Focused and Fun: A How-to Guide for Creating Hypotheticals for Law Students

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This article offers an easy-to-follow guide to creating hypotheticals for legal-writing classes, along with examples of hypotheticals that I have used in the past. I am familiar with this topic because I have been creating hypotheticals for first- and second-year students for over ten years. Perhaps because I handled a variety of issues in my 25 years as a commercial litigator, the skill comes naturally. The part I enjoy most is creating facts to suit my teaching and storytelling goals, something that I could not do as a practitioner. It could also be that I like to develop characters and scenarios because I have some deep-seated desire to be a fiction writer. In any event, I have created hypothetical problems for beginning and advanced legal-writing courses, moot-court competitions, and final exams. Not only do these problems teach students how to write, they also teach them how to synthesize a rule, how to organize a legal argument, how to separate legally dispositive facts from irrelevant facts, and how to analyze legal issues that they may not have been exposed to yet in their doctrinal courses.

Through trial and error (a process that continues to date), I have devised a checklist to help ensure that my hypotheticals are generally workable depending on the pedagogical goal for each assignment, whether a short, informal memo or a full appellate brief — or anything in between. This article describes the many factors I consider, progressing from the least-complex assignments to the most complex. Part 1 describes a general ten-step

checklist for legal-writing hypotheticals. Part 2 addresses special considerations for 1L students and discusses my approach to hypotheticals (with examples) for the first and second semesters. Part 3 addresses the advantages and disadvantages of using sample or model answers.

Part 1: A Basic Ten-Step Checklist for All Legal-Writing Hypotheticals

Below are ten items that I always consider when creating a hypothetical:

(1) Does it teach CREAC structure?

With the exception of some second-year problems that tend to be based purely on issues of law, most assignments in my school's legal-writing program are designed to elicit student work product that follows the *CREAC* formula: *Conclusion*, *Rule*, *Explanation*, *Application*, and *Conclusion*. This goal tends to eliminate problems based exclusively or almost exclusively on pure issues of law, in which the facts are largely irrelevant.

(2) Does it teach rule synthesis?

Synthesis "is the process of finding collective meaning — what the cases as a group stand for — even though that meaning cannot be found in any one individual case."[1] Synthesis is not just describing one case, then a second case, and then a third case. Instead, the legal writer has to explain what the cases have in common and organize them around a common thread. In other words, given the three cases' facts and holdings, what new hypothesis or observation emerges about the controlling rule's meaning and application?

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[1] Richard K. Neumann, Jr., Ellie Margolis & Kathryn M. Stanchi, *Legal Reasoning and Legal Writing* 94 (8th ed. 2017).

Typically, if students are analyzing more than one case, they will have to learn rule synthesis. For the students' first project, I prefer to use a hypothetical in which the synthesis is relatively straightforward. Giving these brand-new students daunting cases — cases that fail to clearly announce a rule or that are weighed down by antiquated language — is counterproductive. They are already being inundated with all that is new and challenging about law school. The last thing I want is for them to turn their backs on legal writing before they even get started. If new students are able to wrap their brains around two or three straightforward cases to begin with, then they are more likely to approach the process with enthusiasm. Reading and writing about two or three cases during the first weeks of law school is intimidating, even when opinions are clear and concise.

(3) Does it teach analogical reasoning?

Analogical reasoning, an important form of legal reasoning, "justifies a result by making direct factual comparisons between the facts of prior cases and the facts of the client's situation."[2] It also means distinguishing the facts of prior cases from the facts in your hypothetical. To teach this skill, you must tailor your problem to fall within the cracks of precedent so that students will have some basis on which to compare and contrast the hypothetical facts with the cases' facts.[3] It's also important to remember your students' experience level. Beginning legal writers find it difficult to analogize if the facts in the precedents are too attenuated from the

[2] Linda H. Edwards, *Legal Writing and Analysis* 56 (2d ed. 2007).

[3] Neumann, Margolis & Stanchi, *Legal Reasoning* at 95 (offering a concise and helpful checklist on how to analogize and distinguish: (1) be sure that the issue in the precedent is the same one that you are trying to resolve; (2) identify the precedent's determinative facts, looking for crucial facts as opposed to coincidental facts; (3) compare the precedent's determinative facts with your facts, looking for those that are equivalent; and (4) distinguish those facts that are different, using the steps above).

facts in the hypothetical. In fact, they may have trouble grasping why the precedent is even on point.

