

Spring 2007

## The Use of Actual, Not Fictional, Hypotheticals

Peter M. Edelstein

Follow this and additional works at: <https://digitalcommons.fairfield.edu/nealsb>

---

### Recommended Citation

Edelstein, Peter M. (2007) "The Use of Actual, Not Fictional, Hypotheticals," *North East Journal of Legal Studies*: Vol. 13 , Article 8.

Available at: <https://digitalcommons.fairfield.edu/nealsb/vol13/iss1/8>

This item has been accepted for inclusion in DigitalCommons@Fairfield by an authorized administrator of DigitalCommons@Fairfield. It is brought to you by DigitalCommons@Fairfield with permission from the rights-holder(s) and is protected by copyright and/or related rights. **You are free to use this item in any way that is permitted by the copyright and related rights legislation that applies to your use. For other uses, you need to obtain permission from the rights-holder(s) directly, unless additional rights are indicated by a Creative Commons license in the record and/or on the work itself.** For more information, please contact [digitalcommons@fairfield.edu](mailto:digitalcommons@fairfield.edu).

**THE USE OF FACTUAL, NOT FICTIONAL,  
HYPOTHETICALS**

by

**Peter M. Edelstein\***

**Abstract**

For as long as this author can remember, principals of law have been illustrated and explained by the use of hypotheticals in the form of statements or questions composed of contrived scenarios and the use of alphabet letters instead of actual events and persons.

This author proposes that traditional hypotheticals trade off short term insight for long term understanding and retention. Hypotheticals based on recognizable people and facts gleaned from actual events result in a more effective teaching technique.

---

\*Professor of Law, Pace University, Lubin School of Business, Pleasantville, New York.  
Member, Edelstein & Lochner LLP, Mount Kisco, New York.

I. Introduction.

The author's premise was derived, not from sudden realization of the blandness and small profit in the use of antiseptic hypotheticals using "A's" and "B's" and simplistic fact patterns, but as the result of a dismaying epiphany that one cannot buy a newspaper without seeing a breach of law related article on the front page.

In law school students heard (and now we perpetuate) questions and statements like:

Assume A says to B: "I will sell you my car for \$1,000." Does an offer exist?" or "A says to B: "I will sell you my house for \$500,000." B says, "O.K. it's a deal." Is the Statute of Frauds applicable?

How dull, unimaginative, uninteresting and forgettable. Events constantly occurring around us furnish a rich and fascinating mine of living material to supplement and replace traditional hypotheticals with meaningful facts to which the students' can readily relate. This writer proposes that traditional hypotheticals trade off short-term insight for long-term understanding.

The word "hypothetical" has evolved to serve two functions as a teaching technique: first, to illustrate an example of a legal doctrine, theory or other "rule;" and second, to elicit a response that demonstrates the students' understanding of the substantive material. The author urges both usages can make more effective educators and better students by supplementing the fictional hypothetical with the factual one.

## II. Practice.

Assume (for purposes of this paper) that instructors' objectives are:

- (i) getting the students' attention,
- (ii) creating an interest in the subject matter,
- (iii) generating a desire to learn.

While it is beyond the scope of this article to delve into the "psychology of education," probably all instructors have had the experience of illustrating a rule based on "real life" experience, especially one in which the instructor may have been involved. Students always seem more attentive and interested in these examples. There is a sense that the students' tend to retain the point because of their emotional identification with the instructor. This emotional involvement converts into a motivation to understand and more easily learn the subject matter.

When teaching the concept of consideration, disputed debts and past consideration, the following "true" hypothetical is the platform:

I live in a house that faces a beautiful view of a large lake. When I bought the house twenty-six years ago there was a magnificent tree in the yard between the house and the lake. Each successive year I noticed that the tree lost its leaves earlier in the summer. Knowing nothing

about trees, I diagnosed that the tree was sick. I called a tree company for a second opinion. The arborist confirmed that the tree was sick and had to be removed. We entered a **contract** to have a tree removed from my property for \$1,000.00. After the arborist and his crew climbed the tree, they came down and the arborist told me he could not do the job because the tree had Dutch Elm disease and the limbs were brittle and therefore may crack and cause his workers to fall. I was really ticked off and told the arborist so, he said he would speak to his men. Upon his return he said that the men told him they would do it for more money, so the arborist and I **agreed** that the amount for the tree removal would now be \$2,000. Before the bill was received, I felt that the arborist had scammed me as to the additional \$1,000.00 and this was his way of getting another \$1,000. I disputed the bill in good faith.

