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Paula Schaefer

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INJECTING LAW STUDENT DRAMA INTO THE CLASSROOM: TRANSFORMING AN E-DISCOVERY CLASS (OR ANY LAW SCHOOL CLASS) WITH A COMPLEX, STUDENT-GENERATED SIMULATION

Paula Schaefer*

“You should sue Boone for violating the non-compete agreement. I wish you could sue him for being a bad person and breaking hearts.”

—Simulation Character Gem Finch, played by law student Lauren Poeling¹

I. INTRODUCTION

Gem Finch is a horrible lawyer. This is evidenced by her dual representation of Boone Radley and Pickle Harris. When Boone and Pickle end their romantic relationship (after Pickle finds him with another woman), they also decide to end their business partnership. Gem agrees that she can represent both partners in determining fair terms for Pickle to buy out Boone’s interest in the business—even though Gem and Pickle are good friends. Unbeknownst to Boone, Gem and Pickle scheme to hide a lucrative business opportunity that has just been offered to the partnership. Gem and Pickle email one another twenty or more times a day, rationalizing their behavior—the business deal was not final yet and Boone is a cheater who does not deserve to share in the deal.²

Gem, Boone, and Pickle are just three of the characters who play a dramatic—and key—role in my e-discovery-focused pre-trial litigation class. I did not originally invite them into the class for the drama. I was primarily interested in their email. In 2009, I was planning a pre-trial litigation class that would include e-discovery issues. But I could not find a pre-packaged case that

* Associate Professor of Law, University of Tennessee College of Law. I appreciate the helpful feedback on this Article from participants in the Southeastern Association of Law Schools 2010 Conference and the Michigan State University Junior Faculty Workshop in fall 2010. Thanks also to Ben Barton, Kristi Bowman, Jeff Kahn, Joe King, Carol Parker, and Glen Staszewski who read drafts of this Article and provided invaluable suggestions. The technology piece of the class, and this Article, would not be possible without Jolyon Gray and Erin Hostettler. I am indebted to Eliza Land Fink, Michelle Consiglio, Isabel Archuleta, and Steven Stuart who provided research assistance. Finally, thank you to all of the students who have participated in the simulation discussed in this Article.

¹ Interview by pre-trial litigation students with witness Gem Finch (as played by law student Lauren Poeling), in Knoxville, Tenn. (Jan. 27, 2011).

² The character names were developed by my research assistant Eliza Land Fink as a tribute to the characters in Harper Lee’s Pulitzer Prize-winning novel. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

included ESI—the Electronically Stored Information that is the mainstay of e-discovery practice. The case materials included in most pre-trial litigation books involved car accidents and simple contract disputes.³ I knew that I needed ESI to make the course work.

So with ESI in mind, I developed a two-semester simulation.⁴ In the fall semester, I offer a group of law students a single hour of course credit (as an independent study) to email one another, following a loose script, to create a business dispute among their assigned characters. Their dispute becomes the lawsuit in my pre-trial litigation class the following semester.⁵ In that course, independent study students play the clients and the witnesses (“student-characters”), and the pre-trial litigation students are their lawyers (“student-lawyers”).

While the initial goal of the simulation was ESI, the result was (and is) a complex, realistic drama that enhances every aspect of the course. Developing a theory of the case requires more than reading a two-page summary of facts, as might be required in a typical pre-trial litigation class. The student-lawyers have to review thousands of documents, interview witnesses, and stay in constant contact with their clients. Their clients are passionate and opinionated. The witnesses have allegiances and their own motives. To meet the demands of their clients, the student-lawyers must learn e-discovery doctrine and develop the skills needed to litigate the case and address the ethical dilemmas they encounter. In the process, the student-characters gain knowledge and skills they will take to practice, too.

In short, the simulation does more than generate the data for e-discovery. It makes the course into something akin to the practice of law. In this Article, I explain the transformative power of a complex, student-generated simulation.

Following this introduction, Part II will discuss the research that supports the use of simulations as a teaching tool in the law school classroom. While simulations are not new to the law school curriculum, the student-generated, complex simulation I use is not typical. Part III will explain the simulation’s organization and the central role students play in developing the story over two semesters. Part IV describes how the simulation facilitated my students learning e-discovery doctrine and skills. With the simulation they were able to move beyond rules and cases, and gain first-hand experience in e-discovery practice. For anyone who is pondering how to teach an e-discovery class, this discussion is for you. For everyone else, Part V contains a discussion of how complex simulations can be developed and used in other parts of the law school curriculum to better prepare students for the practice of law.

II. SUPPORT FOR SIMULATION USE IN THE LAW SCHOOL CURRICULUM

Two reports on legal education suggest that educators should adopt a pedagogical approach that better prepares law students for practice. The *Carnegie*

³ See *infra* note 24 and accompanying text.

⁴ See Paula Schaefer, *Sassy Sentiments Simulation* (Fall 2010), <http://ssrn.com/abstract=1676991> [hereinafter Schaefer, *Simulation*].

⁵ See Paula Schaefer, *E-Discovery Focused Pre-trial Litigation Course Syllabus* (Spring 2011), <http://ssrn.com/abstract=1677000> [hereinafter Schaefer, *Syllabus*].

*Report*⁶ emphasizes that law schools do a good job educating students in legal doctrine and analytical skills, but need to do more to help students develop practice skills and understand their professional identity and obligations.⁷ Similarly, Roy Stuckey's 2007 *Best Practices in Legal Education*⁸ discusses the law school's failure to prepare students to practice competently and professionally.⁹ *Best Practices* urges law schools to integrate doctrine and skills training in context-based courses, and to teach professionalism pervasively across the curriculum.¹⁰

Simulations can be an important tool for addressing the shortcomings identified in these studies.¹¹ Clinical education is often thought of as the primary means of training professionals (such as law and medical students) in practice skills,¹² but simulations can also fill this role.¹³ Medical schools have

⁶ See generally WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

⁷ *Id.* at 12–14 (explaining that the framework for legal education must integrate legal analysis, practical skills, and professionalism); *id.* at 79 (concluding that “for many [law] students, neither practical skills nor reflection on professional responsibility figure significantly in their legal education” and that law schools face the challenge of reintegrating these facets into professional education).

⁸ ROY STUCKEY & OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES], available at http://www.law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf.

⁹ *Id.* at 19–25.

¹⁰ *Id.* at 71–76 (discussing these as best practices for organizing the law school curriculum); see also *id.* at 104–16 (explaining that law schools should use “context-based” instruction). For a discussion of various definitions of legal professionalism that includes “promoting diversity, treating others with respect, providing service to the profession, practicing with knowledge and skills, engaging in life-long learning, and having good judgment,” see Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 J. LEGAL WRITING INST. 113, 118 (2007).

¹¹ BEST PRACTICES, *supra* note 8, at 132–38 (describing best practices for simulation-based courses in the law school curriculum and explaining that the learning in such courses “relies on students assuming the roles of lawyers and performing law-related tasks in hypothetical situations under supervision and with opportunities for feedback and reflection”); GERALD F. HESS & STEVEN FRIEDLAND, TECHNIQUES FOR TEACHING LAW 194 (1999) [hereinafter HESS, TECHNIQUES] (“Simulations help students to integrate theory, rules, and practice.”); Paul S. Ferber, *Adult Learning Theory and Simulations – Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 422 (2002) (discussing how simulations facilitate teaching substantive law, skills, and professionalism). Though current ABA Standards for Approval of Law Schools do not explicitly reference the use of simulations (as they have in the past), simulation use is presumed by a statement that skills instruction must include student skill performance evaluated by the instructor. STANDARDS FOR APPROVAL OF LAW SCHOOLS, ch. 3, interpretation 302–03 (2010–2011), available at http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/chapter3.authcheckdam.pdf. Such performance is necessarily made possible through simulation. The ten law schools that formed the Legal Education Analysis and Reform Network [“LEARN”] are engaged in numerous projects, including an assessment of the use of simulations in law school pedagogy. *General Description of Plan Projects 2009-2010*, LEARN, http://www.law.stanford.edu/display/images/dynamic/events_media/LEARN_030509_lr.pdf.

¹² The current draft of ABA Standards for Approval of Law Schools removes all reference to simulations and in-class assessment of student skill performance (which in the previous footnote I note is something that would generally occur in conjunction with a simulation).

used simulations with great success in training doctors: actors play the part of patients and interact with medical students, who practice interviewing and diagnosing.¹⁴

Law schools have used simulations in much the same way.¹⁵ Legal research and writing classes often involve a hypothetical case file that students use to simulate law practice, such as drafting a legal memorandum or appellate brief.¹⁶ Trial practice classes typically include simulated trials with students playing the part of litigators and volunteers (other students or actors) playing the parts of witnesses and clients based on a description of the character and events in the underlying matter.¹⁷ Negotiation, mediation, and client counseling classes are often designed around a hypothetical dispute, with law students taking on the role of attorney or mediator and classmates playing the parts of clients and opposing counsel.¹⁸ Simulations are used in transactional law clas-

See STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 11, at Standard 302. Instead, Draft Standard 303 describes live client clinics as the curricular forum in which students learn to assess their performance, competencies, and to reflect upon the “values and responsibilities of the legal profession.” STANDARDS FOR APPROVAL OF LAW SCHOOLS, ch. 3, Standard 303(b)(1) (Draft for Nov. 7–8, 2010 meeting), *available at* <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/November%202010%20Meeting%20Materials/Student%20Learning%20Outcomes%20November%202010%20draft%20-%20redline%20to%20previous%20draft.pdf>.

¹³ In some respects, law school simulations have advantages over clinics. Ferber, *supra* note 11, at 431 (arguing that simulations allow the professor to control the pace of the exercise, allowing students to learn in a shorter period of time than in practice); Gene Koo, *New Skills, New Learning: Legal Education and the Promise of Technology* 13, 16 (The Berkman Ctr. for Internet & Soc’y at Harvard Law Sch., Research Publication No. 2007-4, March 2007), *available at*, <http://cyber.law.harvard.edu/publications> (asserting that law school clinics often lack the technological infrastructure to sufficiently train law students in technology-related skills and that simulations can be used to help students develop skills); *see also* Randall Ryder, *Maximizing Skills-Based Classes in Law School*, *LAWYERIST* (Nov. 3, 2010), <http://lawyerist.com/maximizing-skills-based-classes-in-law-school/> (“If you are a law student, think of . . . simulations as your sandbox. Simulations are your chance to try different strategies, approaches . . . [and] learn without real consequences.”).

¹⁴ *CARNEGIE REPORT*, *supra* note 6, at 99; *see also* Christine N. Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum*, 26 *GA. ST. U. L. REV.* 361, 363 (2010) (explaining that medical schools format for acquiring medical skills as a three step process of “[s]ee one, do one, teach one” with “do one” representing the step that students must perform the subject skill such as putting on a splint).

¹⁵ Jay M. Feinman, *Simulations: An Introduction*, 45 *J. LEGAL EDUC.* 469 (1995) (explaining a law school simulation as resembling the activity of lawyers—a student does the things that lawyers do when confronted with a situation that lawyers may confront in practice); Ferber, *supra* note 11, at 418 (describing the law school simulation as composed of three elements: (1) a lawyering task; (2) a hypothetical situation; and (3) “significant” time (relative to the task) in which to perform the lawyering exercise).

¹⁶ *CARNEGIE REPORT*, *supra* note 6, at 107 (describing simulated practice of drafting legal documents using a case file in first year legal methods courses).

¹⁷ *BEST PRACTICES*, *supra* note 8, at 179–80 (noting the use of simulations in trial practice classes).

