

PERSPECTIVES BEYOND THE DEAN'S OFFICE

TRIAGE IN THE TRENCHES OF THE LEGAL WRITING COURSE: THE THEORY AND METHODOLOGY OF ANALYTICAL CRITIQUE

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I. INTRODUCTION

CRITIQUING student papers is an important aspect of teaching legal writing because it provides students with a unique educational experience during the first year of law school.¹ Generally, first-year courses are taught to large groups of students using podium-style Socratic instruction. The majority of the learning occurs vicariously as students observe others engaging in a dialogue with the teacher. During these class conversations, the teacher uses ideas from

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1. See Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 177, 179 (1999) [hereinafter Berger, *Applying New Rhetoric*]; Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 57, 59-60 (2000) [hereinafter Berger, *Rhetorical Model*]; Anne Enquist, *Critiquing and Evaluating Law Students' Writing: Advice from Thirty-Five Experts*, 22 SEATTLE U. L. REV. 1119, 1125-29 (1999) [hereinafter Enquist, *Advice from Experts*]; Jane Kent Gionfriddo, *The "Reasonable Zone of Right Answers": Analytical Feedback on Student Writing*, 40 GONZ. L. REV. 427, 429-30 (2004-05); Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method With the Writing Process*, 64 TEMP. L. REV. 885, 897 (1991); Christine M. Venter, *Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills*, 57 MERCER L. REV. 621, 623 (2006). See generally Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 145 (1996) [hereinafter Enquist, *What Students Say*]; Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725 (1989).

several students to facilitate an exploration of legal concepts. Students develop analytical proficiency through the examination of the ideas explored in class.² In the legal writing course, the learning of analytical skills is more personal.³ Students are required to apply legal concepts and critical reasoning skills to their own ideas by working through the teacher's individualized comments of the students' writing. Receiving feedback on their own ideas and using the feedback to refine their thinking during the first year provides the students with vital personal guidance at an important stage in their learning.⁴

Critiquing student work is also one of the most demanding elements of teaching legal writing because it is time consuming and intellectually challenging.⁵ The average legal writing teacher provides feedback on 1,204 pages of student writing each year.⁶ Reading and commenting on this much student writing requires a substantial investment of time and energy.

Commenting on student assignments is challenging because the teacher attempts to "get inside the head" of each student through the student's writing to help clarify complex legal analysis.⁷ Before teaching legal writing, few legal writing professors have had experience or training using writing to determine where students are struggling with legal ideas. Most legal writing professors are trained as lawyers or writers, or both,⁸ but that training does not include instruction about providing effective critique to novice legal writers.⁹

Critiquing student papers also is challenging because it requires the teacher to face the successes and failures of the teacher's own teaching. Each set of papers provides instant feedback about what worked or did not work in classes that were designed to help the students prepare the assignment. Every legal writing teacher has a memory of seeing a pattern of problems in a set of papers and wondering, "What did I do or say to create this problem?" This is a very humbling experience.

2. *E.g.*, Kearney & Beazley, *supra* note 1, at 889-90; Neumann, *supra* note 1, at 728-39.

3. Venter, *supra* note 1, at 623.

4. Enquist, *Advice from Experts*, *supra* note 1, at 1141-42; Gionfriddo, *supra* note 1, at 439 n.45; Neumann, *supra* note 1, at 742-43.

5. Berger, *Rhetorical Model*, *supra* note 1, at 57; Steven J. Johansen, "What Were You Thinking?": *Using Annotated Portfolios to Improve Student Assessment*, 4 LEGAL WRITING: J. LEGAL WRITING INST. 123, 123-25 (1998).

6. Ass'n of Legal Writing Dirs. & Legal Writing Inst., 2006 Survey Results, [http://www.alwd.org/2006%20survey%20results%20report%20\(final\).pdf](http://www.alwd.org/2006%20survey%20results%20report%20(final).pdf) (last visited Feb. 5, 2007) (response to questions 53, 54) [hereinafter ALWD/LWI 2006 Survey]. *See* Gionfriddo, *supra* note 1, at 441 n.55 (discussing the ALWD/LWI 2004 Survey Highlights). *See also* Jo Anne Durako, *A Snapshot of Legal Writing Programs at the Millennium*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 95, 107-09 (2000) (using the results of the ALWD/LWI 1999 Survey to compare the workload of legal writing and doctrinal teachers).

7. *See infra* note 105 and accompanying text.

