and vitality as an instrument for education, research and public service in a recent era marked by fierce competition for funding from both private and public sources.

Another measure of the respect which LAIP has won is evidenced by the published research product of students who have participated in the program and of staff and faculty members of LAIP across the past two decades. Set forth below is a recent compilation of student, staff and faculty publications generated out of participation in LAIP (with the present position of the former student listed after the name of each).

Student Publications

Note, Transfer of Juveniles to Adult Correctional Institutions, 1966 Wis. L. Rev. 866 (George E. Dix, Professor of Law, University of Texas).

Note, Legal Services for Prison Inmates, 1967 Wis. L. Rev. 514 (Thomas W. O'Brien, Partner, Quarles & Brady, Milwaukee).

Comment, Resolving Civil Problems of Correctional Inmates, 1969 Wis. L. Rev. 574 (James A. Jablonski, former Professor of Law, Washington University, St. Louis, Missouri).

Comment, Administrative Fairness in Corrections, 1969 Wis. L. Rev. 587 (Robert L. Martin, private practice, Orange, New Jersey).

Constitutional Law — Criminal Procedure — Jury Instructions and the Unanimous Jury Verdict, 1978 Wis. L. Rev. 339 (Sally Wellman, Assistant Attorney General, Wisconsin).

Note, Criminal Law — Critique of Wisconsin's Lesser Included Offense Rule, 1979 Wis. L. Rev. 896 (William O. Salen, Brennan, Steil, Ryan, Basting & MacDougall, Janesville, WI).

Comment, Madness and Medicine: The Forcible Administration of Psychotropic Drugs, 1980 Wis. L. Rev. 497 (Stephan Beyer, Sidley & Austin, Chicago, IL).

Note, *The Validity of the Dangerousness Standard for Recommitment of Persons Found Not Guilty by Reason of Mental Disease or Defect*, 1980 Wis. L. Rev. 391 (Kathleen A. Kunde, University of Chicago Law School, Chicago, IL).

Note, *Presumptive Intent Jury Instructions After Sandstrom*, 1980 Wis. L. Rev. 366 (David D. Cook, University of Wisconsin-Extension Law Department).

Comment, *Repeal of the Wisconsin Sex Crimes Act*, 1980 Wis. L. Rev. 941 (Marie T. Ransley, 1981 graduate).

Note, *Beck v. Alabama: The Right to a Lesser Included Offense Instruction in Capital Cases*, 1981 Wis. L. Rev. 560. (Dianne S. McGaan, Williams & Conley, Washington, D.C.).

Note, *After Sandstrom: The Constitutionality of Presumptions that Shift the Burden of Production*, 1981 Wis. L. Rev. 519 (Erica M. Eisinger, Supervising Attorney, LAIP); with a foreword by Frank J. Remington, 1981 Wis. L. Rev. 513).

Note, *Restricting the Admission of Psychiatric Testimony on a Defendant's Mental State: Wisconsin's Steele Curtain*, 1981 Wis. L. Rev. 733 (William M. Conley, clerk, Judge Thomas Fairchild, Seventh Circuit, Chicago, IL).

Comment, *Federal Jurisdiction — Interstate Detainers and Federal Habeas Corpus: Long-Arm Shortcut to Solving the Catch 2241*, 1982 Wis. L. Rev. 863 (Jamie Kittel, staff attorney, Seventh Circuit, Chicago, IL).

Schmolesky & Thorson, *Importance of The Presentence Report After Sentencing*, 18 Crim. L. Bull. 406 (1982) (John Schmolesky, former supervising attorney in the program, is now an Assistant Professor of Law at St. Mary's Law School in San Antonio, Texas; Tim Thorson, Culp, Dwyer, Suterson & Grader, Seattle, WA).

Note, *Sumner v. Mata: Muddying the Waters of Federal Habeas Court Deference to State-Court Findings*, 1981 Wis. L. Rev. 751 (John Greene, 1984 graduate).

Comment, *Municipal Liability: Eliminating the Special Duty Doctrine for Police* (Jerry Krause, student), forthcoming 1984 Wis. L. Rev.

Comment, *Wisconsin's Party to Crime Statute*. (Gary Ostos-Irwin, student), forthcoming 1984 Wis. L. Rev.

Note, *State v. Dean, Compulsory Process* (Debbie Katz, student), forthcoming 1984 Wis. L. Rev.