¹⁸ *CARNEGIE REPORT*, *supra* note 6, at 112–14 (discussing the use of simulations to teach alternative dispute resolution theory and skills); John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 *OHIO ST. J. ON DISP. RESOL.* 247, 286 (2010) (explaining the use of simulations in teaching alternative dispute resolution); Harriet N. Katz, *Evaluating the Skills*

ses,¹⁹ courses focused on practice management,²⁰ and seminars.²¹ First-year²² and upper-level²³ doctrinal classes have successfully incorporated simulation exercises. And as I mentioned in the opening paragraph of this Article, pre-trial

Curriculum: Challenges and Opportunities for Law Schools, 59 MERCER L. REV. 909, 929 (2008) (describing a simulation in a client counseling class in which a student plays the role of lawyer and another student plays the part of a business owner); John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, DUKE F. FOR L. & SOC. CHANGE 101, 121–22 (2009) (describing a client counseling exercise that utilizes actors who play the part of clients based on a detailed scenario and instructions to stay in character); *id.* at 124–25 (students play the roles of lawyers in a negotiation simulation based on the “bong hits 4 Jesus” case, *Morse v. Frederick*).

¹⁹ GEORGE W. KUNEY, *THE ELEMENTS OF CONTRACT DRAFTING WITH QUESTIONS AND CLAUSES FOR CONSIDERATION* (3d ed. 2011) (providing background information for negotiation and contract drafting simulations); Ann Marie Borrego, *Schoolhouse Rock*, TEX. LAW. (May 1, 2008), www.law.com/jsp/tx/PubArticleTX.jsp?id=900005634574 (describing Columbia Law School’s Deals program in which students work on simulated transactions); Karen Barton et al., *Authentic Fictions: Simulation, Professionalism and Legal Learning*, 14 CLINICAL L. REV. 143, 160–68 (2007) (describing an online simulation used at the Glasgow Graduate School of Law to simulate transactional practice); *see generally* Robert C. Illig et al., *Teaching Transactional Skills Through Simulations in Upper-Level Courses: Three Exemplars*, TRANSACTIONS: TENN. J. BUS. L. (SPECIAL REPORT) 15 (2009) (describing the use of simulations in teaching transactional skills); Praveen Kosuri, et al., *You Too Can Create a Simulation Exercise (or Even a Course)*, TRANSACTIONS: TENN. J. BUS. L. (SPECIAL REPORT) 101 (2009).

²⁰ Charlotte S. Alexander, *Learning to be Lawyers: Professional Identity and the Law School Curriculum*, 70 MD. L. REV. 465, 476 (2011) (describing the use of simulations in law practice management courses).

²¹ Sally Frank, *A City Council Examines Pornography: A Role-Play for a Law School Class*, 21 WOMEN’S RTS. L. REP. 169, 171–72 (2000) (describing a simulated city council debate regarding a pornography ordinance used in a Women and Law seminar).

²² Carol Chomsky & Maury Landsman, *Introducing Negotiation and Drafting into the Contracts Classroom*, 44 ST. LOUIS U. L.J. 1545, 1547 (2000) (providing students with a partially negotiated contract, with only three terms remaining for negotiation in the simulation); Stephen D. Easton, *Turning Criminal Law Students into Prosecutors and Defense Attorneys (At Least for One Day)*, 48 ST. LOUIS U. L.J. 1217, 1218–19 (2004) (explaining his use of simulated mini-trial in the criminal law course). *See generally* Christina L. Kunz, *Incorporating Transactional Skills Training into First-Year Doctrinal Courses*, TRANSACTIONS: TENN. J. BUS. L. (SPECIAL REPORT) 331 (2009); Robert G. Vaughn, *Use of Simulations in a First-Year Civil Procedure Class*, 45 J. LEGAL EDUC. 480 (1995).

²³ Katz, *supra* note 18, at 924 (discussing family law and business organizations courses that incorporate simulation exercises); William R. Slomanson, *Pouring Skills Content into Doctrinal Bottles*, 61 J. LEGAL EDUC. (forthcoming 2011) (describing simulation in an upper level state civil procedure course); Andrew L. Strauss, *Creating and Conducting In-Class Simulations in Public International Law: A Producer’s Guide*, 4 ILSA J. INT’L & COMP. L. 669, 671 (1998) (explaining the author’s use of simulations at the end of each substantive section of a public international law course as a tool to help students review and integrate the doctrine covered in the course); Carol R. Goforth, *Use of Simulations and Client-Based Exercises in the Basic Course*, 34 GA. L. REV. 851, 854–60 (2000) (describing simulated client interview, drafting assignment, and negotiation in a business associations class); *Curriculum — Second and Third Year*, WASH. & LEE L. SCH., <http://law.wlu.edu/academics/page.asp?pageid=1102> (describing numerous practice area-focused practicums that incorporate simulations).

litigation textbooks often include a case file that enables students to simulate the work of lawyers through the stages prior to trial.²⁴

Simulations allow the professor to control the pace of the exercise and to structure a class to explore specific skills and subject matter areas.²⁵ With a well-planned simulation, the professor is able to balance various goals for the class.²⁶

Perhaps most importantly, simulations give students the opportunity to learn by doing.²⁷ This is not only consistent with the goals of the *Carnegie Report* and *Best Practices*,²⁸ but it is supported by research on active learning.²⁹ Students are passive learners when they listen to a lecture or observe another student engage with the professor through the Socratic method.³⁰ Students learn more when they actively use the material or practice the skills that

²⁴ ROGER S. HAYDOCK ET AL., *FUNDAMENTALS OF PRETRIAL LITIGATION* 713–68 (7th ed. 2008) (containing eleven case files in Appendix C—the shortest a single page of information and the longest containing just over two pages of information on the characters involved in the dispute and twelve attached documents); THOMAS A. MAUET, *PRETRIAL*, (7th ed. 2008) (Aspen Publishers, Pretrial CD-ROM, 2008) (CD accompanying text includes six case files for cases involving a car accident, a false arrest, employment discrimination claim, and three contract disputes.).

²⁵ *CARNEGIE REPORT*, *supra* note 6, at 119 (arguing that the value of simulation is that students can be provided targeted instruction, including exaggeration and repetition of key activities that is not possible in live interaction with real clients); Garvey & Zinkin, *supra* note 18, at 114 n.111 (describing the numerous skills practiced in a week-long simulation at Case Western’s CaseArc Integrated Lawyering Skills Program that allows students to participate in a criminal case from client interview to jury trial).

²⁶ *BEST PRACTICES*, *supra* note 8, at 137 (explaining that simulations must be designed to appropriately balance detail, complexity, and usefulness).

²⁷ HESS, *TECHNIQUES*, *supra* note 11, at 194 (explaining that simulations are grounded in the old adage that students “learn not by what they see or hear, but by what they do”).

²⁸ *CARNEGIE REPORT*, *supra* note 6, at 118–22 (discussing how students can learn from practice experiences in clinics and simulations); *BEST PRACTICES*, *supra* note 8, at 121–22 (describing simulation-based courses and law school clinics as “experiential” courses); Coughlin et al., *supra* note 14, at 395–404 (explaining the benefits of active learning exercises in law school).

²⁹ See generally Gary F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 402 (1999) (advocating the use of active learning principles in law school to increase learning and explaining that active learning is not just a set of techniques but also “an orientation . . . [that] includes a belief that legal education should help students understand legal concepts and theory, improve critical thinking, and develop professional skills and values.”) [hereinafter Hess, *Good Practice*]; MICHAEL HUNTER SCHWARTZ ET AL., *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 4–8 (2009) (explaining that cognitivists and constructivists recognize the importance of active learning activities).

³⁰ June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 WM. MITCHELL L. REV. 1011, 1012 (1989) (urging the integration of theory and practice into teaching methods so that students could experience “active learning” rather than the Socratic method); HESS, *TECHNIQUES*, *supra* note 11, at 194 (explaining that students engaged in a simulation are less likely to “coast along as passive observers of education like passengers in a car, taking notes but lacking real engagement”); Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1, 2–3 (2003) (asserting that the Socratic method is premised on the assumption that students are actively engaged, where this assumption is likely only true for the small number of students who prefer auditory learning).

are the subject of the class.³¹ To achieve active learning, the focus must shift from professor to students.³² Simulated client interaction is one method used to change the focus.³³ Law students who represent clients in simulated exercises become active participants in their legal education.³⁴ They learn law not through note-taking and memorization, but through reading and analyzing the law to solve their client's problems. They use the law and gain a new understanding of it as they draft documents, negotiate agreements, or take depositions.³⁵ They experience and resolve the professionalism challenges faced by lawyers in practice.³⁶

The typical law school simulation is simple, though, and that simplicity imposes some limits. As I use the phrase, a "simple simulation" is one in which students are provided with a packet of information that sets the scene for students to simulate a lawyering task.³⁷ The lawyering exercise itself may not be simple (there may even be multiple exercises throughout a semester), but the jumping-off point is a few pages of factual background, a small number of documents, and information that students (or non-student volunteers) can use to role-play clients or witnesses.³⁸ While law students can use such materials to perform lawyering tasks (drafting a complaint, for example), the simplicity of

³¹ Hess, *Good Practice*, *supra* note 29, at 401 (describing student learning on a spectrum that spans from learning passively (such as by listening) to learning actively (such as by applying concepts and skills in a simulation or real life)).

³² Boyle, *supra* note 30, at 1–6 (pointing out that most professors are exhausted at the end of a class and that students who participate only passively are not; she argues that active learning is premised on a shift from professor-centered to student-centered instruction so that students better absorb doctrine and skills); SCHWARTZ ET AL., *supra* note 29, at 31 ("Students want to be engaged in class. As the teacher, we are always . . . *doing* something To help engage your students, ask not what you are doing, but what they are doing.") (emphasis omitted).

³³ Cicero, *supra* note 30, at 1018 (explaining that an active learning tool like a simulation allows student to assimilate the material to carry out actions towards the goal of the exercise).

³⁴ Hess, *Good Practice*, *supra* note 29, at 410 (explaining that simulations are an important method for fostering student development of thinking skills, performance skills, and emotions and values); Barton et al., *supra* note 19, at 166–67 (explaining that a legal simulation has "task authenticity" that facilitates students suspending their disbelief and engaging in professional role play).

³⁵ Ferber, *supra* note 11, at 422 (explaining that in a simulation, students learn the substantive law by performing tasks that would be performed in that area of practice, reinforcing the learning of substantive rules and concepts); Carol McCrehan Parker, *Writing is Everybody's Business: Theoretical and Practical Justifications for Teaching Writing Across the Law School Curriculum*, 12 J. LEGAL WRITING INST. 175, 178–81 (2006) (discussing using writing assignments to promote active learning for law students and suggesting that writing assignments within simulations can provide realistic practice experiences).

³⁶ SCHWARTZ ET AL., *supra* note 29, at 19 (explaining that active learning through simulations can help students develop professional values).

³⁷ This definition is consistent with that given by Professor Paul Ferber, though he would stress that the simple simulation gives the law student sufficient time to perform the lawyering exercise, unlike a classroom hypothetical that asks the student to immediately state what he or she would do as a lawyer in a situation. Ferber, *supra* note 11, at 419 (defining simple simulation as one in which the teacher presents a simple factual situation, assigns roles, and gives them reflection and preparation time for the lawyering task).