Almost without fail, the students seem to learn the rules related to consideration, (that there was no consideration for the second promise based on pre-existing duty and the genuineness of the disputed debt). Students easily relate to this

type of anecdote. Because of an identification with the author's legal problem, the students become interested in the facts, and as a result are motivated to remember the rules being taught.

"Personal" hypotheticals are easy to convey and make for lively discourse. Hypotheticals that are adapted from current affairs seem to be even more beneficial. Additionally, they expand the students' universe beyond I-pods, beer and sex, to include world events.

### III. Methodology and Illustrations.

Where do we find the bases for such hypotheticals (other than our personal experiences)? To plant seeds that may flourish this author believes that newspapers (*The New York Times* is the author's choice because of its comprehensive coverage) may be the most fruitful source.

Some random examples:

1. Subjects for possible hypotheticals in the areas of: *contracts, offer, acceptance, consideration, restrictive covenants, interference with contractual relationships:*

#### "A CBS DEAL WITH COURIC MAY BE NEAR

CBS's long courtship of Katie Couric has moved close to a conclusion. A deal to recruit her away from NBC's "Today" show and into the nightly anchor chair at CBS News may be completed as early as this week, people close to the negotiations said yesterday.

While Ms. Couric is under contract to NBC through the end of May and, under the terms of her current deal, cannot have any formal talks with CBS or another network until the beginning of that month, NBC executives decided in recent days to permit Ms. Couric's representatives to discuss outside offers for her future services."

(*New York Times*, April 4, 2006,  
by Bill Carter)

This writer suggests that there is not a student in class who cannot identify with Katie and her horrible problems in deciding which billion-dollar offer to accept.

2. Subjects for possible hypotheticals in the areas of: *negligence, fraud, elements of a trial, concept of a class-action, settlement, federal drug regulation, rules of evidence, damages:*

#### "JURY TO START DELIBERATION IN TWO VIOXX INJURY CASES

After a month of testimony, the fourth Vioxx-related personal injury trial ended Monday with well-worn closing arguments from lawyers for Merck and for two men who say the company's

drug Vioxx caused their heart attacks.

Less than two years after Merck withdrew Vioxx from the market, and eight months after the first Vioxx case reached a verdict, litigation over the drug has settled into something of a groove.

In this case, as in the earlier suits, lawyers for Merck insisted that the company fully disclosed Vioxx's potential dangers to regulators and the public. Lawyers for the plaintiffs pointed to documents and e-mail messages showing that company scientists were concerned about Vioxx's risks long before Merck withdrew the drug from the market in September 2004."

(*New York Time*, April 4, 2006, by Alex Berenson)

While college students are too young to enjoy the thrills of arthritis, they can relate to the potential damage of a "bad" medicine on the market.

3. Subjects for possible hypotheticals in the areas of: *the FAA, contract law, breach of contract, labor unions, power of labor unions, arbitration, negotiation, and settlement:*

#### "6,000 PILOTS AT DELTA AIR VOTE TO STRIKE

The nearly 6,000 pilots at Delta Air Lines, proving resistant to a second round of concessions, voted overwhelmingly to approve a strike should their contract be voided by an arbitration panel, the pilot's union said yesterday. The panel is expected to issue a ruling by April 15."

(*New York Times*, April 5, 2006, by Jeff Bailey and Christopher Elliot)

Any student planning travel for a spring break or home at the end of the semester wants to know about this subject.

4. Subjects for possible hypotheticals in the areas of: *ethics, criminal law, fraud, trials, witnesses, evidence and the relative weight thereof, politics and the law:*

#### "IN ENRON TRIAL, A CALCULATED RISK - TWO FORMER CHIEFS PREPARE TO TAKE THE STAND IN THEIR OWN DEFENSE

Two of the country's best corporate salesmen are about to make the most important pitches of their lives.

After 32 days of testimony from 22 witnesses, prosecutors rested their case last week in the criminal trial of Enron's former chief executives, setting the stage for the defense to take over as of Monday.

Now the trial has moved to what may be the make-or-break moment for both sides: the testimony of Jeffrey K. Skilling and Kenneth L. Lay. Mr. Skilling could take the stand as early as Wednesday.”  
(*New York Times*, April 4, 2006, by Alexei Barrionuevo and Kurt Eichenwald) (Author's note: Lay is now dead; Skilling in jail)

Cases of possible massive wrongdoing and possible absence of all ethical considerations captivate everyone.