For example, I created a hypothetical for second-year students on the existence of an "ombudsman" privilege. The hypothetical was placed in the district court of Arizona, and the only Ninth Circuit case on point involved whether a privilege should be recognized for unlicensed social workers under an employee-assistance plan. Even my 2Ls initially failed to discuss the Ninth Circuit case, reasoning that because it did not involve the ombudsman privilege directly, it was not on point. So for a 1L student who's still wrestling with the difference between a holding and dicta — or whether a 1910 Supreme Court case takes precedence over a 2016 court-of-appeals case — a hypothetical requiring this leap in logic would have been too difficult.

(4) Does it teach policy?

I like to choose a problem that forces students to think about and address the policy or purpose behind the controlling rule. While "every legal rule has at least one purpose," courts do not always state the policy directly.[4] Again, for the first project, I like to create a hypothetical in which courts express the purpose or policy directly. In my experience, students are at first uncomfortable with and confused about policy in general. They think of it as a way to inject their opinion about a case or issue, as opposed to relying on the policy as expressed under the law. In addition, when they write about policy as part of a larger memo or other project, they often do not know where that discussion belongs. Does it go at the beginning? Does it go at the end? Does it belong in the middle of a case discussion? Of course, my answer is always that it depends, but I like using a hypothetical in which this issue of placement and analysis surfaces.

[4] *Id.* at 94–95.

(5) Is it a realistic scenario that teaches following instructions?

If possible, I try to devise hypotheticals that sound real. This just means that I use real-sounding names, I avoid fictional circuits or fictional statutes, and I embody my fictional characters with lifelike feelings. Because truth is stranger than fiction, this isn't much of a challenge. For the first several years, I extrapolated from cases I had handled in practice. But now, the sky's the limit for what stories and characters I use.

Besides using a realistic story, I use instructions that require students to focus on what the assignment is. This might seem obvious, but I have found that students do not always follow instructions, and a hypothetical helps hone that skill. For example, I have tried two kinds of instructions in my hypotheticals: those that are precise and those that are more ambiguous, requiring the student to think about what the assigning attorney really wants (as is often the case in real life).

A precise instruction, for example, might tell the student to focus on only one of a claim's three elements. Or it might instruct the student to focus on only the best defense to a claim.

In contrast, an ambiguous instruction might present a statute and instruct the "associate" to discuss any "potential pitfalls." An example of that type of instruction is contained in this article in part 2. In my experience, the "ambiguous" instruction is more likely to spark some interesting class discussion, but students prefer a precise instruction so that they can more easily follow a road map.

(6) Does it avoid triggering student sensitivities?

Fortunately, I have yet to have a student complain about a hypothetical, aside from its complexity or difficulty. When I started teaching, my instinct was to use lightning-rod issues to provoke strong feelings in the students and keep them interested.

I wanted to use issues revolving around abortion, transgender issues, same-sex marriage, and similar issues. I was dissuaded from doing so, and in hindsight, that was the right decision.

Of course, one would want to avoid any cases in which a student might have a direct interest, assuming that a professor would have reason to know of that student's interest or involvement. Yet students from somewhat smaller jurisdictions may occasionally be familiar with precedent because of some personal family involvement in the case. I'm not sure how to avoid this entirely, and it is probably less of an issue in the larger jurisdictions.

Concern about student sensitivities is real: law schools have reported instances of student complaints about exam hypotheticals. For example, nine students at DePaul University's College of Law complained when a professor used the N-word in a criminal-law hypothetical about a white supremacist.[5] Similarly, at Howard University, two students filed a sexual-harassment case against a professor based on a hypothetical in which a woman complained that she had been inappropriately touched during a Brazilian wax.[6] Finally, white students complained when a University of Texas law professor, who is black, gave an exam asking students to argue in favor of school segregation.[7]

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[5] Debra Cassens Weiss, *Law Students Complain About Prof's Use of Racial Slur in Hypothetical Involving White Supremacist*, ABA J., Mar. 1, 2018, https://www.abajournal.com/news/article/law_students_complain_about_profs_use_of_racial_slur_in_hypothetical_involv?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Daily+News#When:18:35:00Z.