8. *See* AM. B. ASS'N, SOURCEBOOK ON LEGAL WRITING PROGRAMS 57 (1997) (indicating that legal writing teachers should have experience as practicing lawyers); Ass'n of Legal Writing Dirs. & Legal Writing Inst., 2005 Survey Results, <http://www.lwionline.org/survey/surveyresults2005.pdf> (response to question 29, explaining qualifications of legal writing teachers and specialists) (last visited Feb. 5, 2007).

9. Enquist, *Advice from Experts*, *supra* note 1, at 1119.

Fortunately, providing effective feedback is a skill that can be learned and over the years the legal writing academy has provided support for new teachers to develop successful critiquing strategies. Many experienced legal writing professionals have written articles on the subject¹⁰ and most legal writing conferences include presentations about providing feedback on student papers.¹¹ In addition, most legal writing teachers have benefited from the support of colleagues who provide personal advice on how to critique student writing. Furthermore, new legal writing teachers draw on their experiences as students, practitioners, or teachers in other fields to help develop techniques for commenting on student-drafted legal documents.¹²

Nevertheless, most legal writing professors learn how to comment on their students' papers by simply doing it.¹³ Over time, each teacher develops a method to help students refine the difficult reasoning and presentational skills that are required to effectively analyze and explain complex legal issues in writing.¹⁴ Unfortunately, learning effective critique methods can be long and frustrating and most novice legal writing professors face their first set of papers without any direct experience critiquing a student-written legal document.¹⁵

The purpose of this article is to explore the skills a teacher needs to effectively comment on student-drafted legal assignments. It then provides an opportunity to practice and evaluate commenting skills on a student draft. This experience should provide guidance for new legal writing teachers when faced with their

10. See, e.g., Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 175 (1997); Berger, *Applying New Rhetoric*, *supra* note 1; Berger, *Rhetorical Model*, *supra* note 1; Enquist, *Advice from Experts*, *supra* note 1; Enquist, *What Students Say*, *supra* note 1; Gionfriddo, *supra* note 1; Jessie C. Grearson, *Teaching the Transitions*, 4 LEGAL WRITING: J. LEGAL WRITING INST. 57 (1998); Johansen, *supra* note 5; Kearney & Beazley, *supra* note 1; Neumann, *supra* note 1.

11. For example, there has been a workshop on critique at every Legal Writing Institute conference since 2000. E.g., Legal Writing Institute, *Legal Writing on the Move: The Twelfth Biennial Conference of the Legal Writing Institute 2* (2006), <http://www.lwionline.org/activities/2006conferencebrochure.pdf>. The Association of American Law Schools New Teachers Workshop has also included a hands-on session for new legal writing teachers on critiquing techniques. Ass'n of Am. Law Schs., *Workshop for Beginning Legal Writing Teachers* (2005).

12. Many commentators have urged legal writing teachers to borrow theories from English composition and other disciplines to teach legal writing more effectively. See Berger, *Applying New Rhetoric*, *supra* note 1, at 165-68; Johansen, *supra* note 5, at 124; Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 565-68 (1997); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1098-102 (1986). The discipline of legal writing has benefited greatly from many of these ideas because most legal writing courses focus on teaching students the process of developing analysis that is necessary for all good legal writing. However, legal writing teachers need to carefully consider the differences between legal writing and other types of writing when borrowing ideas from other disciplines to teach legal writing. For example, the nature of writing about legal analysis, where the writer is synthesizing the ideas from the authority to answer the legal question or make persuasive arguments to a court is very different from a composition where the writer is describing her own ideas. See Gionfriddo, *supra* note 1, at 436 n.29.

13. Kearney & Beazley, *supra* note 1, at 891-92.

14. See Johansen, *supra* note 5, at 123.

15. Enquist, *Advice from Experts*, *supra* note 1, at 1119.

first set of student papers and offer experienced teachers the opportunity to discover new insights to help them find energy and excitement in critiquing papers many years into their teaching career.

The first skill that teachers must learn is to prioritize when commenting on student papers; this idea is discussed in section II. Integrating the concept of prioritization, section III explores specific methods to help teachers provide effective feedback on student assignments. Section IV is a practicum where you, as a hypothetical legal writing teacher, will have the opportunity to critique a student draft. You will prepare the materials for a student problem and, experimenting with the ideas from sections II and III, critique a student paper based on that problem. After fully commenting on the draft, you will use a sample critique to explore the differences between your approach to commenting on the student draft and the sample feedback.