³⁸ See, e.g., *supra* note 24 and accompanying text.

the materials means the exercise is not very authentic.³⁹ Lawyers do not draft a complaint based on a two-paragraph summary of facts; they interview the client, interview witnesses, and review and analyze a box (or CD) of documents. Though a simple simulation may be well-suited for many classes, if authenticity is the goal, the simple simulation may not be the answer.⁴⁰

A more complex simulation can transform a class into something that replicates the real activities and challenges of practice. A “complex simulation,” as I use the phrase, is one that not only simulates the lawyering task (drafting the complaint), but that also simulates the environment in which the lawyer would encounter that task—the knowledgeable people the lawyer would interact with (clients, witnesses, experts, other lawyers, etc.), the type of matter (multi-faceted business dispute, employment discrimination case, business merger, etc.), and the quantity and type of information the lawyer would consider (not just legal research but also documents provided by clients and witnesses).⁴¹ In my definition, a simple simulation primarily *describes* the environment in which the lawyering tasks occur, while a complex simulation *simulates* both the environment and the lawyering tasks.⁴² The people playing clients and witnesses in a complex simulation could be individuals with real-world experience that lends itself to the subject matter of the simulated case,⁴³ or they could be vol-

³⁹ Barton et al., *supra* note 19, at 145 (noting that authenticity is an issue in experiential learning, including simulations).

⁴⁰ Simulations are often criticized for not being authentic, and thus, less desirable than clinic or other real client experiences. BEST PRACTICES, *supra* note 8, at 111 (“Even the best simulation-based courses . . . provide make believe experiences with no real consequences on the line.”); Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 68 (2001) (arguing that well-thought-out simulation exercises can increase student engagement and are better than no experiential learning exercise, but that a real client experience is better); HESS, TECHNIQUES, *supra* note 11, at 196 (“[W]ithout live clients, the simulation may omit the irrationality and unpredictability of clients, de-emphasizing the important need for judgment as a legal skill. Similarly, simulations may deemphasize complex doctrinal theory.”).

⁴¹ Though Professor Deborah Maranville does not define simple simulation or complex simulation, her description of four “contexts” that we can provide students informs my simulation definitions. Maranville, *supra* note 40, at 56 (describing four types of context that can be given to students: context about the people and real life factual situations in which the cases arise; context for the practices giving rise to legal disputes; context for understanding the institutions and processes in which legal doctrines are applied; and finally, the legal tasks that lawyers perform and the doctrine integral to those tasks); *see also* Ferber, *supra* note 11, at 421, 423–25 (describing a “complex simulation” as one that provides facts and documents to expand the information base of a simple simulation and an “extended simulation” which “involves the creation of a complex world and a simulation which runs over a significant period of time”). Because my definition of a complex simulation does not distinguish between those that run over a long or short period of time, my definition would encompass Ferber’s complex and extended simulations.

⁴² As I have defined it, a simple simulation might contain background materials that are more than descriptive—such as a contract or an accident report. The simulation is still “simple” though because the quantity and type of materials are not realistic of how the situation would occur in practice. Or in other words, that simulation lacks in several dimensions of context described by Maranville. Maranville, *supra* note 40, at 56.

⁴³ *See* Cicero, *supra* note 30, at 1022 (explaining that William Mitchell structures simulated exercises that include a real estate agent who negotiates with students regarding a purchase agreement, a professional arbitrator who arbitrates a dispute, and medical experts who are prepared and deposed); Carol Zeiner, *The Real Transaction as a Teaching Tool*, L. TCHR.,

unteers playing a role that is scripted in part by the professor and in part by the volunteer.⁴⁴ The source for documents could be a real client's case file (with client consent), publicly available documents,⁴⁵ documents created by an industrious and sleep-deprived professor, documents from a third-party vendor,⁴⁶ or documents created by the characters themselves. Because of the volume of documents needed for my pre-trial litigation class, I focused my energy on creating seven elaborate character descriptions and a basic storyline for a developing business dispute.⁴⁷ Then I recruited law students to become those characters.

The student-characters do the heavy lifting of becoming the characters and fleshing out the story, creating thousands of documents in the process. I describe this as a "complex, student-generated simulation" because the students create the environment in which the lawyering tasks will occur. As a result of the student-characters' efforts, my pre-trial litigation students do not receive a written summary of the facts that form the basis of their lawsuit.⁴⁸ They meet with clients who are angry, frustrated, and ready to sue a former business partner. Without prompting, their clients sometimes misrepresent damaging facts. The clients overwhelm their attorneys by turning over a shocking number of documents. In short, the situation is a lot like practice. In Part V of this Article I provide a general discussion of designing such simulations, but first Part III

Spring 2006, at 1 (describing how in their simulated exercise of planning and building a commercial office building, real estate finance students received expert advice from a tax attorney, zoning and land use attorney, and environmental expert); Memorandum from Professor Brian Krumm to Univ. of Tenn. Coll. of Law Representing Enterprises Course participants, Asset Purchase Gen. Fact Pattern (Feb. 26, 2011) (on file with author) (describing a business owner, a banker, and other individuals who played themselves in a negotiation simulation that was based on an actual matter in which these individuals were involved); *Curriculum — Second and Third Year*, *supra* note 23 (describing Corporate Counsel Practicum in which lawyers specializing in various areas of law participate in "conferences that would be held among counsel representing a seller"); HESS, *TECHNIQUES*, *supra* note 11, at 125–26 (describing a trial advocacy class in which students examine medical residents who play the role of treating physician).

⁴⁴ Ferber, *supra* note 11, at 450–54 (explaining information to be included in documents prepared for individuals playing characters in a simulation, including facts, character motivation, specific instructions (including scripted text), and directions that allow the actor some flexibility in playing the character).

⁴⁵ Strauss, *supra* note 23, at 673–75 (discussing the issues that arise when using real-life situations in simulations, including the opportunity to provide students the actual transcripts and briefs).

⁴⁶ For example, some e-discovery vendors have databases of documents that they use to demonstrate the functionality of their products. *See, e.g., Concordance Fundamentals Training Materials*, at 6 (LexisNexis 2010) (referencing "Cowco" database of documents provided to product licensees). In theory, such materials could be used in an e-discovery class.

⁴⁷ Schaefer, *Simulation*, *supra* note 4, at 48.

⁴⁸ The second semester of my simulation begins with an email introducing the student-lawyers to their clients, explaining document identification, collection, and preservation efforts, and setting up a meeting between them. *See* Schaefer, *Syllabus*, *supra* note 5, at 1. This is similar to how Professor Ferber launches his extended simulation. Ferber, *supra* note 11, at 424 ("Factually, all I tell them is 'Here's your client's name and phone number. Call and handle her problem. I think it has to do with [some construction problem; some supply contract; etc[.]].'").

describes the storyline and mechanics of the simulation from my class—the Sassy Sentiments Simulation.

III. THE SASSY SENTIMENTS SIMULATION

A. *The Characters and Plot of the Sassy Sentiments Simulation*

At the beginning of any fall semester, business partners Boone Radley and Charlotte “Pickle” Harris are busy running their edgy greeting card company, “Sassy Sentiments.” Pickle runs the creative side of the business from Brunswick, Georgia, while Boone focuses on the financial side of things in Knoxville, Tennessee. The partners are also dating one another. The long distance business and romantic relationship necessitates a high volume of electronic communication,⁴⁹ and it is the set up for diversity jurisdiction in their future litigation.⁵⁰

Two lawyers play a part in the fall semester simulation. Lawyer Gem Finch has known Pickle since childhood and has represented both Pickle and Boone in personal and business matters through the years, including drafting their Partnership Agreement. Pickle and Gem email one another many times each day, discussing business and personal matters. The other lawyer is Nathan Radley. Nathan is Boone’s brother and a recent law school graduate. The Radleys talk to one another by email multiple times each day.⁵¹

In August, with Pickle’s knowledge, Boone hires a real estate agent named Callie Purnia to help him find new office space for Sassy Sentiments. In addition to running her real estate business, Callie is also a law student. Boone and Callie email one another frequently about possible real estate. As August turns to September, it becomes obvious from their daily email banter that their business relationship has turned into a close relationship.⁵²

During this same time period, and without Boone’s knowledge, Pickle is engaged in negotiations to substantially expand Sassy Sentiments’ business. Siblings Jay and Violet Ewell own the thriving retail business Blu Cabinet.⁵³ The Ewells are interested in replacing Blu Cabinet’s current line of greeting cards with Sassy Sentiments’ cards. Like Gem, the Ewells are also good friends with Pickle. By mid-September, after extensive negotiations by email, Blu Cabinet has formally committed to buy (depending on the outcome of negotiations between the characters) something in the neighborhood of \$300,000 in greeting cards over the next twelve months. Blu Cabinet sends a Commitment Letter to Sassy Sentiments detailing the agreed terms and requesting that Sassy Sentiments sign and return the document. Pickle wants to surprise Boone with the Blu Cabinet deal, and hints during the negotiations that she may have news to share with him soon.⁵⁴

⁴⁹ Schaefer, Simulation, *supra* note 4, at 3.

⁵⁰ Schaefer, Syllabus, *supra* note 5.

⁵¹ Schaefer, Simulation, *supra* note 4, at 8–9, 12.

⁵² *Id.*

⁵³ In 2010, law student Shelby Ward, playing Blu Cabinet owner Violet Ewell, created an amazing blog for Blu Cabinet. THE BLU SHELF: BLU CABINET’S OFFICIAL BLOG, <http://blucabinet.blogspot.com/> (last visited Nov. 4, 2011).

⁵⁴ Schaefer, Simulation, *supra* note 4, at 16, 22.

In mid-September, with the Commitment Letter in hand, Pickle drives to Knoxville to surprise Boone. The email exchange that follows—among all seven characters—reveals that Pickle walked in on what she perceived to be a romantic dinner between Boone and Callie. In the days that follow, Boone and Pickle agree to end their romantic and business relationships. Pickle tells Boone that she wants to own the business without him, and, feeling guilty about how things ended, he agrees to do whatever she wants. As always, Boone and Pickle turn to Gem for legal advice. In emails to both partners, Gem explains how she can help them end the partnership and determine a fair buyout price so that Pickle can take over the card business. Boone sends the business’s financial documents to Gem so that she can help them determine a value for the business.⁵⁵

In emails exchanged between only Pickle and Gem, Pickle says she does not want to share the Blu Cabinet deal with Boone. Gem encourages Pickle to destroy the Commitment Letter and suggests that she ask the Ewells for a new letter only after the partnership is terminated. In other emails that include Boone, Pickle and Gem pressure him to agree on a fair price for the business. Eventually, Boone enlists the help of his brother (and attorney) Nathan to represent him in the talks. Like Boone, Nathan does not learn about the Blu Cabinet deal during the negotiations.⁵⁶

By mid-October, the partners sign an agreement ending the partnership and providing for Pickle’s purchase of Boone’s interest in the business (the “Buyout Agreement”). The simulation instructions state that there are a few mandatory provisions for that Agreement. It must provide for the termination of the partnership relationship and detail the price and other terms of Pickle’s buyout of Boone’s interest in the business, including Boone’s agreement not to compete with Sassy Sentiments for three years. The Buyout Agreement must also note that an outstanding partnership expense is Gem’s final bill, which both partners will split equally. Finally, the document must contain a provision providing for attorneys’ fees if either party breaches its terms. Every other aspect of the Agreement can be structured as the parties wish.⁵⁷

Despite the non-compete provision, Boone starts a new card company called “Simply Stated.” He seeks advice from both Nathan and Callie about whether his new company violates the non-compete. Together they reason that he is not competing for the same types of customers because he will not make edgy (or “sassy”) cards in the new business; he will make “simple,” personalized announcements and invitations. Also in October (just after the Buyout Agreement is signed), Pickle requests and receives the new Commitment Letter from Blu Cabinet; it is identical to the September letter other than the date. In the weeks that follow, Pickle and the Ewells exchange many messages about their new business endeavor.⁵⁸

In November, things begin to unravel. The Ewells receive an invitation to a family event; they recognize the card’s style and think it is a Sassy Sentiments card. They see that it was made by a company called “Simply Stated”

⁵⁵ *Id.* at 19.