5. Subjects for possible hypotheticals in the areas of: *ethics, taxes, contracts, illegal bargains, and sex.*

“AN OLD  
PROFESSION THAT'S NEW  
TO DOING TAXES

At 22, Sarah Patterson has already spent several years in the working world, but she has yet to

report her income to the government.

For one thing, Ms. Patterson, of Manhattan, works in a cash business, with no withholding tax. But she is also worried about how to list her profession on a 1040 form – she is a foot fetish model.”  
(*New York Times*, April 5, 2006, by Corey Kilgannon)

Everybody loves this.

6. Subjects for possible hypotheticals in the areas of: *start-up of small businesses, financing a small business; entrepreneurship:*

“FOR START-UPS,  
WEB SUCCESS ON THE  
CHEAP

When Seth J. Sternberg and two colleagues started Meebo, a Web-based instant messaging service, they didn't go looking for venture capitalists. Using their credit cards, they financed the company themselves to the tune of \$2,000 apiece. It was enough to cover their biggest expense – leasing a few computer servers at \$120 a month each.

Within a month of its introduction in September 2005, Meebo was getting as many as 50,000 log-ins a day, and it needed more servers. It decided to take a modest \$100,000 from three angel investors, wealthy individuals who typically contribute small amounts but do not get involved in management decisions.”

(*New York Times*, November 9, 2006, by Miguel Helft)

Students dream of becoming wealthy from an internet scheme.

7. Subjects for possible hypotheticals in the areas of: *contracts, insurance, causes of action*:

“INSURER SUED FOR  
REFUSING TO PAY COSTS  
OF ANOREXIA

A New Jersey couple filed suit against Aetna, Inc., the Hartford-based insurance company, on Wednesday, claiming that it refused to fully cover their daughter’s treatment for anorexia.

The suit was filed in United States District Court here. The couple, Cliff and Maria DeAnna

of Mountainside, N.J., said Aetna refused to pay for nearly 10 weeks of their daughter’s inpatient treatment, saying her eating disorder was not “biologically based.” Insurers have balked at covering mental illnesses that they say do not have a proven physiological basis.”

(*New York Times*, November 9, 2006, by Tina Kelly)

Who can resist an anorexia case?

8. Subjects for possible hypotheticals in the areas of: *contracts, mistake of fact, mistake of value, title to personal property, remedies, consideration, difference between sufficiency of consideration and adequacy of consideration*:

“COULD BE A POLLOCK;  
MUST BE A YARN

After retiring from truck driving in 1987, Teri Horton devoted much of her time to bargain hunting around the Los Angeles area. Sometimes the bargains were discovered on Salvation Army shelves and sometimes, she willingly admits, at the bottom of Dumpsters.

Even the most stubborn deal scrounger probably would have

been satisfied with the rate of return recently offered to her for a curiosity she snagged for \$5 in San Bernardino thrift shop in the early 1990s. A buyer, said to be from Saudi Arabia, was willing to pay \$9 million for it, just under an 180 million percent increase on her original investment. Ms. Horton, a sandpaper voiced woman with a hard-shell perm who lives in a mobile home in Costa Mesa and depends on her Social Security checks, turned him down without a second thought.”

(*New York Times*, November 9, 2006, by Randy Kennedy)

Doesn't everyone wish for a find like this?

9. Subjects for possible hypotheticals in the areas of: *environmental law, remedies, rights of owners of real property versus interests of public, federal law, jurisdiction:*

“IN CAPE COD’S DUNES,  
SOMETHING’S GROWING  
BESIDES SCRUB PINE

Seen from the top of a sand-strewn bluff, the Atlantic, flecked with white caps, stretches out for miles along a deserted beach. Shrubs with tiny leaves, turning red in autumn, rustle in the wind.

On a dune not far away, two freshly built, very large houses interrupt this near-primeval landscape in the midst of the Cape Cod National Seashore, a federally protected area established in 1961 to limit exactly that kind of development.

Nearby, a Modernist beach house built around the time of the park’s founding is almost hidden in the dunes. Small and brown, it sits lightly over the land, on stilts. But while new houses, some still covered in Tyvek insulation, sprout on privately owned land in the midst of the national seashore, this one, like dozens of others from the same era, has been taken over by the National Park Service, which administers the seashore, and it is now rapidly decaying.