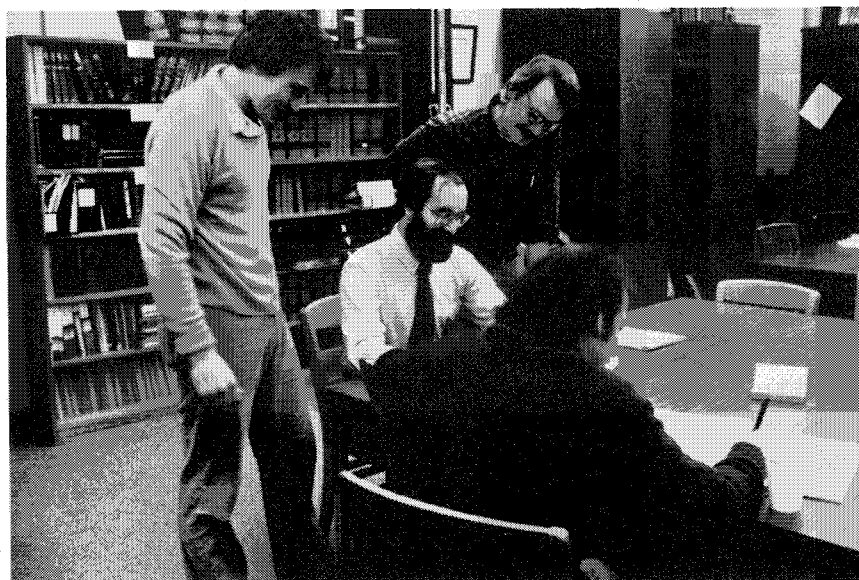
The earlier articles reflected the involvement of students as participant-observers. The participation was wide-ranging — from probation officer, to recreational officer, to administrative assistant to the parole board.

Writing during later stages in the program reflected a greater involvement with the inmate and mental patient clients. Emphasis switched from important policy issues in the correctional system to issues relating to the legal assistance needs of inmates and mental patients.

Some of the most recent student writing has dealt with important doctrinal questions that are of great interest because the issues are currently being litigated in state and federal court and involve issues of fundamental importance in the criminal law field.

Two of the program's publications, David Cook's student note and John Schmolesky's article on *Sandstrom* and *Ulster County* have recently been cited by the Supreme Court in *Connecticut v. Johnson*, 51 USLW 4175, 4178 (Feb. 23, 1983).

Projected research will be of the law-in-action variety with efforts made to acquire additional knowledge and to use that knowledge to improve the correctional and mental health processes.





Staff Publications

Remington, Wisconsin Correctional Internship Program, in *Proceedings of the Asheville Conference of Law School Deans on Education for Professional Responsibility*, at 56 (1965).

Kimball, *Correctional Internships: A Wisconsin Experiment in Education for Professional Responsibility*, 18 *J. of Legal Educ.* 86 (1965).

Dickey & Remington, *Legal Assistance for Institutionalized Persons — An Overlooked Need*, 1976 *S. Ill. U. L. J.* 175.

Remington, *State Prisoner Litigation and the Federal Courts*, 1974 *Ariz. St. L. J.* 549.

Remington, *Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts* (Federal Judicial Center, 1980).

Dickey, *The Lawyer and the Quality of Service to the Poor and Disadvantaged: Legal Services to the Institutionalized*, 27 *DePaul L. Rev.* 407 (1978).

Dickey, *The Lawyer and the Accuracy of the Presentence Report*, 43 *Fed. Probation* 28 (June 1979).

Dickey, *Incompetency and the Nondangerous Mentally Ill Client*, 16 *Crim. L. Bull.* 22 (1980).

L. Abramson, *Criminal Detainers* (Ballinger Pub. Co., 1979) (Professor Abramson, a member of the Louisville Law School faculty, was in effect a "scholar-in-residence" in the Legal Assistance Program during the 1977-78 academic year).

Dickey, Remington, & Schultz, *Law, Trial Judges, and the Psychiatric Witness — Reflections on How a Change in Legal Doctrine Has Been Implemented in Wisconsin*, 3 *J. of L. and Psychiatry* 331 (1980).

Dickey, *The Promise and Problems of Rulemaking in Corrections: The Wisconsin Experience*, 1983 *Wis. L. Rev.* 285.

Remington, *State Prisoner Access to Post Conviction Relief — A Lessening Role for Federal Courts, An Increasingly Important Role for State Courts*, 44 *Ohio St. L. J.* 287 (1983).

Schmolesky, *County Court of Ulster County v. Allen and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face*, 33 *Rutgers L. Rev.* 261 (1981).