⁵⁶ *Id.* at 9, 13.

⁵⁷ *Id.* at 24, 27.

⁵⁸ *Id.* at 28.

and quickly trace the card to Boone. Meanwhile, Callie learns that Blu Cabinet is selling Sassy Sentiments' cards in its numerous store locations.⁵⁹ Callie tells Boone that he is entitled to half of that deal. In another twist, Pickle realizes that Sassy Sentiments' biggest customer from the past has substantially cut back its monthly order; she believes that Boone is responsible. Pickle and Boone confront one another with the evidence of their misdeeds. By the semester's end, both are prepared to hire litigation counsel.⁶⁰

B. *Mechanics of the Fall Semester Simulation*

At the beginning of the simulation, students are given background information and email addresses for all characters,⁶¹ and a calendar (for only the months of August and September) that is character-specific.⁶² In addition, Boone, Pickle, and Gem receive a copy of the Partnership Agreement.⁶³ Boone and Pickle also are provided with some financial information for the partnership.⁶⁴ At the beginning of October and the beginning of November, students receive calendars for those months. Unlike the first calendar that is character-specific because it contains confidential information for each character, the October and November calendars are organized by "character group": Boone, Nathan, and Callie receive the same calendar, and Pickle, Gem, and the Ewells receive the other calendar.⁶⁵

Providing the calendar in monthly segments does not reveal future events, allowing students to react to events as they happen. Further, giving the calendar only to characters whose interests are aligned does not give away the other side's secret information, which makes litigation more realistic in the spring semester: each client (and each witness) only knows the information that he or she would know were the situation real. Finally, providing the calendar in one-month segments allows adjustments in the timeline if the characters get off track in the prior month. The possibility of characters missing deadlines is real, but it is easily addressed and can make the simulation more interesting.⁶⁶

⁵⁹ In fall 2010, the announcement appeared on the Blu Cabinet blog. Violet, *Announcing Sassy Sentiments Cards at Blu Cabinet*, BLU SHELF: BLU CABINETS OFFICIAL BLOG (Oct. 28, 2010, 8:01 PM), <http://blucabinet.blogspot.com/2010/10/announcing-sassy-sentiments-cards-at.html>.

⁶⁰ Schaefer, Simulation, *supra* note 4, at 31, 34.

⁶¹ In preparation for the simulation, each of the seven characters was assigned a university email account. Even though that common email domain name among characters is not realistic, using university accounts allows me to control who has access to each account and permits the accounts to be reused from year to year.

⁶² Schaefer, Simulation, *supra* note 4.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ For example, in fall 2009, the business partners and Gem did not finalize the terms of the document they called "Buyout and Termination Agreement" by the calendared date of October 1. Nonetheless, the Ewells stayed on their schedule and sent a new Commitment Letter on October 8. A week later, when the Partnership Termination and Buyout Agreement was finally signed, Gem made it effective October 1 so that it would still "technically" precede the Blu Cabinet deal. The wrinkle in the timing became an interesting, but unplanned, issue in the pre-trial litigation class the following semester.

To achieve the high volume of ESI, the calendar requires each character to write at least ten email messages each day.⁶⁷ The calendars include some “key dates” when certain events are supposed to happen, such as the date that Pickle breaks up with Boone after finding him with Callie. But more often, the schedule provides only general direction and gives the characters license to be creative.⁶⁸

C. *Mechanics of the Spring Semester Simulation*

In January, the e-discovery focused pre-trial litigation class begins.⁶⁹ In this part of the simulation, the student-lawyers work through the usual steps of representing clients in litigation, while the student-characters react to the instructions of the lawyers, consistent with their allegiances and personalities developed over the prior semester.⁷⁰

Students acting as lawyers in pre-trial litigation are divided into opponent pairs, with half of the class representing Boone and the other half representing Pickle. For student-lawyers, Tuesday class time is reserved for discussion of the assigned readings. Thursdays are organized as a two-hour “lab” when attorneys perform the task (or at least some part of the task) associated with Tuesday’s reading assignment. On a typical Thursday, lawyers interact with their clients, witnesses, opposing counsel, co-counsel, law firm IT personnel, or their supervising attorney (the professor).⁷¹ Depending on the week, they may be interviewing a witness, reviewing draft pleadings with their clients, drafting discovery, reviewing ESI, or taking a deposition.⁷²

The interactions between the two groups of students are not scripted. Student-lawyers must abide by the professional conduct rules of the jurisdiction, so their interactions with witnesses and clients—both inside and outside of the classroom—must be consistent with these obligations.⁷³ Spring semester instructions for the student-characters are simple. Each is told to “play the character.” None are required to attend class unless a student-lawyer requests attendance *and* the person believes the character would oblige. Likewise, the characters are expected to exchange email and talk to the attorneys only when such acts are in-character. So when Pickle’s attorneys ask Callie to meet with them, she is likely to refuse, just as we would expect Boone’s girlfriend to respond.

For Boone and Pickle, the character instructions result in both characters having a fair amount of in- and out-of-class interaction with their attorneys, but having no contact with opposing counsel until depositions near the end of the semester. Witnesses have a lesser role in the spring semester (and receive fewer course credits than the clients). They talk to attorneys they wish to talk to and are deposed by attorneys who subpoena them later in the semester.

⁶⁷ I also require the students to send a copy of each email to me so that I know what is happening during the simulation. Schaefer, *Simulation*, *supra* note 4.

⁶⁸ *Id.*

⁶⁹ Schaefer Syllabus, *supra* note 5.

⁷⁰ Schaefer, *Simulation*, *supra* note 4; Schaefer Syllabus, *supra* note 5.

⁷¹ Schaefer Syllabus, *supra* note 5.

⁷² *Id.*

⁷³ *Id.*

IV. HOW THE SASSY SENTIMENTS SIMULATION HELPS STUDENTS DEVELOP E-DISCOVERY KNOWLEDGE, SKILLS, AND PROFESSIONALISM

With their lower billable rates and seeming comfort with technology, junior associates are often given a major role in e-discovery. But they are not always prepared for the challenge.⁷⁴ The goal of my pre-trial litigation course is to help students build a foundation of knowledge, skills, and professional traits needed as they enter practice.⁷⁵ The materials generated by the fall semester simulation, as well as the role played by the student-characters in generating those materials, are essential to the student-lawyers' success. As the simulated case progresses through each e-discovery topic, students read the applicable e-discovery rules of procedure and evidence, cases, best practices guides, ethics rules, and various articles.⁷⁶ As noted earlier, we discuss those materials in a short class on Tuesday, and then students practice the related skills in a longer class on Thursday.⁷⁷ In this Part, I discuss how the Sassy Sentiments Simulation helps students develop knowledge and skills in key areas of e-discovery practice.

A. Identification, Preservation, and Collection of ESI and Discovery Planning and Drafting

In the early days of the spring semester, the student-lawyers read various materials to gain an understanding of what information is discoverable⁷⁸ and their obligation to identify, preserve, collect, and (ultimately) produce that

⁷⁴ Koo, *supra* note 13, at 6 (concluding that law students need training to prepare them for e-discovery and stating that a law firm partner that responded to a Harvard-LexisNexis survey reported that “new associates were becoming overwhelmed by the sheer amount of data, which can obscure the case itself from new attorneys unable to understand the big picture”).

⁷⁵ Schaefer, Syllabus, *supra* note 5, at 1 (“Course Outcomes”); *see also* Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLINICAL L. REV. 807, 825 (2007) (describing the goals of simulation-based courses and noting that such courses should target the level of proficiency that a new lawyer needs to competently provide legal services).

⁷⁶ Schaefer, Syllabus, *supra* note 5. Course books include the Federal Rules of Civil Procedure and an e-discovery book that is geared to a practitioner audience. *See generally* MICHELE C.S. LANGE & KRISTIN M. NIMSGER, *ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW Now* (2d ed. 2009).

⁷⁷ My role in the Thursday class is usually as a senior lawyer in the firm who plays a (mostly) silent role in the background but who will provide advice when asked. *But see infra* note 127 and accompanying text.

⁷⁸ FED. R. CIV. P. 26. Basic background information about electronic discovery practice and the Electronic Discovery Reference Model materials. *See generally* LANGE & NIMSGER, *supra* note 76, at 1–24 (Chapter 1, Discovery, The New Philosophy); *ELECTRONIC DISCOVERY REFERENCE MODEL*, www.edrm.net (last visited Nov. 4, 2011).

information.⁷⁹ We consider the usefulness of involving information technology (IT) experts in e-discovery at its earliest stages.⁸⁰

Our law school's IT Team Leader plays the role of our law firm's IT director.⁸¹ Prior to the first class, he and I work with both clients to identify and collect all ESI and paper documents created in the fall semester. The class schedule makes this early collection necessary.⁸² Though it would be great for the student-lawyers to be involved in this phase of the case, there are benefits to this approach. The early collection is consistent with what a junior lawyer might encounter in practice and highlights the challenges for a lawyer who is a latecomer to a case.

Thus, early document identification and collection become part of the story. Prior to our first class, I (as the senior lawyer in the firm) write the pre-trial litigation students an email about a new case I am assigning to them. I introduce the client, tell them basic background information, and explain that I have already worked with the client and our law firm IT personnel to collect all of the potentially relevant information.⁸³

In the first class, we discuss the materials they have read and the situation they find themselves in: a case has been handed to them with the assurance that the document collection is complete. I try to impress upon the student-lawyers that they must take ownership of discovery—asking the questions necessary to fully understand what has already happened and being responsible for what will happen in the future. Their first client interview (scheduled for the following week) must involve more than a discussion of the underlying facts. They must also ask about the collection and preservation efforts that have taken place to date and explore other possible sources and locations of ESI.⁸⁴ Though I have never consciously failed to collect documents from the clients, the student-lawyers for both clients have always uncovered additional ESI and paper docu-

⁷⁹ *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (discussing affirmative steps counsel should take to identify, preserve, and produce discoverable information); *Passlogix, Inc. v. 2FA Tech., LLC*, 708 F. Supp. 2d 378 (S.D.N.Y. 2010) (\$10,000 fine for firm's failure to adequately implement a litigation hold); LANGE & NIMSGER, *supra* note 76, at 56–95, 349–69 (covering Practical Legal Implications & Preservation/Litigation Hold Letters, respectively); *see also The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process*, 11 SEDONA CONF. J. 265 *passim* (2010), http://www.thesedonaconference.org/dltForm?did=legal_holds_sept_2010.pdf (enter your name and email address in the form, then click the "Download" button); THE SEDONA CONFERENCE WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA CONFERENCE "JUMPSTART OUTLINE: QUESTIONS TO ASK YOUR CLIENT & YOUR ADVERSARY TO PREPARE FOR PRESERVATION, RULE 26 OBLIGATIONS, COURT CONFERENCES & REQUESTS FOR PRODUCTION, (2011), http://www.thesedonaconference.org/dltForm?did=jumpstart_outline.pdf (enter your name and email address in the form, then click the "Download" button).

⁸⁰ LANGE & NIMSGER, *supra* note 76, at 68–69 (explaining the importance of communicating with IT personnel to understand the client's IT infrastructure).

⁸¹ Jolyon Gray plays a key role in the simulation for the entire year, dealing with all IT issues. *See infra* notes 104–05 and accompanying text (describing our use of Concordance).

⁸² The practical reason for the early collection is that we need to prepare the data for review in our review tool (discussed below) and provide students early access to the documents. With all of the topics that we need to cover in a pre-trial litigation class, we cannot spend several weeks on identification, collection, and preservation.

⁸³ Schaefer, Syllabus, *supra* note 5.