II. TRIAGE: FOCUS ON ANALYSIS FIRST

Although legal writing teachers have many opinions about the best way to critique student work, one idea is critical: Legal writing teachers must learn to prioritize when commenting on student assignments.¹⁶ No teacher can, and no teacher should, attempt to deal with every problem when providing feedback on a student's paper.¹⁷ Limiting feedback is difficult for most novice writing teachers because new teachers feel like they are doing an inadequate job unless they comment on every problem they identify.¹⁸ But here is the problem: If the teacher is unable to prioritize the problems when critiquing the paper, the student will be unable to prioritize the issues that need to be addressed when rewriting the paper. The student will become overwhelmed. Typically, when overwhelmed, the student will focus on the smallest details when rewriting the assignment, ignoring the larger, more complex issues that should be corrected. Furthermore, if the teacher attempts to address every problem in most student papers, the teacher also will be overwhelmed and quickly become exhausted.

So, what is the answer? Triage.¹⁹ Just as a medical doctor must first treat the most life-threatening problems of a patient, the legal writing professor must focus on the most important issues when critiquing a student's paper. Therefore, the teacher must focus on analytical problems first.²⁰ Major flaws in the student's

16. Neumann, *supra* note 1, at 763-64 ("Critiques work best when the teacher selects a relatively small number of issues . . .").

17. Enquist, *Advice from Experts*, *supra* note 1, at 1130-32 (explaining that experienced legal writing teachers find that students cannot deal with too many comments on one assignment); Kearney & Beazley, *supra* note 1, at 898 (explaining that students will be overwhelmed if the teacher addresses too many problems in student writing at one time).

18. Enquist, *Advice from Experts*, *supra* note 1, at 1130; Neumann, *supra* note 1, at 738 (observing that new critiquers have a hard time triaging comments).

19. Neumann, *supra* note 1, at 736 (discussing importance of using triage when critiquing).

20. *E.g.*, Berger, *Rhetorical Model*, *supra* note 1, at 72-76 (explaining that teacher commenting should first focus on helping students better develop the underlying ideas); Gionfriddo, *supra* note 1, at 437 n.37 ("[L]aw practice writing . . . depend[s] upon accurate and precise analysis based on legal authority; thus, in giving comments in either context, a teacher does the student, and

understanding of the substantive legal ideas and how those misunderstandings affect organizational choices in the student's paper must be corrected before writing and stylistic problems can be effectively addressed.²¹ This is just another way of saying that "good writing comes from good thinking."²² The student's legal "thinking" must be clear before comments on basic writing will be helpful. The good news is that the curriculum of nearly all legal writing courses provides a built-in method for triage. At most law schools, the legal writing course requires a draft and revision of all major assignments.²³ With a draft and a rewrite, the teacher can focus on the student's analysis when commenting on the draft and wait until the final revision to evaluate smaller details such as writing style, grammar, and punctuation.

Legal writing courses did not always assign drafts and revisions of the same assignments.²⁴ At many law schools, the legal writing course was added to the law school curriculum because legal educators thought that poor legal writing was due to the lack of fundamental writing training at the undergraduate level.²⁵ Therefore, legal writing courses were designed to provide students with basic writing instruction, including grammar review and sentence construction, rather than to teach legal reasoning. To teach these writing skills, the courses introduced students to a variety of legal documents. Using a product-oriented

ultimately the legal profession, a serious disservice if she does not correct fundamental errors in the student's legal analysis."); Kearney & Beazley, *supra* note 1, at 898 (explaining that teachers should focus on analytical comments in earlier drafts). *See, e.g.*, Neumann, *supra* note 1, at 744-45 (explaining that an important goal of critique is to develop ideas); Parker, *supra* note 12, at 568-73 (explaining that teachers must help students with their understanding of the underlying legal analysis at the draft stage in order for students to produce clearly written final documents).

21. Gionfriddo, *supra* note 1, at 428-30 (explaining that teachers should focus on analytical issues in student drafts because those issues are the most difficult for students).