[6] Samantha Harris, *Brazilian Waxing Hypothetical on Law Exam Leads to Harassment Charge: Academic Freedom Stripped Bare at Howard University*, Reason, July 14, 2017, https://reason.com/2017/07/14/law-prof-writes-exam-question-about-braz/.

[7] Rob Shimshock, *Black Student Upset That Exam Question on Segregation Offended White People*, W. J., May 22, 2018, https://www.westernjournal.com/black-student-upset-that-exam-question-on-segregation-offended-white-people/.

While an argument can be made that law students will have to face sensitive and disturbing issues as lawyers, in my courses, I want their focus to be on learning how to write effectively.

(7) Does it require sifting through relevant and irrelevant facts?

Creating a case "record" is a major part of creating a hypothetical. In some cases, the record expands as the students move forward from one semester of legal writing to the next, but even the smallest record should include both relevant and irrelevant facts. In addition, if possible, I create a record that purposefully omits some facts that a student (or a court) might want to know, particularly for an office-memo assignment. When the students have both relevant and irrelevant facts, they can learn the differences between allegations, facts, factual inferences, factual characterizations or conclusions, background facts, emotionally significant facts, and legally determinative facts.[8] Obviously, this is a critical skill for all lawyers.

(8) Does it create opportunities for practical and engaging in-class exercises?

Even in the first semester of legal writing, I like to incorporate fun in-class exercises designed to reinforce the analysis of the hypothetical, to introduce some practical skill, and to give the students a breather from digesting cases and writing about the law. For example, I incorporate a client interview designed to help students obtain more facts or clarify certain facts. I also incorporate a meeting with a supervisor. Students need more experience talking about cases, rather than just briefing them for doctrinal classes. I also ask students to argue their "case," even when the assignment is to write an office memo. Students like these exercises; they are much more engaged than when they are working on in-class

[8] Neumann, Margolis & Stanchi, *Legal Reasoning* at 105–11.

writing exercises. Almost any hypothetical situation can lend itself to these types of in-class exercises, and the possibilities run through my mind as I create every hypothetical.

(9) Does it teach research skills?

Another goal is to teach the students how to conduct research. My school uses a graduated approach, making the research component more and more complex as students move from assignment to assignment and semester to semester. Students move from their initial "closed" memo (cases provided) to complex, multi-issue assignments. Whether preparing a hypothetical for a first-year course or an upper-level course, I'm mindful that students need to use a systematic approach that yields concrete results. I see no value in sending them on a proverbial wild-goose chase. Yet I often add a factual element or choose an issue that implicates a less-settled aspect of the law.

For example, one hypothetical involved Arizona's burden of proof in competency hearings for criminal defendants. Arizona's statute is silent on this point, and Arizona caselaw is sparse. Because the federal statute is also silent, students naturally look to federal cases, only to find a split in the circuits. A national search for state appellate decisions reveals another split, with about two-thirds of state courts placing the burden on the defendant. Students get so focused on reconciling the courts' differing views that they barely notice how much they are learning about the research process and the library resources. And hypotheticals with a twist remind students that the research process is not a rote exercise. On the contrary, it is every bit as analytical as their writing and oral advocacy. The memo or brief begins in the library, even if that library is a computer screen.

(10) Does it have a reasonable page or word limit?

My final overall consideration is the page or word limit, which is important for several reasons. First, when they begin law school, students are often not used to having page *limits*. Instead, most are used to trying to increase margins or triple-space documents so that they can extend the paper to meet a minimum-page *requirement*. Having students navigate a page limit helps them develop new skills, including drafting concisely.

Second, page limits allow me to moderate student workload, and typically the limit increases with each assignment. As an example, the first assignment for this academic year was four pages, the second was ten pages, and the second-semester assignment was twelve pages. Advanced legal writing, however, has longer page limits, usually 20 to 25 pages.