⁸⁴ *See supra* notes 79–80 and accompanying text.

ments in their early client meetings. Taking ownership of discovery in this case should translate to similar confidence in practice, where doing anything less results in sanctions for attorneys and clients.⁸⁵

The next e-discovery-focused task in the class occurs several weeks later with the Rule 26(f) discovery planning conference.⁸⁶ Before the 26(f) conference, students review materials that address the requirements of the conference⁸⁷ and steps they can take to make the conference productive.⁸⁸ Students learn that more than traditional discovery, e-discovery requires extensive planning and cooperation between opposing attorneys.⁸⁹ Key issues discussed in the 26(f) conference include subjects on which discovery will be needed, phased discovery, and unique issues related to ESI (such as preservation, location, forms of production, and costs of production).⁹⁰ Though the simulation case provides relatively simple ESI issues for each client (no mega-corporation with a complex computer network), students gain experience planning for discovery with an opponent.

Also in a modern 26(f) conference, attorneys are required to discuss issues of privilege protection, including an agreement to the consequences of an inadvertent disclosure of privileged information,⁹¹ a so-called “clawback agree-

⁸⁵ Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L. J. 789, 792 (2010) (describing sanctions for e-discovery misconduct as being at an all-time high in 2009 and that sanctions occur not only in cases of intentional misconduct, but also in cases of grossly negligent and negligent conduct by counsel); LANGE & NIMSGER, *supra* note 76, at 91–95 (describing sanctions for spoliation of evidence pursuant to the Federal Rules of Civil Procedure and the court’s inherent authority).

⁸⁶ FED. R. CIV. P. 26(f) Conference of the Parties; Planning for Discovery.

⁸⁷ FED. R. CIV. P. 26(f); FED. R. CIV. P. 16(a); FED. R. CIV. P. 16(b); E.D. TENN. L.R. 16.1; FED. R. CIV. P. Form 52 Report of the Parties’ Planning Meeting.

⁸⁸ THE SEDONA CONF., SEDONA CONFERENCE COOPERATION PROCLAMATION (2008), <http://www.thesedonaconference.org/dltForm?did=proclamation.pdf> (enter your name and email address in the form, then click the “Download” button); The Sedona Conference Working Grp. on Elec. Document Retention & Prod., Sedona Conference Jumpstart Outline (May 2008) (public comment draft), <http://www.thesedonaconference.org/dltForm?did=Questionnaire.pdf> (enter your name and email address in the form, then click the “Download” button).

⁸⁹ Moze Cowper & John Rosenthal, *Not Your Mother’s Rule 26(f) Conference Anymore*, 8 SEDONA CONF. J. 261 (2007); Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 997 (2009) (“Transparency and cooperation . . . are imperative for e-discovery to be performed in an efficient and economic manner. . . . This new model . . . is at odds with the training of most experienced attorneys who treat discovery just like every other component of litigation.”); *id.* at 999–1000 (describing a cooperative 26(f) Conference and the issues that should remain for courts to resolve in entering an order under Rule 16).

⁹⁰ FED. R. CIV. P. 26(f) (parties’ planning conference); FED. R. CIV. P. 26(b)(2)(B) (party may seek a court order that it need not provide discovery of ESI that is “not reasonably accessible because of undue burden or cost”).

⁹¹ FED. R. CIV. P. 26(f)(3) (requiring parties to discuss any issues about privilege or work product protection “including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order”); *see also* FED. R. CIV. P. 16(b)(3)(B)(iv) (a scheduling order may include party agreements regarding a procedure for asserting claims of privilege or work product after information is produced); FED. R. EVID. 502(d) (providing that if a federal court orders that privilege or work product protection is not waived by disclosure in a pending case, such order is binding in other federal and state proceedings).

ment.”⁹² This is a complicated area of the law,⁹³ and having a poorly designed agreement can be worse than having no agreement.⁹⁴ Prior to the 26(f) conference, we discuss these issues, the ease by which a privileged document could be disclosed, and their interest in preventing misuse of the document and waiver. By the 26(f) conference, students are prepared to hammer out the terms of a meaningful clawback agreement.

After the 26(f) conference, students provide initial disclosures,⁹⁵ and prepare interrogatories and requests for production of documents to serve on their opponent.⁹⁶ The class considers Rule 34’s requirement that a document request must “describe with reasonable particularity each item or category of items” requested.⁹⁷ We discuss the cost of e-discovery, the legal and professional conduct authorities that should guide attorneys in making non-frivolous and reasonable discovery requests,⁹⁸ and the standard that will be applied to determine if cost-shifting is appropriate or if discovery should be prohibited or limited.⁹⁹

When students begin drafting document requests and thinking about their own ESI issues, most realize that describing what they want is a difficult task. Drafting requests for production that are too broad can result in unnecessary cost, too much information (including junk email), and objections from an opponent. But requests that are too narrow may exclude information that is relevant to the dispute. Some students experiment with requests for production

⁹² FED. R. CIV. P. 26(f) advisory committee’s note on 2006 amendment. Similarly, an agreement that contemplates no pre-production privilege review and no waiver if privileged information is viewed by an opponent during an initial review is called a “quick peek” agreement. *Id.*

⁹³ Students read the following materials that are pertinent to entering a clawback agreement in federal court in the Eastern District of Tennessee: Federal Rule of Evidence 502, Federal Rule of Civil Procedure 26(b)(5)(B); Tennessee Rules of Professional Conduct Rules 1.4(a)(1), 1.6, 4.4(b). *See also* Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 218–32 (2010) (describing the issues that are currently not addressed by the web of authority in this area and the additional problems created by poorly crafted clawback and quick peek agreements).

⁹⁴ *See* Relion, Inc. v. Hydra Fuel Cell Corp., No. CV06-607-HU, 2008 WL 5122828, at *2–4 (D. Or. Dec. 4, 2008) (holding that though parties had agreed and court had ordered that “inadvertent production” of documents did not result in waiver, when party disclosed document, opponent used it in support of a motion and court subsequently determined that the production was not “inadvertent”); Cmty. Bank v. Progressive Cas. Ins. Co., No. 1:08-cv-01443-WTL-JMS, 2010 WL 1435368, *3–4 (S.D. Ind. Apr. 8, 2010) (holding that even though plaintiff believed that defendant had agreed to return inadvertently disclosed documents, court found that defendant had only agreed to be “courteous” if such issues arose but not to any legally binding obligation to return inadvertently disclosed documents).

⁹⁵ FED. R. CIV. P. 26(a)(1) Initial Disclosures.

⁹⁶ FED. R. CIV. P. 33 Interrogatories to Parties; FED. R. CIV. P. 34 Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes.

⁹⁷ FED. R. CIV. P. 34(b)(1).

⁹⁸ FED. R. CIV. P. 26(b)(2), (c), (g)(1)(B); TENN. RULES OF PROF’L CONDUCT R. 3.2, 3.4.

⁹⁹ FED. R. CIV. P. 26(b)(2), (c); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003) (describing eight factors to be considered in cost-shifting); *see also* LANGE & NIMSGER, *supra* note 76, at 136–41 (describing factors considered to order cost-shifting).

that require their opponent to search for specific names or terms.¹⁰⁰ Some include interrogatories that ask the opponent to list the search terms utilized and locations searched for documents produced in the case.¹⁰¹ When they receive their opponent's documents, they often learn the shortcomings of their requests. They will be able to build on this experience when they start practicing.

B. Document Review, Privilege Issues, Initial Disclosures, and Production

The student-lawyers face the daunting task of culling through ESI in order to make their initial disclosures, respond to an opponent's discovery requests, answer interrogatories, and locate and withhold privileged documents. With the universe of documents in the thousands, it is physically possible, but inefficient, for students to print and review each document.

Instead, the class introduces students to various options for cost-effective e-discovery, even in small cases,¹⁰² and provides them with software they will use for their review. The goal is to provide an introduction to technology that they will use in practice.¹⁰³ In 2011, the class used Concordance.¹⁰⁴ Like other document review software, Concordance allows lawyers to use search terms, tag documents for categorization (such as "responsive," "non-responsive," or "privileged"), redact privileged information, and Bates stamp documents for production.¹⁰⁵

Incorporating Concordance into the class was both challenging and rewarding. Though a law school does not have the technology resources and needs of many law firms, we have been able to use this product through extensive training, technical support from the vendor, and most importantly, through the efforts of the law school's IT Team Leader. I do not think our experience is

¹⁰⁰ See *Helmert v. Butterball, LLC*, No. 4:08CV00342, 2010 WL 2179180, at *4–5 (E.D. Ark. May 27, 2010) (granting in part motion to compel defendant to search ESI for specific terms).

¹⁰¹ *But see Eurand, Inc. v. Mylan Pharm., Inc.*, 266 F.R.D. 79, 85–86 (D. Del. 2010) (declining to order counsel to reveal search terms where parties had previously agreed that search terms "would not be the subject of disclosure, discovery or second guessing").

¹⁰² LANGE & NIMSGER, *supra* note 76, at 125–35 (describing options for reviewing and producing documents); *id.* at 153–205 (discussing e-discovery technology and innovations); see also THE SEDONA CONF. WORKING GRP. ON ELECTRONIC DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (Jonathan M. Redgrave ed., 2d ed. 2007), http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf (enter your name and email address in the form, then click the "Download" button); The Sedona Conf. Working Grp. on Electronic Document Retention & Prod., *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 SEDONA CONF. J. 189 (2007), http://www.thesedonaconference.org/dltForm?did=Best_Practices_Retrieval_Methods___revised_cover_and_preface.pdf (enter your name and email address in the form, then click the "Download" button).

¹⁰³ Losey, *supra* note 89, at 986 (arguing that e-discovery misconduct is, in part, a product of lawyers not keeping up with technology which results from "the failure of most law schools to adapt to the modern technological revolution"); *id.* at 1003 ("[In e-discovery], technological incompetence has a direct and very severe negative impact on one's professional competence to do e-discovery work.").

¹⁰⁴ For information about Concordance, see *Concordance*, LEXISNEXIS, <http://law.lexisnexis.com/concordance> (last visited July 26, 2011).

¹⁰⁵ *Concordance Fundamentals Training Materials*, *supra* note 46, at 20.

unlike what lawyers in a small law firm experience in adopting and using a search tool in a cost-effective way. Students experience first-hand some of the challenges, but also the advantages of using a software review tool over a paper document review or a native document review.¹⁰⁶ I hope that by being part of the process, students develop confidence in integrating such tools into their practice—even if they are in a small firm or working on a small case without a large e-discovery budget.¹⁰⁷

Deciding which documents should be withheld on the basis of privilege is complicated, both because of the number of documents and the nature of the communications among the simulation characters. The student-lawyers must move beyond memorizing definitions of the attorney-client privilege and work product doctrine.¹⁰⁸ They make difficult professional judgments about the applicability of the attorney-client privilege under the facts.¹⁰⁹ For example, Gem had one-on-one communications with both Pickle and Boone while the partnership was in existence and during the negotiation of the buyout.¹¹⁰ Pickle's attorneys want to argue that these communications are privileged, even though Gem billed the partnership for her advice.¹¹¹ Meanwhile, Boone's attorneys want to assert the privilege for all of Boone's communications with his attorney and brother, Nathan, even though Boone often forwards his email to Callie.¹¹² The attorneys must search case law for support (or a lack of support) to make a judgment about the positions they want to take regarding the applicability of the privilege. Once they make privilege decisions, students are immersed in the mechanics of redacting privileged information from documents, withholding privileged documents, and communicating those decisions to opposing counsel with a privilege log.¹¹³

The document review and production also allows students to recognize temptations and opportunities for attorney misconduct. Students note how easy it would be for lawyers to withhold "bad" documents. In the context of specific examples that arise as they prepare to produce documents, we discuss the rules that prohibit discovery misconduct and the consequences of such actions.¹¹⁴

¹⁰⁶ LANGE & NIMSGER, *supra* note 76, at 125–35.