22. *See* Richard Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 621 (1986) ("[L]awyers cannot write clearly unless they can think clearly, unless they can recognize and construct a convincing legal argument—unless, in other words, they understand the structure of the law."); Neumann, *supra* note 1, at 763 n.114 ("Thinking is not merely inseparable from writing: writing enlarges and fills out the thinking it expresses, and it exposes analytical problems and demands that they be solved."); Venter, *supra* note 1, at 625 (noting that legal writing faculty must "explore how their students' thought processes shape their students' writing and vice versa"). *See also* Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 136 (1987) ("The task of critical writing, however, is important for lawyers, and especially for students, because the critical writing process can improve significantly the quality of legal analysis, legal interpretation, and legal thought in general."). *See generally* Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEGAL WRITING: J. LEGAL WRITING INST. 1 (1991) (contrasting critical thinking in the law and other disciplines).

23. ALWD/LWI 2006 Survey, *supra* note 6, at 14 (question 23).

24. In fact, the debate of whether legal writing should be included in the law school curriculum continued until the 1980s. *See* Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 299-300 (1980).

25. *See id.* at 301; J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 41-42 (1994). *See also* Kissam, *supra* note 22, at 141-43, 148; Phelps, *supra* note 12, at 1098; David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 132-36 (2003); Marjorie Dick Rombauer, *Regular Faculty Staffing for an Expanded First-Year Research and Writing Course: A Post Mortem*, 44 ALB. L. REV. 392, 392-93 (1980).

approach, students prepared one final draft of each assignment, which was then submitted for a grade and comments.²⁶

Legal writing teachers soon recognized that this approach was not improving student writing and looked to the developing theories of English composition to find a solution.²⁷ The “process theory” of writing convinced most legal writing teachers that new methods were necessary to improve legal writing. At its core, “process theory” recognizes that writing is “not a smooth linear progression . . . but instead is ‘messy, recursive, convoluted, and uneven.’”²⁸ Effective writers use writing and revision as a process to work out and develop the ideas that they are trying to explain.²⁹ If writing is seen only as a final product, the process of working through the underlying ideas to clarify the concepts that the writer is describing is shortchanged or ignored altogether. Therefore, English composition commentators argued that when teaching writing, teachers need to help students use the composing process to fully comprehend and develop their ideas. Writing teachers developed a teaching approach that allows the teachers to intervene with students at the stage where students are developing their ideas rather than just evaluating the final product.

Many legal writing teachers embraced this theory because it seemed to explain what many law practitioners understood intuitively about good legal writing: Writing and revising legal documents helps lawyers fully understand the complicated legal concepts they must clearly explain.³⁰ Therefore, legal writing teachers developed curricula that incorporated these ideas.³¹ Recognizing that

26. See Rideout & Ramsfield, *supra* note 25, at 42, 46.

27. Rideout & Ramsfield, *supra* note 25, at 51-56; Gale, *supra* note 24, at 302; Kearney & Beazley, *supra* note 1, at 887-90; Kissam, *supra* note 22, at 138-41.

28. Berger, *Applying New Rhetoric*, *supra* note 1, at 160 (quoting Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMP. & COMM. 76, 85 (1982)).

29. *E.g.*, Venter, *supra* note 1, at 633.

30. See Parker, *supra* note 12, at 585 (explaining that the process of drafting, rewriting and revising legal writing is necessary to produce “professional-quality” legal documents); Rideout & Ramsfield, *supra* note 25, at 84 (noting that lawyers in practice use the process of drafting and revising to produce legal documents). See also Hyland, *supra* note 22, at 619 (explaining that most practitioners understand that “the law must be written to meet the demands of conceptual thinking, and that can be done well only by those who think clearly”); Kissam, *supra* note 22, at 141 (noting that lawyers must use the writing process when analyzing legal issues to be effective in practice); Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, 1193-94 (2000) (“[R]esearching, analyzing, and writing about the law occurs as a complex, interwoven process. . . . [that] is the practice of law.”).

31. See, *e.g.*, Berger, *Applying New Rhetoric*, *supra* note 1, at 165-68; Grearson, *supra* note 10, at 61-67 (discussing effect of “process pedagogy” on legal writing discipline); Kissam, *supra* note 22, at 140; Phelps, *supra* note 12, at 1098-102; Rideout & Ramsfield, *supra* note 25, at 51-56 (explaining how legal writing should be taught using process theory). The arguments for using the writing process in the legal writing course was summarized by Mary Kate Kearney and Mary Beth Beazley in 1991:

Engaging legal writing students in a Socratic dialogue is useless unless the legal writing assignments are structured around writing process principles. Teachers who use the product method, responding only to final, finished drafts, intervene in their students' thought processes

comments on final assignments alone are too late in the students' thinking process to help students clarify their underlying ideas, teachers began reviewing drafts of assignments so they could provide feedback that the students would use to finalize the documents. Soon, most legal writing courses had adopted this approach. Now, most courses require at least one draft and a final rewrite of the same assignment. On the draft teachers may provide comments that will help the student develop and refine the ideas that need to be communicated in the final document.³²

For feedback on draft assignments to help law students understand the importance of using the writing process to develop legal analysis, comments must assist students with the foundational reasoning skills that are necessary to prepare legal documents. Therefore, analytical and organizational issues should be the focus of the critique of the draft and comments on basic writing should be made on the final paper.³³ If the teacher comments on substantive issues and basic writing problems at the same time, the students will have difficulty understanding which issues are most important and will have a hard time

too late: the students have already finished their thinking and writing, and have no opportunity to remedy the problems identified by the feedback. Using the writing process allows the teacher to "stop time" and respond to early drafts. The teacher can then intervene in the students' thought processes and ask Socratic questions while the students are formulating their legal analysis. The students learn because they must use their teacher's feedback to figure out what is wrong with their writing and fix it.

Kearney & Beazley, *supra* note 1, at 890.

32. Although some legal writing teachers read several "drafts" of the same assignment to help the student prepare the final document, most legal writing courses do not have the resources to allow their teachers to provide feedback on several drafts of the same assignment. See Gionfriddo, *supra* note 1, at 440-41 nn.51-55 and accompanying text. Therefore, I use the term "draft" to mean the best writing the student can produce at the time the draft is submitted.

33. Gionfriddo, *supra* note 1, at 434-38 (discussing importance of guiding students to accurate analysis in comments to draft student papers); Kearney & Beazley, *supra* note 1, at 893 ("When the legal writing teacher requires students to write focused drafts, the students are encouraged to master the content of their legal analysis before moving on to the content-dependent questions of style and mechanics."); Neumann, *supra* note 1, at 766 (noting that "[t]he goal of critique is . . . to help the student find manners of thought that are effective"); Parker, *supra* note 12, at 568 (explaining that most problems in law student writing "suggest that the novice legal writers have not yet sufficiently refined their analyses to clearly communicate their ideas");

Legal writing is the reflection of a complex series of problem-solving decisions; it is the battle among disparate ideas; it is the effort of a creative mind trying to work within the rhetorical confines of the discourse. These complex analytical requirements can interfere with the novice's previous command of writing in another context.

Rideout & Ramsfield, *supra* note 25, at 42-43. See also Williams, *supra* note 22, at 15 (explaining that basic writing skills may deteriorate as writers struggle with new forms of analytical thinking, but will correct themselves once writers understand the underlying analysis); Kissam, *supra* note 22, at 168-70 (encouraging the use of drafts and rewrites in writing assignments throughout the law school curriculum to help students with their understanding of the analysis).

rewriting the assignment.³⁴ Students may waste precious time by working on the construction of sentences or improving the structure of paragraphs that may have to be omitted or completely rewritten to express the analysis accurately. This exercise may be very discouraging and frustrating for the student.³⁵ Similarly, on most draft assignments, if a student only corrects grammatical and structural writing problems, the student will not be able to successfully rewrite the assignment, even though the final product may be stylistically elegant because the student will not have used the writing process to fully develop the analysis.³⁶

Although the level of analytical assistance changes as students acquire more expertise with legal reasoning,³⁷ in most draft assignments during the first year,

34. See Hyland, *supra* note 22, at 621 (explaining that lawyers who only correct basic grammar and style problems rather than correcting the underlying analysis “are condemned to write poorly forever”).

35. However, if the teacher identifies that the student has a consistent problem with some basic writing or grammar principles, the teacher should identify the problem and encourage the student to correct it when reworking the draft.