F. Remington, D. Newman, E. Kimball, H. Goldstein, W. Dickey, *Criminal Justice Administration* (Michie/Bobbs-Merrill, rev. ed. 1982).

Ongoing Research and Writing

(1) David Cook is writing a new volume of the *Defense of Criminal Cases in Wisconsin*. This new volume, being written in collaboration with the Legal Assistance to Institutionalized Persons Program staff, deals with the postconviction stage of the criminal justice process.

(2) *Edna McConnell Clark Project*. We (Herman Goldstein, Frank Remington, David Schultz together with Walter Dickey) are preparing a proposed research project to be conducted by the law school in collaboration with the Wisconsin Division of Corrections. The project will reflect Herman Goldstein's important work in the police field following the so-called "problem approach" and the long experience we have had in our continuing working relationship with members of the Wisconsin trial judiciary. The research will attempt to create and evaluate more effective programs or responses to important community problems (e.g., prostitution); alternatives to incarceration (e.g., restitution, community service); institutional programs (e.g., education; vocational training); parole and parole planning (e.g., legal services to deal with family, debt, government benefit issues). We anticipate financial support from the National Institute of Corrections; the Edna McConnell Clark Foundation and the Wisconsin Division of Corrections.

(3) Michael Dwyer, Erica Eisinger, supervising attorneys at LAIP, and Robert D. Miller, M.D., Ph.D., Forensic Training Director at the Mendota Mental Health Institute, are preparing a paper on the role of LAIP students at Mendota as members of unit treatment teams. The "team model" represents an experiment which seeks to integrate legal services with psychiatric, social and other services provided at the institute. The study will first describe the history, ob-

jectives and operation of the team model at Mendota. It will then attempt to evaluate the effectiveness of the model from a service and educational point of view with attention to questions of professional responsibility and the constitutional obligation of the state to provide legal assistance. The study will use attitude questionnaires to examine the perceptions of Mendota students, staff and patients. When possible, the study will contrast these perceptions with those of students, staff and patients at the Winnebago Mental Health Institute, a comparable institution where LAIP students assume a traditional adversarial role.

(4) Erica Eisinger is working on a study of federal habeas corpus review of the reliability of state court fact finding. Recently, some federal judges and commentators have called for a curtailment of federal reconsideration of the factual determinations supporting a conviction. This call rests on several assumptions: that state prisoners are overly litigious; that most state habeas claims lack merit; and that state courts can be trusted to avoid convicting the innocent. The study proposes to test these assumptions using interviews conducted by LAIP students with all male prisoners entering the Wisconsin prison system in the summers of 1982 and 1983 as well as interviews during the summer of 1984. The study will look at how many state prisoners express concern over the propriety of their convictions, either upon admission, or, in the case of the 1982 entrants, after education by fellow inmates. From these data, the study will attempt to assess the extent of state court capacity to protect the innocent and to identify the situations in which there is a need for federal review of the reliability of the fact-finding process.

Students currently in the program are working on the following law review notes or comments:

State v. Hegwood; State v. Macemon; sentence modification issues (Jeff Kassel).

The Insanity Defense in Wisconsin — How Beneficial to Clients? (Virginia Schubert).

Bearden v. Georgia: restitution as a condition of probation (Fred Lautz).

Nichols v. Gagnon, 710 F.2d 1267 (7th Cir. 1983); Protection of fact-finding process in conflict, with deference due state court determinations (Tim Schally).

Wisconsin's Rape Shield Law and the Sixth Amendment (*State v. Gavigan*, 111 Wis. 2d 150; *State v. Droste*, Case No. 81-2288 CR, argued October 5, 1983 (David Haxton).

State v. Kaye, 106 Wis. 2d 1 (1982): conflict of interest resulting from dual representation in criminal cases (Dyan Evans).

Parental interests of unwed fathers (Eric Wendorff).

Salinas v. Breier: The Need to Impose Greater Police Chief Accountability for Subordinate's Misconduct (Christopher Lowe).

LEARNING BY DOING A SIMULATION OF THE REAL THING: Professor Stuart Gullickson's Students Perform as Lawyers in Hypothetical Situations

Learning law by doing the real thing — as undergraduate law students do by participating in the LAIP Program at Wisconsin — does not exhaust the possibilities for learning law by doing. Simulation of the real thing by having students function as lawyers in hypothetical situations has been used with increasing frequency in legal education and Professor Stuart Gullickson has been a prime mover behind developments in this direction at the Wisconsin Law School for the past decade and a half.