¹⁰⁷ Koo, *supra* note 13, at i, "Executive Summary" (concluding that using "authentic practice technologies" exposes law students to the tools needed in practice).

¹⁰⁸ FED. R. EVID. 501 (providing that privilege is governed by the common law or in accordance with state law when state law provides the rule of decision for the underlying claim); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 68 (2000); FED. R. CIV. P. 26(b)(3) (providing that ordinarily a party may not discover documents prepared in anticipation of litigation by or for another party or its representative).

¹⁰⁹ CARNEGIE REPORT, *supra* note 6, at 119 (explaining the need for law students to develop professional judgment in context).

¹¹⁰ Schaefer, Simulation, *supra* note 4.

¹¹¹ *Id.*

¹¹² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 (2000) (privilege is waived if the client discloses the information).

¹¹³ FED. R. CIV. P. 26(b)(5)(A)(i-ii) (providing that if a party withholds information on the basis of privilege or work product protection, the party must expressly make the claim and describe the nature of the documents in a way that does not reveal the privileged or protected information, but that enables other parties to assess the claim.).

¹¹⁴ FED. R. CIV. P. 26(c), (g), & 37; TENN. RULES OF PROF'L CONDUCT R. 3.2; TENN. RULES OF PROF'L CONDUCT R. 3.4; *see also* Willoughby et al., *supra* note 85, at 792 (discussing

C. *Informal Resolution of Discovery Disputes*

Drafting a motion to compel or a motion for a protective order might seem like a good fit in a class with an e-discovery focus. I decided that a more important skill is the ability to work with opposing counsel to resolve discovery disputes. Cooperation is key in e-discovery.¹¹⁵ Even if the court's assistance is needed, a necessary prerequisite to motion practice is a good faith effort to work out the dispute between counsel.¹¹⁶

So instead of drafting a motion, we focus on resolving discovery disputes. Student-lawyers spend a week reviewing their opponent's disclosures and discovery responses (including documents produced), identifying problem areas, and working through their disputes in writing and in person with opposing counsel.¹¹⁷ Privilege disputes are a common topic of conversation and resolution. Without the documents generated by the simulation, this experience would not be nearly as realistic.

D. *Developing Professional Traits and Knowledge Needed in E-Discovery*

The issue of professionalism (which includes but is not limited to compliance with professional conduct rules)¹¹⁸ is at the center of all of the e-discovery exercises.¹¹⁹ Students who are otherwise reasonable often believe litigation is inconsistent with cooperation and civility.¹²⁰ It is critical that they understand

sanctions for discovery misconduct); *infra* note 121 and accompanying text (additional discussion of these rules).

¹¹⁵ Losey, *supra* note 89, at 997 (arguing that cooperation is imperative for competent e-discovery practice, but "at odds with the training of most experienced attorneys who treat discovery just like every other component of litigation").

¹¹⁶ FED. R. CIV. P. 26(c)(1) (motion for protective order must include a certification that the movant has in good faith conferred with opposing counsel to resolve the dispute without court intervention); FED. R. CIV. P. 37(a)(1) (motion to compel must include a certification that the movant has in good faith conferred with opposing counsel in an effort to obtain discovery or disclosure without court intervention).

¹¹⁷ Schaefer, Syllabus, *supra* note 5.

¹¹⁸ CARNEGIE REPORT, *supra* note 6, at 132 (explaining that the apprenticeship of professional identity must include training that "includes the virtues of integrity, consideration, civility, and other aspects of professionalism"); BEST PRACTICES, *supra* note 8, at 59 (describing professionalism as one of the attributes of effective, responsible lawyers that schools should help students acquire). For additional information about the meaning of professionalism and what should be encompassed in lawyer professionalism training, see generally Amy Timmer & John Berry, *The ABA's Excellent and Inevitable Journey to Incorporating Professionalism in Law School Accreditation Standards*, PROF. LAW., 2010, at 1 (discussing professionalism and the role of law schools in training students in professionalism); Neil Hamilton, *Professionalism Clearly Defined*, PROF. LAW., 2008, at 4, 8 (drawing on various sources to define five principles of professionalism).

¹¹⁹ As to professional conduct rules, my course syllabus incorporates reference to pertinent professional conduct rules in each week's readings, demonstrating that the professional conduct rules are as important as other sources of law to successfully conducting e-discovery. Schaefer, Syllabus, *supra* note 5.

¹²⁰ In legal education, cooperation and collaboration are not often emphasized as skills needed by lawyers. Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 533 (2007) (asserting that medical and business schools teach collaboration, assuming it is a vital skills to professionals, but that law schools communicate a narrow idea of professionalism that is focused on the individual).

that the law and professional conduct rules governing e-discovery require cooperation, good faith, and moderation.¹²¹ Both the attorneys who request too much and those who resist too much (particularly without clearly indicating an objection or withheld document) can create a host of problems for their clients and for themselves—from costly discovery disputes¹²² to court-imposed sanctions and the prospect of attorney discipline.¹²³

The simulation provides context for students to practice fulfilling their legal and professional conduct obligations.¹²⁴ This will help them become competent, ethical lawyers.¹²⁵ While interacting with opposing counsel, students are able to practice (and I am able to comment upon) the civility that is essen-

¹²¹ FED. R. CIV. P. 26(c) (must confer in good faith prior to seeking protective order); FED. R. CIV. P. 26(f) (parties are required to attempt “in good faith to agree on the proposed discovery plan”); FED. R. CIV. P. 26(g)(1)(B) (an attorney’s signature certifies that to the best of the attorney’s knowledge, a disclosure is complete and correct, and that any discovery request, response, or objection, is: “(i) *consistent with these rules and warranted by existing law or by a nonfrivolous argument* for extending, modifying, or reversing existing law, or for establishing new law; (ii) *not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation*; and (iii) *neither unreasonable nor unduly burdensome or expensive*, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”) (emphasis added); FED. R. CIV. P. 37(a)(1) (parties must certify “good faith” effort to confer prior to seeking a motion to compel); FED. R. CIV. P. 37(a)(4) (“evasive or incomplete” discovery responses are considered a failure to respond); TENN. RULES OF PROF’L CONDUCT R. 3.2 (lawyer shall make “reasonable efforts” to expedite litigation); TENN. RULES OF PROF’L CONDUCT R. 3.4 (“A lawyer shall not . . . unlawfully obstruct another party’s access to evidence” and “shall not make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.”); *see also* SEVENTH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE, [PROPOSED] STANDING ORDER RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION § 1.02 Cooperation (Oct. 1, 2009) (“An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.”), *available at* <http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf>.

¹²² Losey, *supra* note 89, at 1002 (arguing that attorneys do not cooperate in e-discovery “out of ignorance and fear” and that they fight over everything, making “the process terribly overpriced”).

¹²³ *See* Passlogix, Inc. v. 2FA Tech., LLC, 708 F. Supp. 2d 378, 422–23 (S.D.N.Y. 2010).

¹²⁴ BEST PRACTICES, *supra* note 8, at 16 (“Students who receive instruction that is contextualized by reference to problems or professional settings . . . treat associated intellectual tasks with a greater seriousness of purpose and a higher level of engagement.”); Mary C. Daly & Bruce A. Green, *Teaching Legal Ethics in Context*, N.Y. ST. B.J., May/June 1998, at 6, 8–10 (explaining the advantages of teaching legal ethics in the context of doctrinal areas in which those issues arise); Alan M. Weinberger, *Some Further Observations on Using the Pervasive Method of Teaching Legal Ethics in Property Courses*, 51 ST. LOUIS U. L.J. 1203, 1203–06 (2007) (discussing arguments favoring incorporating professional conduct education throughout the curriculum); CARNEGIE REPORT, *supra* note 6, at 146, 158 (noting that simulations can be used to help students recognize ethical questions even when the issues are obscured by other matters).

¹²⁵ Losey, *supra* note 89, at 986–87 (arguing that four fundamental forces explain all e-discovery misconduct: incompetence; overzealous conduct; lack of development of professional duties of an advocate; and lack of technological sophistication).

tial for cooperation in e-discovery.¹²⁶ Out of context, I could tell a student it is consistent with the client's interests to collaborate with opposing counsel in discovery. But the comment becomes more meaningful when I stop the students' heated discussion (when they are supposed to be resolving a discovery dispute) to point out a disrespectful tone that makes resolution unlikely.¹²⁷ After a semester of this emphasis in a memorable context, students should leave the class with the perspective that cooperation is a necessary component of e-discovery and serves the client.

V. ADAPT MY SIMULATION OR CREATE YOUR OWN: USING COMPLEX SIMULATIONS IN THE LAW SCHOOL CURRICULUM

The reaction I hear most often when I describe the Sassy Sentiments Simulation is, "That sounds like a lot of work." Admittedly, creating the framework for the simulation took some planning the first year, but that framework can be used again and again. Teaching pre-trial litigation is labor-intensive, irrespective of the simulation, but with the simulation the students are better prepared for practice. And I can conceive of no other way to provide a hands-on e-discovery experience. So by my estimate, the benefits of using the simulation outweigh the costs.¹²⁸ Legal educators at other schools could easily adapt my simulation for use in their own courses or create a new simulation that fits their academic interests and the needs of their students. The question is whether and when it is worth the effort.

In this part of the Article, I consider other contexts (beyond my e-discovery pre-trial litigation course) in which a complex simulation would produce benefits to students that justify its use. First, I discuss creating a simulation that will also provide educational benefits for the students playing characters. Second, I consider how a complex simulation could enhance learning in traditional skills courses in the law school curriculum. Finally, I move on to the circumstances in which complex simulations can be successfully integrated into traditional doctrinal courses.

A. *Complex, Student-Generated Simulations Must Have the Aim of Educating Two Sets of Students*

The work necessary for a student-generated simulation cannot be justified unless both sets of students will learn something from the process. Just like students playing the lawyer roles, students playing characters in a complex simulation must be provided the opportunity to gain substantive legal knowledge,

¹²⁶ Sparrow, *supra* note 10, at 119–22 (providing an excellent discussion of the meaning of civility for lawyers).

¹²⁷ *Id.* at 132 (urging that law students can learn civility when professors show it is important "by naming it, modeling it, teaching it, providing feedback on it, and evaluating it").

¹²⁸ *But see* Miguel A. Méndez, *Teaching Evidence: Using Casebooks, Problems, Transcripts, Simulations, Video Clips and Interactive DVDs*, 50 St. Louis U. L.J. 1133, 1139–40 (2006) (explaining his success in preparing students for practice by using a simulation to teach evidence, but explaining his decision to abandon this approach because of a lack of institutional support and the time it took from his own scholarship).

to develop lawyering skills, and to learn from the professional dilemmas they encounter.¹²⁹

As a threshold matter, I should note that the students in the character roles need not receive a significant amount of course credit. Using my course as an example, the five students who play witnesses receive one hour of credit for the entire year. The two students who play the clients—a more significant role in both semesters—receive two hours of credit for the entire year. The learning objectives and anticipated student outcomes should be consistent with the credit earned for the course.¹³⁰

Student-characters can gain substantive legal knowledge through the legal research necessary to play their character roles in the fall semester, as well as through experiencing the legal consequences of their conduct in the spring semester. The Sassy Sentiments Simulation involves the dissolution of a partnership and Pickle's purchase of Boone's interest in the business. The students who play attorneys Gem and Nathan must complete the legal and factual research necessary to guide their clients through the process; clients Boone and Pickle learn from that experience, too.¹³¹ Further, all of the student-characters learn about the law as clients and witnesses in the case that unfolds in the spring semester; in particular, they learn that the poor advice (or complete lack of advice) by lawyers in the fall semester led to clients' bad choices and litigation in the spring semester.¹³² Finally, because the class has an e-discovery focus, the student-characters (especially those playing clients) learn something about e-discovery too—from the duties of preservation to the central role of email and other ESI in litigation today.