36. Berger, *Rhetorical Model*, *supra* note 1, at 73 (noting that unless the writing teacher comments on the underlying problems with the students’ ideas, the teacher will find that the critique “is not improving the students’ writing; in fact, many errors will begin to seem trivial, problems in the students’ writing will be seen beneath the surface, rules and formulas will improve the presentation but not the thinking or the learning”); Gionfriddo, *supra* note 1, at 445 n.70 (“[A] legal writing teacher who gives comments on organization and writing without reference to the underlying erroneous legal analysis would be analogous to a teacher of torts who corrects an exam’s organization and grammar problems without reference to whether the student had answered the exam’s analytical question.”); Kearney & Beazley, *supra* note 1, at 899 (“Comprehensive comments result in students’ paying inappropriate attention to style and mechanics during the early stages of the writing process.”). See also Gale, *supra* note 24, at 325 (“Reasoning unexpressed, or unclearly, imprecisely or inaccurately expressed, is reasoning uncompleted.”); Phelps, *supra* note 12, at 1098 (noting that revision will not improve writing if the students are not given support to correct underlying substantive problems); Rombauer, *supra* note 25, at 393-94. For a discussion of the problems with legal writing in general, see Hyland, *supra* note 22, who has explained that the underlying reason for bad legal writing is the inability to think through the law, noting:

Despite the ritual of the first year of law school, many lawyers do not learn to think conceptually. The reason may be that doctrinal analysis, the specifically legal training in conceptual thinking, is in decline. Those who find economic motive everywhere else also find it here: they suggest that the doctrinal analysts prefer the salaries at large law firms to teaching. I believe another factor is more important: legal reasoning itself is in crisis, and we simply cannot agree on how judges decide cases. Contemporary legal education has responded to the difficulty by avoiding it. Instead of probing the structure of American law, law professors and their students are tempted to regard it externally, from the perspective of their undergraduate majors: microeconomics, analytic philosophy, political science, sociology, psychology, anthropology, literary theory, or whatever. From that perspective, it is difficult to see—and far more difficult to communicate—the conceptual structure of a legal argument. Since scholars themselves no longer conceive of legal concepts as elements of a legal theory, as complex structures of determination, their students learn conceptual thinking only with great difficulty. Little do the scholars suspect that their own teaching is one of the reasons lawyers write poorly.

Id. at 622-23 (footnotes omitted).

37. Gionfriddo, *supra* note 1, at 434-37, 445; Johansen, *supra* note 5, at 127.

students need guidance with basic legal reasoning skills. Those basic skills include improving critical reading proficiency, developing strategies to extrapolate ideas from cases, synthesizing those ideas to express legal principles, learning to apply the synthesized principles to factual situations, and using the legal principles to support factual analogies.³⁸ The teacher must provide students with comments that help students identify and correct substantive problems in these areas so the students understand the underlying analysis and the organization that flows from that analysis. Focusing feedback on substantive and related organizational challenges will help the students understand the ideas they are trying to express and, in the process, assist them in becoming more proficient legal thinkers.³⁹

In the critique on the final paper, the teacher can turn his attention to presentational issues, including style and basic writing. At this point in the writing process, the student will be able to understand the presentational writing problems because the student will have worked out the basic substantive and organizational issues.⁴⁰ Therefore, when the student receives the comments on the final paper, the student will be able to focus on correcting the presentational issues without trying to determine which problems are due to an incomplete understanding of the analysis and which problems are tied to writing concerns.

III. EFFECTIVE ANALYTICAL CRITIQUE

Recognizing that the teacher must prioritize his comments by focusing on analytical concerns on first drafts is an important step to becoming effective at critiquing assignments in the legal writing course. Then the true challenge begins: Providing feedback on analysis that will be useful to the students and efficient for the teacher. The ideas explored in this section suggest ways to become successful and proficient at critiquing analytical issues on student drafts.

38. For a discussion of analytical skills students should learn in the first year, see generally Gale, *supra* note 24, at 302-03, 306-08; Gionfriddo, *supra* note 1, at 430-33; Romantz, *supra* note 25, at 136-45; Rombauer, *supra* note 25, at 392-93; Rowe, *supra* note 30, at 1202-04; Venter, *supra* note 1, at 626-29.

39. See Gionfriddo, *supra* note 1, at 433 (“[S]tudents will create high quality legal documents only when they have learned how to produce an analysis that is accurate, precise and thereby useful to the legal community.”); Kissam, *supra* note 22, at 141 (“The critical writing dimension (and thinking about writing as critical writing) is thus an integral aspect of effective legal analysis.”); Rideout & Ramsfield, *supra* note 25, at 73-74 (explaining that comments on drafts should focus on substance); Romantz, *supra* note 25, at 144 (“The ability of legal writing courses to offer detailed and repeated critique of student performance helps students learn the mechanics of legal thinking.”).