Third, because the hope is that students can use these assignments as writing samples, it is preferable to have a reasonable page limit. This allows them to send prospective employers complete documents rather than awkward excerpts. Although it is beyond the scope of this article to survey every law school's career center to determine what the law school recommends (and many law schools do not publish this information), a survey of several schools shows a consistent preference for shorter documents rather than lengthy appellate briefs. For example, the University of Arizona Law School's "tip sheet" for selecting and preparing a writing sample suggests that in the absence of a specified length, a five- to eight-page document is recommended, and a writing sample exceeding ten pages is discouraged. It also notes that writing samples for postgraduate judicial clerkships average five to ten pages in length. Similarly, Cornell Law School states that

generally, five to ten pages is a sufficient length.[9] George Washington University Law School suggests a writing sample that is five to ten pages long,[10] and Marquette University suggests a five- to twelve-page document.[11] Finally, The City University of New York School of Law suggests a sample that is in the eight- to twelve-page range.[12]

A final practical consideration influencing the page limit is the number of papers that the professor needs to grade. With about 30 students in each class (or more in many law schools), having a 25-page limit would make it difficult for professors to give meaningful feedback within tight deadlines. Students do not benefit from rushed assembly-line feedback.

Part 2: Writing Assignments for the First Year

The Two-Step Mini-Memo

The first assignment requires students to draft a "mini-memo," using a two-step process.[13] The process is designed to gradually introduce the students to CREAC. For the first step, the students are instructed to review certain materials — a statute, an assigning partner's memo, and cases preselected by that partner — and then prepare a memo addressing the pitfalls that might arise in the case. For this problem, I use a notice-of-claim statute

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[9] Cornell Law Sch. Career Servs., Writing Sample, https://www.lawschool.cornell.edu/careers/students/ResumesAndAppMaterials/Writing-Sample.cfm (last visited Aug. 9, 2020).

[10] Geo. Wash. Law Sch. Career Ctr., https://careers.law.gwu.edu (last visited Aug. 9, 2020).

[11] Marq. U. Law Sch., https://law.marquette.edu/career-planning/writing-samples (last visited Sept. 10, 2018).

[12] CUNY Sch. of Law, http://www.law.cuny.edu/legal-writing/students/writing-sample.html (last visited Sept. 10, 2018).

[13] The structure of this first assignment was devised by Susie Salmon, Director of Legal Writing, University of Arizona James E. Rogers College of Law.

requiring parties suing a public entity to serve a letter notifying the entity of the claim. While I use Arizona's statute, almost all jurisdictions have some form of a notice-of-claim statute or ordinance, making the problem easily adaptable in almost every state.[14] The advantage of this type of assignment is that it also introduces students to the concept of statutory interpretation and construction by courts.

Here is an example of the first assignment:

> To: New Associate
> From: Supervising Attorney
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> Welcome to the firm! I hate to put you to work on your first day, but I need some help quickly. I was referred a new case today, and the client is coming in this Friday to talk about her situation. I had only a brief conversation with her about the case, but it appears that she was severely injured in a car accident, and she says the traffic lights were inoperable. This means that I may have to sue the city or other public entity that operates those traffic signals.
>
> I remember hearing something about some requirement before filing suit against a state agency. I researched it, and section 12-821.01 of the Arizona code requires the filing of a notice of claim. I'm attaching the statute itself along with a few cases I found addressing the main issues. I'm not even sure that I'm going to take the case at this point, so please do not look at any materials beyond the statute and these cases.

[14] *See* Daniel E. Feld, Annotation, *Modern Status of the Law as to Validity of Statutes or Ordinances Requiring Notice of Tort Claim Against Local Governmental Entity*, 59 A.L.R.3d 93 (1974).

> Based on these materials, prepare a memo summarizing: (1) the key requirements under the statute; and (2) the potential pitfalls that exist based on the attached cases. Also, I want to make sure that I have a general understanding of the purpose of giving notice before filing suit. It seems like this is nothing more than a weapon to thwart claims made against state agencies. I do not want to risk losing this case based on a technical noncompliance with these provisions.
>
> In short, provide enough information about the requirements and *key* issues so that I can quickly get the information I need from the client to draft the notice of claim if we decide to take the case. If you learned about CREAC in your legal-writing class, it may help you to think of this as giving me the rule and rule explanation on this issue. Please be brief; I don't have much time to read a long memo because I'm in trial next week. Also, the potential client's name is Jane Suffolk, so use that reference on your memo. Thanks.