Even though all of the students in the Sassy Sentiments Simulation do not play lawyers, all seven have the opportunity to practice and develop their lawyering skills. Six of seven characters participate in negotiating and drafting a contract.¹³³ Further, for the two students who play lawyers (Gem and Nathan) and for the one student who plays an eager-to-practice law student (Callie), the simulation provides opportunities to practice responding to client questions, conducting legal research, and advising the client about the implications of that research on business decisions.¹³⁴ Just as it is in practice, timely and clearly-written communication is essential to the functioning of the simulation. Students learn to be diligent in following the character calendars, reading and responding to email from other characters daily, and initiating discussions with other characters. These habits will serve them well in practice.

¹²⁹ See *supra* notes 6–10 and accompanying text (describing these as the objectives of legal education).

¹³⁰ Schaefer, Simulation, *supra* note 4.

¹³¹ *Id.*

¹³² See *infra* notes 138–43 and accompanying text.

¹³³ Schaefer, Simulation, *supra* note 4.

¹³⁴ See generally Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N. LEGAL WRITING DIRECTORS. 118 (2008). Obviously, Callie should not be representing a "client" as a law student. She sees the repercussions of this representation in the spring semester when her communications with Boone are not protected by any privilege and become the subject of questions in her deposition.

Students develop some of the skills by observing rather than by doing. Medical school pedagogy has long recognized the value of students modeling skills to other students.¹³⁵ This same modeling occurs in a simulation with two sets of students. For example, in my class, every character-student is interviewed by at least seven lawyers, prepared for deposition by at least one lawyer, and deposed by at least two lawyers.¹³⁶ The students who play Pickle and Boone communicate with their seven lawyers regularly—in person, on the phone, and by email. Further, Pickle and Boone review and discuss with their lawyers seven complaints, seven answers, and seven sets of written discovery.¹³⁷ In the process, all of the simulation characters have the opportunity to observe a number of different approaches to a task, decide what is effective (and what is not), and consider how they will handle these interactions and tasks in practice.

Numerous professionalism lessons can be incorporated into the simulation in the course of the year. During the spring semester of my class, the students who play characters learn the vulnerability of and demands placed upon a client or a witness who is caught up in the legal system. When they are in practice, they should be more empathetic to the stresses and demands of being a client or witness.¹³⁸ The simulation puts the student-characters into realistic professional dilemmas, and often requires them to make the wrong choice. While attorney Nathan and law student Callie sometimes make mistakes and offer poor advice,¹³⁹ Gem is the worst offender. She claims to represent both Boone and Pickle, but obviously has a conflict in doing so.¹⁴⁰ She encourages Pickle to lie to Boone about the Blu Cabinet deal, even while assuring Boone she is protecting his interests.¹⁴¹ Further, even if Gem was only Pickle's attorney, the advice is problematic because lying to Boone violates Pickle's fiduciary duty as a partner. Gem's "legal advice" in this regard eventually leads to Boone's cause of action against Pickle (for breach of fiduciary duty and fraud) and against lawyer Gem (for malpractice, breach of fiduciary duty, and aiding and abetting

¹³⁵ Coughlin et al., *supra* note 14 at 362–63.

¹³⁶ Schaefer, Syllabus, *supra* note 5.

¹³⁷ *Id.*

¹³⁸ Barbara Glesner Fines, *Teaching Empathy Through Simulation Exercises — A Guide and Sample Problem Set*, at 3 (2008), available at <http://ssrn.com/abstract=1304261> (discussing use of a simulation exercise that requires professional responsibility students to play the part of clients so that student can learn "how it feels to be a client"); Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621, 632 (2002) ("Empathy is the process of simply *knowing* what another's experience is."); Cicero, *supra* note 30, at 1019 (asserting that active learning methods like simulations are effective in teaching empathy).

¹³⁹ Nathan's simulation instructions require that he not ask Boone questions that would reveal Boone's plan to create a competing card company. This information would be important for Nathan to elicit as he negotiates an agreement that contains a non-compete clause. See Schaefer Simulation, *supra* note 4. Callie allows Boone to rely on her for legal advice, even though she is not a licensed attorney. Further, the "legal advice" she provides is often a rationalization to support the conduct Boone wants to engage in rather than legal advice that would explain the potential liability he faces for running a competing card company despite the non-compete clause. *Id.*

¹⁴⁰ TENN. RULES OF PROF'L CONDUCT R. 1.7.

¹⁴¹ Schaefer, Simulation, *supra* note 4.

Pickle's breach of fiduciary duty).¹⁴² Throughout the fall semester and again as the case unfolds in the spring semester, we discuss the lessons that transactional lawyers can learn from the mistakes of Gem, Nathan, and Callie. It is my goal that both sets of students leave the spring semester thinking "this could happen to me."¹⁴³

B. *Traditional Skills Course Meets Complex Simulation*

Using a simulation in a skills course is not new.¹⁴⁴ But a more complex simulation like the one discussed in this Article is different because it creates passionate, invested, and knowledgeable clients and witnesses, and a more realistic legal dispute—including the documents clients would possess in such a case.¹⁴⁵ The complexity of the simulation provides students the opportunity to develop skills they will need in practice, but that they ordinarily would not encounter in the classroom. Further, with realistic characters comes the necessity for students to exercise a combination of knowledge, skill, and professional judgment as they play the part of lawyers.¹⁴⁶

While the Sassy Sentiments Simulation was developed for a pre-trial litigation course, its basic fact pattern could be used or adapted for use in other litigation and dispute resolution skills courses—like mediation, arbitration, and trial practice. It would also be possible to use the same simulation for more than one of these courses during the course of a single year. For example, we could follow the student-characters through pre-trial litigation and mediation in the fall semester and then through trial practice in the spring semester.

Further, even though the Sassy Sentiments Simulation was aimed at *producing* a legal dispute, it could be adapted for skills courses where the aim is *avoiding* a legal dispute. Student-lawyers in a negotiation, contract drafting, or transactional lawyering class could help the Sassy Sentiments characters draft a partnership agreement, negotiate the terms of the real estate purchase and financing, select a new form of business organization, and negotiate the terms of the buyout. In adapting the simulation for such a class, the professor would

¹⁴² Because Gem is not represented by counsel in my Pre-trial Litigation Class, Boone's attorneys take a default judgment against her. FED. R. CIV. P. 55.

¹⁴³ CARNEGIE REPORT, *supra* note 6, at 129 (arguing that "professional ethical engagement" spans the distinction between professional ethics and wider issues of morality and character). I agree that a lawyer's morality, good character, and knowledge of professional conduct obligations are important, but would add that alone, even these are insufficient. Many lawyers and other professionals have the false sense that professional misconduct is a reflection of poor character or immoral behavior, when it is often the product of other factors such as rationalizations, justifications, or poor judgment. The simulation is meant to highlight the multitude of factors that contribute to poor decision making by lawyers.

¹⁴⁴ See *supra* note 24 and accompanying text (describing the simple disputes that are often the basis of the cases in pre-trial litigation courses).

¹⁴⁵ Michael A. Mogill, *Dialing for Discourse: The Search for the "Ever After"*, 36 WIL-LAMETTE L. REV. 1, 3 (2000) (discussing the "human element" that is often missing from traditional legal education); CARNEGIE REPORT, *supra* note 6, at 56–57 (lamenting that the focus of legal education is often the case rather than the client and that law students should learn to look at cases from the perspective of clients).

¹⁴⁶ CARNEGIE REPORT, *supra* note 6, at 82 (asserting that practice involves face to face client interaction that requires attorneys to move beyond the "distanced stance of the observer" and to begin blending knowledge, skill, and judgment).

put more emphasis on developing the documents and storyline that would enhance the realism of the exercises.¹⁴⁷

One advantage of using a complex simulation in a skills class is that it requires the students to investigate, organize, and use the facts of the case in a realistic way.¹⁴⁸ Student-lawyers must elicit information by asking the right questions of clients and witnesses, thus developing their interviewing skills. As they will in practice, student-lawyers must make sense of a large number of documents.¹⁴⁹ Lawyers must know how to uncover the key documents, create a document chronology, and determine which facts are undisputed and which must be developed further. With the simulation materials, and realistic tools like CaseMap,¹⁵⁰ student-lawyers in my pre-trial litigation class learn how to organize the facts and develop their case for trial. The realistic materials can also illustrate the difficulty of meeting the *Twombly* and *Iqbal*¹⁵¹ standards for pleading a plausible case while also complying with Rule 11¹⁵² when a client has suspicions and circumstantial evidence of an opponent's misconduct, but no concrete evidence of a key element of the claim.¹⁵³

A complex simulation adds authenticity to preparing for and taking depositions.¹⁵⁴ Student-lawyers must identify documents for the witnesses whose depositions they will take and defend.¹⁵⁵ They have the realistic experience of preparing a witness for a deposition concerning an incident that occurred many

¹⁴⁷ For example, if the student-lawyers will assist the student-characters in choosing a new entity for their business, the simulation framework could introduce issues like a potential investor or a business activity that carries a risk of liability for the owners. For other ideas of issues that might be integrated into a simulation for a choice-of-entity exercise, see Joan Heminway, *Materials for Choice of Entity Module of the University of Tennessee College of Law's Representing Enterprises Course* (on file with the author).

¹⁴⁸ BEST PRACTICES, *supra* note 8, at 46 (explaining that in practice, legal problems “consist of raw facts (not yet distilled into the short, coherent story laid out in the appellate court opinion)—facts presented by clients”); Sturm & Guinier, *supra* note 120, at 516 (“Law school has too little to do with what lawyers actually do and develops too little of the institutional, interpersonal, and investigative capacities that good lawyering requires.”).

¹⁴⁹ See Koo, *supra* note 13, at 6.

¹⁵⁰ For information about CaseMap, see *Case Map Suite*, LEXISNEXIS, <http://www.lexisnexis.com/en-us/products/casemap.page> (last visited Nov. 6, 2011).

¹⁵¹ See generally *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

¹⁵² FED. R. CIV. P. 11.

¹⁵³ In 2011, Pickle and her attorneys did not know (but had their suspicions) about what Boone had done to interfere with Sassy Sentiments' business relationship with one of its biggest customers—the customer suddenly cut its orders from \$3,000/month to \$500/month and then placed no further orders. Pickle and her counsel were correct in their suspicions, but had no evidence of *what* Boone had done. (Had he made a slanderous statement to the customer? Stolen the business for his new company?) Students who pursued a tortious interference claim learned the difficulty of pleading a cause of action that would withstand a motion to dismiss given the reality that only their opponent knew what actually happened. Schaefer, *Simulation*, *supra* note 4.

¹⁵⁴ This is different from the typical law school simulated deposition experience. Michael J. Davey, *Stress Tips for the Beginner Deposition Taker*, AT ISSUE, Fall 2010, at 1, available at <http://www.pabar.org/public/ylld/pubs/atissue/fall2010ai.pdf> (describing author's only law school deposition taking experience as “in a word, fake.”).

¹⁵⁵ Students have learned how Concordance can be used to create “witness kits.” *Concordance Fundamentals Training Materials*, *supra* note 46, at 20.

months in the past. Student-lawyers must also think about the documents they may want to use in summary judgment and lay a foundation for those documents with their deposition questions.¹⁵⁶ Then, when students move for summary judgment, they must support the motion with the exhibits—including documents and deposition transcripts—necessary to establish the undisputed facts.¹⁵⁷ In sum, the mountain of information generated by a complex simulation transforms all of these pre-trial litigation tasks into something reflective of what students will soon encounter in practice. A complex simulation could be used to similar effect in any skills class.