Using a simulation of real events need not, of course, be anything more than a spectator sport for student learners: Indeed, students and professors, too, can sleep soundly through a videotape presentation which simulates a real trial, for instance. But as Professor Gullickson defines simulation and puts it to use in his teaching, the individual student is required to perform lawyer roles in analyzing and handling legal problems. Learning in that view is by doing, even if the things done are generated out of a hypothetical context.

Because each student is expected to perform in a lawyer's role, the Gullickson use of simulation is a teaching method more expensive than those used in the more traditional mass production methodology. In a speech delivered August 12, 1983, at Innisbrook, Florida, to the Southeastern Conference of the American Association of Law Schools Professor Gullickson described his use of simulation as a teaching technique and assessed its comparative benefits and costs against those involved in more traditional methods.

Excerpts from Professor Gullickson's address follow:

The past fifteen years in legal education have been stimulating ones for law professors who are interested in teaching methods. The turbulence of the late 1960's and early 70's generated pressures on law schools for changes. It fostered an academic climate which encouraged innovation, and resulted in a surge of activity in many areas including teaching methods. Experimentation in instructional techniques spawned new uses of the simulation and problem methods. Workbooks emerged as vehicles for self-study. Clinical instruction took legal education into the client service arena. We learned to complement instruction in both large and small classes with the electronic aid of computers, video cameras, and audio tapes. We even institutionalized a vehicle for exchanging information on pedagogical techniques by adding a Teaching Methods Section to the Association of American Law Schools' structure.

Among all of these developments, one proved to be particularly useful to a large number of educators even though they taught in a variety of ways. That was the expanded use of simulation.

I define simulation as a teaching method in which students function as lawyers in hypothetical situations. It includes gaming, and it contrasts with the principal phase of clinical training in which students represent clients in actual cases.

One should distinguish between simulation and team teaching. They are different concepts, which may or may not be used together. One can present a simulation course alone, or through team teaching.

I believe the simulation method owes its widespread appeal primarily to its versatility. It seems to be appropriate in most classroom settings, and to be effective for most subject matter. It is useful in both large and small classes, and as a component in clinical programs; it works for teaching substantive and procedural law, for the techniques of applying the law, and for interdisciplinary material. It's excellent for explaining concepts through portrayals of them, and for students' learning through experiences.

Simulation is not new. It is probably as old as legal education. We have always used it in moot court programs; and we've probably used it forever in legal writing and in law examinations when we've said, "You are the attorney for the plaintiff. Write a brief on behalf of your client on these facts."

What is new are the additional ways we now employ simulation. Here are some examples. Computer-aided instruction is a form of simulation. A seminar called Metro-Apex uses computer simulation and an interdisciplinary faculty to treat a pollution problem in a large city and thereby teach environmental law, land use controls, local government law, engineering, urban planning, commerce and political science. A Civil Procedure teacher presents a demonstration of a pre-trial conference in lieu of explaining how one operates. An Evidence professor brings out the distinctions between several relevance propositions by having students argue opposing sides of a series of objections based upon relevancy. More and more, we pervasively address professional responsibility by including ethical issues in fact situations that are the basis for simulations in non-professional responsibility courses. In the skills field, we use simulation to develop not just trial and appellate skills, but also to teach interviewing, advising, negotiating, and drafting.

You may find it helpful if I explain the elements of what I call a simulation learning cycle:

First, as with any course, the professor decides upon the educational objective. What is one trying to teach?

Next comes the hard part. One designs an exercise to give students experience with what one seeks to teach. An exercise consists of a fact situation and of directions for carrying out the roles of the participants. The learning opportunity will be richer if the facts appear in the form of the raw materials in opposing counsels' files, rather than in the style of narrative summaries. To prepare the original documents one creates items such as diagrams, excerpts from transcripts of depositions, lawyers' memos to

their files, statements of witnesses, and reports of police officers, doctors, lab technicians, engineers and the like. It may take years to develop enough exercises for an entire course. I find it necessary to use each new one in about three classes to discover all of its latent ambiguities.

Third, one assembles or prepares teaching materials that set out what one expects the class to learn.

Fourth, one prepares a model of the performance one seeks to elicit from the students. When one teaches a skill that is spoken rather than written, such as framing direct questions, one offers an oral model of a direct examination. When tutoring a written task, like drafting articles of incorporation, one presents written examples of well drawn articles. Also, one might portray the model on a video or audio tape, or on a computer screen.