The assignment is somewhat vague by design. Because the notice-of-claim statute has many aspects to it, students have to figure out what aspects warrant discussion. These imprecise instructions can spark a class discussion on what should be included based on the statutory language and the accompanying three cases. Based on the caselaw attached to the partner's memo,[15] students will ultimately home in on two statutory requirements: (1) the claim letter must include a "specific amount" to settle the claim; and (2) the claim letter must include "facts supporting" that amount. Of course, other statutory requirements

[15] *Backus v. State*, 203 P.3d 499, 500 (Ariz. 2009); *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 152 P.3d 490, 491 (Ariz. 2007); *Yahweh v. City of Phoenix*, 400 P.3d 445, 445–47 (Ariz. Ct. App. 2017).

could be used, depending on the caselaw in a particular jurisdiction.

A student's mini-memo responding to this request is typically two or three pages long and includes only the rule (R) and rule explanation (E) parts of the typical CREAC presentation.

After the rule/rule explanation memo is completed, the next step is to complete the CREAC formula by adding the "facts" of our hypothetical case. This is accomplished by having the fictional partner prepare a draft claim letter based on her interview with the client. The partner then sends this draft to the associate (student) and asks the associate to determine whether the letter complies with the statute's requirements. This is a high-stakes assignment because if the associate's advice is wrong, the suit could be dismissed for failure to comply with the notice-of-claim condition.

Of course, I plant a few deficiencies in the claim letter, and students are thus charged with drafting a memo informing the partner that the letter needs to be revised so that it complies with the statute. The end result is a memo that incorporates the full CREAC formula because students now have the facts and can compare them with the facts in the three assigned cases. In this scenario, the relevant "facts" are the contents of the various notice-of-claim letters, so students must quickly expand their understanding of "facts" to mean more than just the underlying facts giving rise to the case — another important lesson.

This initial assignment can lead to some fun in-class exercises, including (1) a discussion between the "partner" and the "associate" during which the associate tries to clarify what the partner wants in the first iteration of the mini-memo, and (2) a client interview during which the partner seeks to obtain the information necessary for the notice-of-claim letter.

This first assignment satisfies the preceding ten-step checklist, except that it does not require the students to conduct research.

The mini-memo teaches CREAC, rule synthesis, analogical reasoning, and policy (the purpose behind a notice-of-claim statute). It also involves a realistic situation and requires students to follow specific directions and sift through facts. The claim itself should not trigger student sensitivities, and the problem provides an opportunity for in-class exercises. Finally, the memo is short; the final product can be no longer than five pages. This is an important early lesson for students: not every piece of legal writing is elaborate or formal. The full office memo — with its traditional issue, brief answer, and formal conclusion section — comes later.

The Full Office Memo

The second assignment in the first semester is to research and write an office memo in the traditional format. While academics have debated for years whether the traditional memo is dead,[16] it is not buried yet. Nor should it be. For students who've had training and practice with full memos, it is relatively easy to scale down to something short and informal if asked. But doing the opposite — producing a full memo after having practiced writing only scaled-down versions — is not so easy. Plus, every piece of a full memo builds a writing skill that's transferable to other legal documents. (Imagine a moot-court competitor or a new law-firm associate trying to write an appellate brief without ever having learned about, or practiced, formal issue statements.)

In any event, my school teaches both full and short memos. And later on in the semester, we teach students how to turn the traditional memo into a more abbreviated e-mail version. We aim

[16] *See generally* Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century*, 48 J. Legal Educ. 32 (2008) (reporting on survey demonstrating growing use of simplified office memos); Charles Calleros, *Traditional Office Memoranda and E-Mail Memos, in Practice and in the First Semester*, 21 Perspectives 105 (2013) (expressing the view that "the traditional office memorandum is alive and well, and it remains an excellent teaching tool").

to give our students a full toolbox, which includes the techniques that go into a full memo.