Further, without a complex simulation, a student-lawyer in a skills class might have the unrealistic experience of making decisions without consulting a client. The complex simulation brings the client back into the picture, allowing student-lawyers to experience the real challenges of communicating with and collaborating with a client.¹⁵⁸ My students are not permitted to file a complaint (or answer interrogatories or file a motion) without seeking client input.¹⁵⁹ As a result, they learn the importance of explaining what they have drafted, answering client questions, seeking client input, and requesting that the client confirms the accuracy of the stated facts. In the process, students often learn first-hand that clients have veto authority over the claims that will be pursued.¹⁶⁰

Other times, the unscripted clients in a complex simulation urge their attorneys to do things that the *attorney* should veto—and there is a lesson there, too. In one semester of my class, Pickle convinced some of her attorneys to provide an interrogatory answer that was contradicted by her own documents. This incident highlighted for the students how easy it is to rationalize making a bad decision at the client's suggestion. This and similar incidents provide an opportunity to discuss what can go wrong when we try to please our clients. We discuss lawyers' legal and ethical obligations in these contexts,¹⁶¹ as well as the practical aspect of explaining this to a client. Without the simulation, students would insist that they would never falsely answer an interrogatory. But

¹⁵⁶ See, e.g., *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007) (explaining the requirements for admissibility of ESI, including a lengthy discussion of methods to establish ESI is authentic); THE SEDONA CONF. WORKING GRP. ON ELEC. DOCUMENT RETENTION & PROD., THE SEDONA CONFERENCE COMMENTARY ON ESI EVIDENCE & ADMISSIBILITY (2008), http://www.thessedonaconference.org/dtlForm?did=ESI_Commentary_0308.pdf (enter your name and email address in the form, then click the "Download" button).

¹⁵⁷ FED. R. CIV. P. 56(c)(2).

¹⁵⁸ CARNEGIE REPORT, *supra* note 6, at 14 (noting that attorneys must develop the "important skills of interaction . . . through modeling, habituation, experiment, and reflection"); *id.* at 115 (explaining that expert judgment is "the ability to size up a situation well, discerning the salient features relevant not just to the law but to legal practice, and, most of all, knowing what general knowledge, principles, and commitments to call on in deciding on a course of action").

¹⁵⁹ Schaefer, Syllabus, *supra* note 5.

¹⁶⁰ For example, in 2010, Pickle's lawyers urged her to file a claim against Gem Finch, but she refused because of their personal relationship. Just as she would in practice, Pickle gets to make this decision in our class. See TENN. RULES OF PROF'L CONDUCT R. 1.2.

¹⁶¹ TENN. RULES OF PROF'L CONDUCT R. 3.4 ("A lawyer shall not . . . counsel or assist a witness to offer false or misleading testimony", "disobey an obligation under the rules of a tribunal", nor "fail to make a reasonably diligent effort to comply with a legally proper discovery request."); TENN. RULES OF PROF'L CONDUCT R. 1.16 (attorney must withdraw if the representation will result in violation of the professional conduct rules).

with the simulation, they find out first-hand that vigilance is needed to prevent this from happening in practice.

C. Using Complex Simulations to Teach Doctrinal Courses

Incorporating a simulation—complex or otherwise—into a doctrinal course gives students the opportunity to learn doctrine in context.¹⁶² It helps students become engaged in the material, and makes it more likely that students will remember course concepts when they encounter similar issues in practice.¹⁶³ Some trade-off of coverage can be justified by what is gained in understanding.¹⁶⁴ Many professors report great success giving up some coverage in order to incorporate simulations into their doctrinal courses.¹⁶⁵

Using a complex simulation as I have defined it, with all of its documents and character involvement,¹⁶⁶ may provide too much realism for some doctrinal classes. There may not be sufficient course time to develop the skills necessary to address the needs of the clients and the case. For a truly complex simulation to work in a doctrinal class, students must either enter the class with some foundation in the necessary skills (so skills development will not overwhelm the doctrinal focus of the class) or the skills must be integral to the doctrine (justifying the time it will take to develop them).

Educators could address this issue by making key skills-based courses prerequisites to doctrinal courses that incorporate complex simulations. If a certain skill will be necessary for the student-lawyer to perform in the doctrinal course simulation, then the related skills-based course could be a prerequisite. For example, if an advanced civil procedure or business torts course incorporated a complex simulation, it might be useful to make client interviewing, pre-trial litigation, or trial practice prerequisites.¹⁶⁷ Advanced classroom-based practicums¹⁶⁸ and capstone courses with a doctrinal focus would also be good can-

¹⁶² Ferber, *supra* note 11, at 431 (“[B]y providing real world context, simulations bring home to the student the relevancy of what is to be learned.”).

¹⁶³ HESS, TECHNIQUES, *supra* note 11, at 194 (arguing that simulations promote interest in subject matter, motivate learning, and result in better knowledge retention and understanding of how to apply that knowledge); Maranville, *supra* note 40, 56–57 (“Lawyering-task context can provide the base of experience that will allow our students to retain and use what we teach them after they leave school.”); Schwartz, *supra* note 29, at 32 (quoting a student who explains “[T]hat class [in which students were placed in four-person law firms for simulated exercises] brought back my enthusiasm for wanting to go out and practice”).

¹⁶⁴ HESS, TECHNIQUES, *supra* note 11, at 196 (responding to assertion that simulations result in loss of coverage by noting the benefit that the simulation provides in a “rich environment for the discussion of a variety of issues”); SCHWARTZ ET AL., *supra* note 29, at 29 (asserting that activities that allow students to be actively involved in class might limit coverage, but “students’ greater engagement during the activities will produce deeper understanding and will be far more memorable years later”).

¹⁶⁵ HESS, TECHNIQUES, *supra* note 11, at 195–222 (describing in various professors’ words the benefits of using simulations in doctrinal courses including courses in Constitutional Law, Civil Procedure, Torts, and others).

¹⁶⁶ See *supra* notes 37–47 and accompanying text.

¹⁶⁷ Which skills course would depend upon how the professor wants to explore the doctrine. For example, if students will explore course doctrine through a simulated mock trial, then trial practice would make sense as a prerequisite.

¹⁶⁸ For examples of such courses (though it is not clear from the descriptions whether the simulations used are complex as I define the term here), see *Curriculum — Second and*

didates for complex simulations. Because such courses are intended to build upon the skills and doctrine learned in the previous two years,¹⁶⁹ students should have an adequate foundation to tackle a complex simulation.

Complex simulations are also the right fit for doctrinal courses in areas where skill is central to understanding the subject area of law.¹⁷⁰ An e-discovery course fits this description.¹⁷¹ Even without handling all of the other stages of pre-trial litigation (as in the course I describe in Part III), e-discovery students would benefit from a semester balanced between learning e-discovery law and conducting e-discovery in a case with realistic clients and documents. What is lost in e-discovery doctrine coverage is surpassed by the confidence students gain in the tasks and challenges of e-discovery practice.¹⁷² Confidence allows junior attorneys to recognize and challenge the improper practices and incorrect directives of clients or senior lawyers (who may be equally uneducated in e-discovery).¹⁷³ In a time when sanctions in e-discovery cases are on

Third Year, *supra* note 23 (describing numerous practicums, including Advanced Family Law Practicum, Business Planning Practicum, Corporate Counsel Practicum, Insurance Practicum, and Intellectual Property Practicum). See also *Washington and Lee's New Third Year Reform*, WASH. & LEE L. SCH., <http://law.wlu.edu/thirdyear/> (last visited Nov. 6, 2011).

¹⁶⁹ Maranville, *supra* note 40, at 61 (articulating her goal of a “spiral curriculum in which students encounter fundamental doctrinal concepts and lawyering tasks repeatedly throughout their legal education, but at increasingly sophisticated levels”).

¹⁷⁰ In addition to the e-discovery course discussed in this section, another example of such a course could be an evidence class that is taught in conjunction with a trial practice class. The students’ understanding of evidence law would be enhanced by developing the skills needed in the courtroom to introduce evidence in a simulated case. See, e.g., University of Tennessee College of Law Evidence-Advocacy and Trial Practice Course Descriptions (courses taught simultaneously using the same problems) (on file with the author); HESS, TECHNIQUES, *supra* note 11, at 215 (describing Professor Laura Berend’s Trial Advocacy Evidence class in which she teaches “evidence through performance” using students in the class as witnesses and judges when they are not lawyers); Robert P. Burns, *Studying Evidence Law in the Context of Trial Practices*, 50 ST. LOUIS U. L.J. 1155, 1162–63 (2006) (discussing teaching evidence in the context of trial advocacy problems and explaining the need to use relatively long hypotheticals to “approximate the level of detail that exists in important cases that actually go to trial”). A complex simulation could be integrated successfully in such courses.

¹⁷¹ Text books are now available for e-discovery classes. See, e.g., SHIRA A. SCHEINDLIN & DANIEL J. CAPRA, *ELECTRONIC DISCOVERY & DIGITAL EVIDENCE IN A NUTSHELL* (2009). A text book could be used in conjunction with a complex simulation. In fall 2011, I used the Sassy Sentiments Simulation in a new e-discovery course.

¹⁷² Losey, *supra* note 89, at 986–87 (asserting that unethical conduct in e-discovery lies in a lack of technological sophistication, overzealousness, incompetence, and a lack of development of professional duties).

¹⁷³ See *Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-B, 2008 WL 66932 (S.D. Cal. Jan. 07, 2008), *vacated in part*, No. 05CV1958-RMB, 2008 WL 638108, (S.D. Cal. Mar. 05, 2008), *appeal dismissed*, *Qualcomm Inc. v. Batchelder*, 327 Fed. Appx. 877 (Fed. Cir. Aug. 18, 2008), *on remand*, *Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-B, 2010 WL 1336937 (S.D. Cal. Apr. 02, 2010). Though the *Qualcomm* case ultimately concluded with no sanctions against the attorneys, the attorneys made extraordinary mistakes in addressing e-discovery, including relying upon the client to gather and search for documents which resulted in tens of thousands of responsive documents not being located or produced, withholding twenty-one responsive documents that were located by a junior associate during trial, and not questioning the adequacy of the document collection and production when inconsistencies should have caused them to do so. *Qualcomm*, 2010 WL 1336937, at *1–8.

the rise,¹⁷⁴ junior lawyers need more experience to build knowledge, skills, and confidence. A complex simulation can provide that experience.

VI. CONCLUSION

The two-semester Sassy Sentiments Simulation transforms a discussion of e-discovery doctrine into an exercise that creates lawyers with e-discovery experience. After graduation, these students will never handle their “first” e-discovery case. They already handled that case in law school. The absence of documents in a typical pre-trial litigation case file makes practicing essential e-discovery skills impossible or unrealistic. The simulation changes that. Beyond documents, though, the Sassy Sentiments Simulation replicates a real case. It creates knowledgeable clients and witnesses and results in a realistic legal dispute. This is an ideal setting for law students to learn how to practice law.

As legal educators question how we can improve skills and professionalism training, the answer may lie in complex simulations. Of course, simulations are nothing new. But with a little work, they can be transformed. When students become engaged characters who develop the facts of a simulation, the skills training can be more realistic and the opportunities for professionalism development more prevalent. Ultimately, the students do the hard work, and that work is rewarded through the authentic experience they gain.

¹⁷⁴ See generally Willoughby et al., *supra* note 85, at 790 (“E-discovery sanctions are at an all-time high.”).