Local environmental and preservation groups, as well as some town officials and residents, worry about the scale of the new houses, additions and outbuildings that are being built – or may one day be built – on 600 private plots in the fragile 27,000-acre seashore, as wealthy owners push the limits of Park



Service guidelines, or ignore them altogether. Although just a handful of mansions have gone up so far, preservationists are concerned that market forces, combined with the increasing recognition by landowners that the guidelines are not legally binding, will lead to the kind of over-building they moved to Cape Cod to avoid.”

(*New York Times*, November 11, 2006, by Tracie Rozhon)

This case illustrates the risks involved when sufficient prior research is not done or there is a failure to recognize the myriad of jurisdictional issues.

10. Subjects for possible hypotheticals in the areas of: *criminal law, sentencing, pleas, evidence, or jurisdiction:*

“YOUNG SNIPER IS  
SENTENCED TO 6 LIFE  
TERMS

Lee Malvo was sentenced Wednesday to life in prison without chance of parole for six murders here in Montgomery County, shootings that were among a three-week series of sniper attacks that terrorized the Washington area four years ago.

In a brief statement, Mr. Malvo, now 21, told the court that he knew he could never be forgiven.

“I’m truly sorry, grieved and ashamed for what I’ve done,” he said.

Mr. Malvo pleaded guilty in October to the six killings here, where the series of 13 shootings began and ended in October 2002.

He testified here in May against his accomplice and onetime mentor, John A. Muhammad, providing a chilling account of their attacks around Washington and elsewhere across the country.

But despite the contrition he voiced Wednesday and his cooperation with the authorities in their case against Mr. Muhammad, he was sentenced by Judge James L. Ryan of Montgomery County Circuit Court to six consecutive life terms without the possibility of parole, the most severe penalty possible.

It is unlikely, however, that he will ever serve time in Maryland.

He has already been sentenced to life in prison in Virginia for shootings there and was sent to Maryland on the condition that he be returned after the case against him here was resolved.”

(*New York Times*, November 9, 2006, AP, author not identified)

This event captivated the entire nation for its sheer brutality.

#### IV. An Endorsement for the Premise Supporting the Use of Meaningful Hypotheticals.

The author is not the first to propose that actual events be used as teaching techniques.

When Jesus wanted to teach his disciples, he did not use hypotheticals involving “Mr. A” and “Ms. B.” Rather, he used parables, with thought-provoking and meaningful themes (and references to possible legal topics for class discussion).

From Luke, Chapter 10, Verses 30-35:

Just then a lawyer stood up to test Jesus. “Teacher,” he said, “what must I do to inherit eternal life?” Jesus said to him, “What is written in the law? What do you read there? The lawyer answered, “You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself.” And Jesus said to

him, “You have given the right answer; do this, and you will live.” But wanting to justify himself, the lawyer asked Jesus, “And who is my neighbor?”

Jesus replied, “A man was going down from Jerusalem to Jericho, and fell into the hands of robbers, who stripped him, beat him, and went away, leaving him half dead (criminal law?). Now by chance a priest was going down that road; and when he saw him, he passed by on the other side (jaywalking and ethics?). So likewise a Levite, when he came to the place and saw him, passed by on the other side (more jaywalking and ethics?). But a Samaritan while traveling came near him; and when he saw him, he was moved with pity. He went to him and bandaged his wounds (assault?), having poured oil and wine (contractual capacity?) on them. Then he put him on his own animal, brought him to an inn (the law of innkeepers, bailments?), and took care of him (ethics?). The next day he took out two denarii, gave them to the innkeeper (consideration, hospitality law?), and said, “Take care of him

(contract?); and when I come back, I will repay you whatever more you spend (debt?).”

Jesus asked: “Which of these three, do you think, was a neighbor to the man who fell into the hands of the robbers?” The lawyer said, “The one who showed him mercy.” Jesus said to him, “Go and do likewise.”

Of course, the question that begs to be asked is why did Jesus use parables. Matthew, Chapter 13, Verses 10 and 11, provides the answer:

Then the disciples came and asked Jesus, “Why do you speak to them in parables?” He answered, “To you it has been given to know the secrets of the kingdom of heaven, but to *them* it has not been given...” (In Aramaic the word *them* has been loosely translated to mean “college students”).

While the quoted biblical references are lengthy, they are easily paraphrased and emphasize the author’s premise.

#### V. Conclusion.

Instructors desire to have the students’ attention, create an interest in the material and generate a desire to learn. All this can be more easily and gracefully effectuated by creating an emotional connection with our students and the subject

matter, thereby producing a more positive motivation to learn. This writer proposes that real-world illustrations are more effective tools to achieve these results than simplistic, abstract or fictional hypotheticals.