40. Gionfriddo, *supra* note 1, at 440-41; Kearney & Beazley, *supra* note 1, at 892.

A. *Tailor Critique to Your Course*

Analytical feedback must be tailored to the teacher's teaching and the curricular sequence of the course.⁴¹ The critique employed by the teacher should be connected to the analytical discussions that take place during class sessions and individual meetings with students. When working on legal reasoning skills in class, the teacher and students develop a shared vocabulary and experience that will help the students learn the ideas that should be the focus of the specific assignments. The teacher's feedback on student writing should reflect that focus and use the shared vocabulary and experiences from the course.⁴²

Furthermore, analytical feedback must vary according to the specific problems used in the course because different types of legal issues will challenge students differently.⁴³ Some assignments pose difficult legal reasoning hurdles, while others may present organizational complexities. Accordingly, the type of analytical feedback necessary to help students successfully complete the assignment will vary from problem to problem. At times, the students will need assistance with broad conceptual ideas. Other times, they will require more targeted organizational suggestions to achieve precise written analysis.

Similarly, the amount and type of feedback necessary to help students with analysis will naturally change as the course progresses.⁴⁴ Early in the course, students may need more guidance with basic legal reasoning skills. For example, they may need focused assistance with careful text reading and basic case synthesis.⁴⁵ As the students become more competent at dealing with complex analytical issues, the focus of critique may shift to help with organizational and subtle substantive matters.

Critique that occurs later in the course will build on the feedback that the teacher provided on earlier assignments. For example, in assignments at the beginning of the year, the teacher will need to fully explain his methods of providing feedback so students understand how to work with the analytical suggestions in the comments when rewriting the assignments. As the students become more familiar with the teacher's techniques, the critique can focus less on how to use the feedback and more on the underlying ideas in the student drafts.

41. Critiquing analysis on student assignments is just one of the many teaching methodologies used to teach legal reasoning in a good legal writing course. Johansen, *supra* note 5, at 126. See also Gionfriddo, *supra* note 1, at 443.

42. For some teachers, this may simply mean explaining the terminology that the teacher uses to teach legal analysis. Others may find it necessary to reconsider their own way of thinking about legal reasoning and the methods they use to teach analytical skills to develop requisite paradigms and terminology for effective critique and teaching on student papers.

43. Gionfriddo, *supra* note 1, at 438; Johansen, *supra* note 5, at 127.

44. Gionfriddo, *supra* note 1, at 453-55 (discussing types of analytical problems students deal with at different times during the first year).

45. Judith B. Tracy, "I See and I Remember; I Do and Understand": Teaching Fundamental Structure in Legal Writing Through the Use of Samples, 21 TOURO L. REV. 297, 304-06 (2005) (explaining analytical skills taught through different writing assignments in legal writing courses).

B. Develop In-Depth Understanding of Analysis of Each Assignment

To provide useful analytical comments on a draft, the legal writing teacher must have a more intimate understanding of the analysis than would be required to simply write the assignment as a practitioner.⁴⁶ The teacher must not only know how he would explain the analysis of the problem, he must also anticipate all the other ways one might write the problem, and he must anticipate every wrong turn students can make so he can guide the students back.

To develop this level of understanding, the teacher should thoroughly study the underlying authority and write a summary of the different legal questions involved. However, rather than prepare a sample memorandum for the problem, the teacher should outline the variety of approaches that would be reasonable explanations of the analysis.⁴⁷ By considering a variety of approaches, the teacher will avoid becoming wed to one approach at the expense of a complete understanding of all approaches. Writing a sample paper may raise mental barriers to accepting and comprehending alternative explanations that the students might attempt to use.

Once the teacher has acquired a thorough understanding of the authority, he should read several student papers before beginning to critique.⁴⁸ Reading several student memoranda will help identify any potential difficulty in the problem that the teacher may not have uncovered when working through the analysis. In fairly simple problems, this may require reading only a handful of papers. With assignments that include more complicated issues, the teacher may need to read most, if not all, the papers before beginning to critique.

By acquiring an in-depth understanding of the analysis and identifying the potential pitfalls in an assignment, the teacher will have a sense of what issues will need to be addressed in all the students' papers. Understanding the most typical problems will help give the teacher an approach to the analytical comments, beginning with the first paper the teacher critiques, which will make the evaluation of the papers more consistent and more efficient.