For the full-memo assignment, the best hypotheticals are those that pose a variety of analytical challenges, with a strategic increase in difficulty. For instance, one of my recent creations involves restitution for a crime victim, which implicates statutes, a three-element test, and cases that are, unlike those in earlier assignments, a bit challenging to synthesize. The other feature is that, at least in Arizona, there are about ten or twelve cases on point, requiring students to whittle down their research to the most relevant four or five. The supporting record consists of a victim-impact statement and other documentation consisting of about ten pages. These documents provide relevant facts, of course, but they also expose students to legal documents that might be less familiar to them. Even though this assignment requires the traditional full-memo format, I still limit students to ten pages. Given all the bells and whistles that go into a full office memo, ten pages doesn't leave any space for students to meander. The writing and analysis in the memo's discussion section must still be economical.

This is a hypothetical that would likely work for professors in many jurisdictions. As with a notice-of-claim statute or ordinance, restitution for crime victims is not unique to Arizona. Many jurisdictions have adopted statutory restitution schemes that allow — and facilitate — compensation to crime victims or their survivors.[17]

For this full-memo project, any number of in-class practical exercises might be used. One idea that I like (that is not mine) is a "speed-dating" exercise, in which students are asked to report on the cases to a supervising lawyer but have a limited time to do

[17] *See* George Blum, Annotation, *Measure and Elements of Restitution to Which Crime Victim Is Entitled Under State Criminal Statute*, 15 A.L.R.5th 391 (1993).

so. The students pair off and face each other, with one student playing the associate and one playing the partner. The associate has three minutes to report on a relevant case, after which the partner rates the presentation. After this, the students switch places, and the new associate reports on another case. Because students have had no experience discussing cases with busy (and sometimes impatient) lawyers, this exercise gives them a great dose of reality. The students get a taste of how to *talk* about a case, which is unlike the case briefing that they do in their doctrinal courses. This mock law-office scenario also feels different from their classroom experiences with Socratic interrogation.

A related project is to turn the memo into a motion and have the students argue both sides. This allows the students to see the other side of the problem, and they always love getting up on their feet. And a professor's pointed questions about the factual record or the law's application invariably help students to think more deeply about their hypothetical case. It may sound paradoxical, but students often work better on paper after working at the lectern.

Still another potential project is to have students play the victim's role (or some other role) and introduce "secret facts" that they'd failed to mention in the initial interview. Students pair up into law firms and interview the mock party or witness, learning to elicit the omitted information. After they learn the information, students must reevaluate whether this changes their opinion on the issue.

As you see, the full office memo represents a gradual progression from the first assignment. Students learn more about statutory interpretation and are required to conduct a more complex rule synthesis, do research, sift through a larger record, and produce a longer, more complicated product that is still within a reasonable page limit. And given that this legal issue presents elements, students learn more about nested or mini-CREACs.

The Spring Open-Research Brief

The second semester brings the familiar transition from objective writing to persuasive writing — and from state law to federal law. My school uses one comprehensive project over the entire semester that requires students to research and write a trial-level brief. For years, we had every student take the same side of the hypothetical case. This meant that we did not have to create or search for a problem that was equally balanced. But we've found advantages in having students take opposing sides. The two-sides approach brings the challenge of creating a hypothetical with more balance and bilateral interest — some juicy facts and law for each side to use. Students invariably complain that one side is much stronger or weaker. I have two standard responses: "The weak side creates more opportunities for creative lawyering," and (with a smile) "Welcome to a lawyer's life."

In my opinion, the two-sides approach has distinct advantages. First, it creates many more opportunities for students to divide into groups and strategize, which leads to a deeper legal analysis and mastery of the factual record. Second, it allows for a seamless transition into contested oral arguments, which are more realistic and beneficial than solo arguments. Third, because we require students to exchange briefs at the first-draft stage, their first drafts tend to be stronger. Finally, the two-sides format forces students to delve meaningfully into their opponent's arguments because their opponent is right there making the point enthusiastically.