Fifth, the students discuss with the professor or with the teaching team, the teaching materials, the model, and their assigned roles. Then they need time to prepare for their work as lawyers. Alternatively, one may prefer to schedule a discussion of the objectives, materials, and assignments before presenting the model, and then limit the discussion following it to questions about the model. One can end a class at this point, or one can continue it and shift to the student presentation phase of another exercise for which one completed the preparation in a previous session.

Now we are ready for the intriguing step, when the students operate as attorneys. For example, they

may put in proof, or draft documents, or conduct a dialogue with a computer, or, perhaps, do all three. During the early stages of a course one is likely to have students repeat the same exercise as the one portrayed in the model. Soon however one should base the work of the class on different, but parallel, fact situations so pupils cannot just mimic the mentor.

One can have a few of the student-lawyers do their exercises before the rest of the class, or one can divide the group into small units and send each of them to different rooms so everyone can have an active role. If one uses a teaching team one member of it supervises each small unit. One can record the presentations on video or audio tape for critique purposes.

Finally, and perhaps the most important step of all, comes the critique of the student-lawyers. The manner of critique will vary with what one is trying to teach. If it is a spoken technique then the critique is likely to include one or more of these options: a conference with the student-lawyers, a written report, or the review of an audio or video tape. If the entire class observed the activity then at least part of the critique should be before them to involve them in the learning process. Some professors have had good success with students critiquing students.

The critique for a written lesson requires correcting each student's paper, discussing it with that person or the class or both, and, perhaps, furnishing a copy of a model solution.





Advantages and Disadvantages

There are a number of advantages to using simulation in addition to its obvious versatility. Learning-by-doing seems to be a more effective device than learning-by-listening for teaching some subjects. It enables us to treat the application of the law. I find lectures and Socratic dialogue to be less than satisfactory for that purpose. Most students seem to be more highly motivated when they are active participants in a learning process, than when they sit passively through it. Simulation allows students to learn by trial and error, but not at the expense of real clients. Simulation lends itself to team teaching which substantially reduces the teacher-student ratio. When I use team teaching in Trial Advocacy my teacher-student ratio is one to four; in my office practice course it was one to 15. Doing simulated exercises is a more efficient way to learn than handling real cases, though it is not necessarily a better way. The efficiency springs from designing the exercises for planned objectives, and omitting surplusage. Last but by no means least, simulation courses usually cost less than programs in which students work with actual cases.

The bad news is that it usually costs more for instruction through simulation than it costs to teach large classes with traditional methods. Other disadvantages attend simulation. While it is more efficient to work with well focused hypothetical cases than with real ones, one loses the value of students having to sift and winnow the significant facts from the irrelevant ones. Also, simulation courses do not render the legal services to underrepresented people which clinical programs do.

It usually takes more of a professor's time to teach the same material through simulation than it takes with traditional techniques, and often simulation courses can accommodate only about 10 to 30 students. Simulation is simply a slower way to teach than the lecture method. Professors who use simulation extensively are likely to have less time for

scholarly production and public service.

Simulation courses may cause space problems, if the professor elects to break out into small groups. When I use team teaching in Trial Advocacy I need 5 rooms for 20 students. Sometimes we have to conduct those classes in three buildings.

If one avoids break-out workshops, then the bulk of the class observes the activity of a few. I believe the learning value of observing other students' presentations diminishes markedly after seeing a few of them, and the motivation of observers tails off as the course progresses.

There may be insufficient class time in stand alone simulation courses, such as those which are not part of a clinical program, to do much more than expose students to concepts, and professors probably will be unable to develop any significant degree of proficiency in their students. That, of course, is a problem common to almost all types of legal education.

I believe we have an inadequate empirical base from which to teach skills at this time, through simulation or otherwise. Our instruction is primarily anecdotal, and based almost exclusively upon the experience of the teacher or of an author whose base is similarly limited. We need to do empirical research in lawyering skills, in conjunction with investigators from other disciplines, to improve the quality of skills instruction.

Finally, a drawback to teaching oral trial skills through simulation is the lack of a completely satisfactory way to grade oral exercises. That deficiency presents teachers with the dilemma either of foregoing grading, or of testing only on written exercises because that may deflect students' attention away from the primary objectives.

In conclusion, I believe the simulation technique can be useful not only as an exclusive method of instruction, but also as a component in clinical programs, and as a supplement to traditional methods in large classes.