A number of special considerations arise when creating a two-sides hypothetical, and it's probably unrealistic to think that all can be met in every problem. For a practical example, it is often better to choose issues involving elements or factors so that students can organize their briefs without too much difficulty. The professor must also create a fact scenario that fits within the interstices of the cases that have already been decided. This

enables students to make effective fact-to-fact comparisons. And because the professor is striving for a well-balanced problem, it is helpful to choose an issue for which the cases fall on both sides in roughly equal numbers. Finally, it cannot be an issue that a higher court is about to decide or likely to decide, which would moot the hypothetical before it is used in class.

Because we are gradually getting students to handle more research and more evidence in the second semester, the problem requires more research and document review than in the first semester. Another skill that we are trying to reinforce in the second semester is understanding the hierarchy of authority. While we introduce this concept early in the first semester, students do not have to apply it until the second semester. Thus, ideally, I like to create a problem that not only has caselaw on point within the circuit, but also has helpful cases outside the circuit. This forces students to figure out how and where to use these cases.

A favorite example of a two-sides hypothetical for dispositive briefing involves the work-for-hire doctrine under the Copyright Act.[18] Under copyright law, copyright ownership "vests in the author or authors of the work."[19] The Copyright Act, however, carves out an exception for "works made for hire."[20] If the work is made for hire, "the employer or other person for whom the work was prepared is considered the author."[21] The work-for-hire doctrine is an effective legal test to use structurally because if someone is an employee when the work was created, the issue then becomes solely whether the work was created within the "scope of employment."[22] That narrow issue is determined using a three-part test, and there are many cases on point. The cases go

[18] 17 U.S.C. § 201(b).

[19] *Id.* § 201(a).

[20] *Id.* § 201(b).

[21] *Id.*

[22] *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994).

both ways, depending on the facts. This makes it an effective hypothetical during the second semester — one that requires students to dig into the facts and study the cases in earnest. No matter which side a student is on, he or she will need to not only present favorable cases but also distinguish the cases that help the other side. By semester's end, students have significantly advanced and refined their understanding of analysis, legal authority, and rhetoric.

Part 3: Sample Answers: Good or Bad Idea?

For all these hypotheticals, I have created sample or model answers (and, for the spring hypothetical, one for each side). When I started teaching legal writing some 13 years ago, I was told that most legal-writing programs do not rely on samples, but I have not conducted a survey to determine whether this is the case today. From my perspective, creating these samples takes a fair amount of work, but it is worth the investment for several reasons.

First, as the problem creator, I can assess firsthand what's involved in researching, organizing, and writing the memo or brief that the students are required to deliver. This is invaluable to me as I launch into teaching it. Second, the sample answer proves that the product can be completed within the prescribed page or word limit. Third, we give the confidential samples to our writing fellows (2L or 3L students), who can then help our 1L students organize the briefs. Fourth, at the end of the semester, we have something to show our students so that they know what an "A" answer would look like.

On the other hand, samples or model answers have their drawbacks. In the real world, there are multiple ways to organize briefs. If a model exists, the professors and writing fellows tend to "teach to the sample." And the model's availability sometimes

discourages the writing fellows from fully investing in the research or analysis. Another possible drawback concerns student psyche. Because an experienced lawyer is writing the sample, students may feel humiliated or helpless when they compare it to their own work product. Thus, many of my school's professors have chosen not to post a sample — or elect to post the best student paper instead (anonymously, of course).

A possible compromise in the sample/no-sample dilemma is to create an outline of the issues, setting forth where the various cases would be discussed. In fact, when I have prepared final exams, I have put together two versions of answers: a full brief and an outline version.

Conclusion

Creating effective hypotheticals is a complicated task. Pedagogical goals change as students advance through the curriculum. Practical considerations abound, and mock legal scenarios may trigger student sensitivities if the professor isn't careful. No problem is perfect. Instead, as with everything else, creating problems is a trial-and-error process that improves over time and with experience. I have found that no matter how easy you think the problem is, students will always be challenged because they are constantly facing new hurdles in their research and writing, and as in the practice of law, cases can get messy. Unexpected dynamics almost invariably crop up, even with the best-planned hypothetical, and I treat those road bumps as teachable moments. I also remind myself of the days when I had *actual* clients in high-stakes cases, and I breathe deeply and challenge myself to improve. Thankfully, with the help of my colleagues, for whom I am eternally grateful, we become learners once again and smooth out those unexpected bumps.