C. Adapt Feedback to Analytical Needs of Each Student

After fully preparing the underlying authority of the problem and reading several student memoranda, the teacher is ready to provide analytical critique on

46. Gionfriddo, *supra* note 1, at 438 (“[T]eachers must read draft documents from the point of view of someone who has a complete knowledge and understanding of what the legal authority says, the range of reasonable analysis the authority supports, and the impact that analysis might have on the client’s problem.”); Kearney & Beazley, *supra* note 1, at 900 (explaining that the teacher must provide comments from the point of view of the expert who developed the assignment).

47. See Gionfriddo, *supra* note 1, at 431-33 (discussing the “reasonable zone” of different, but accurate, explanations of analysis for most legal problems). See also Romantz, *supra* note 25, at 137 (explaining that students must learn to develop reasonable interpretations of law in the legal writing course); Rombauer, *supra* note 25, at 394 (discussing implications of teaching constraints of mandatory precedent).

48. Enquist, *Advice from Experts*, *supra* note 1, at 1143.

individual drafts.⁴⁹ To begin, the teacher should diagnose the analytical struggles and successes of the student's draft. Based on that diagnosis, the teacher needs to determine the best method for feedback.⁵⁰

When beginning to critique an individual paper, the major substantive problems should be identified before providing any feedback. Accordingly, before writing any comments, the teacher should quickly read the entire memorandum or, if the analysis is divided into several sub-issues, the teacher could read the portion of the draft dealing with a particular sub-issue. Reading portions of a paper before making comments requires discipline because most teachers want to immediately comment on the first problem they see. However, the teacher will be able to determine how to best help the particular student by reading the entire draft or a complete section before beginning to comment. The diagnostic reading should be only a quick assessment because the goal is very focused: To get an overall sense of the student's paper to determine the type of critique that will best help the particular student.

Based on this diagnostic review of the paper, the teacher must decide what type of comments will be most effective for that student. There are two basic critiquing approaches that can be used when commenting on analysis: A sequential critique and a narrative comment. In a sequential critique, comments are inserted at the particular place in the draft where the problem appears.⁵¹ In this article, comments are called "interlinear comments" if woven into the student's text and "margin comments" if written on the side or bottom of the paper. By contrast, a narrative comment is usually drafted in paragraph form separately from the student's paper and describes the various problems the teacher encountered in the section.⁵²

The advantage of providing sequential, line-by-line feedback is that the student has the benefit of the teacher's reaction as he is reading the section.⁵³ Often, the teacher's immediate reaction is helpful for the student to see the impact the writing has on the reader.⁵⁴ Reacting sequentially to the paper often helps the teacher, too, because for many teachers, the critiquing process is like the writing process.⁵⁵ As a good writer often needs to work through the entire piece of writing to fully sort out the ideas the writer is trying to communicate, most teachers need to contemplate the entire paper or section from beginning to end to fully understand the nuances of the problems. By providing comments while

49. See *supra* notes 33-39 and accompanying text.

50. Enquist, *Advice from Experts*, *supra* note 1, at 1130 (noting that experienced legal writing teachers advise new teachers to "read the paper through and then decide the major areas of concern on which to focus the comments").

51. The sequential critique can be provided by writing interlinear comments in the margins, typing the comments separately with references by number inserted in the margins, or inserting the comments electronically. See *infra* notes 88-96 and accompanying text.

52. Sometimes it may be best to provide just one narrative comment for the entire paper. This can be helpful when the paper has so many analytical problems that it would be difficult for the student to process interlinear or separate narrative comments.

53. Berger, *Rhetorical Model*, *supra* note 1, at 83-84.

54. Parker, *supra* note 12, at 582-83.

55. Berger, *Rhetorical Model*, *supra* note 1, at 57-58.

working through the student's paper, the teacher helps himself identify where the student has done well and the level of importance of the analytical issues and, therefore, the teacher will provide better comments to the student. After providing the specific comments, the teacher has a better sense of the student's depth of understanding of the issue.

Using a narrative comment also has benefits. A narrative can lead the student through the problems from the most critical to the less important. Thus, a separate narrative comment can provide the student with the necessary guidance without filling the margins with too many comments.⁵⁶ However, when using a narrative approach, it is helpful to refer to specific places in the student's writing with a numbering system or some other way to pinpoint places where the teacher has identified the specific analytical successes and problem areas.⁵⁷ In the narrative, the teacher can simply assign a number to a particular problem and then write that same number on the student's paper wherever the problem appears.

Narrative comments may be the best approach when addressing a draft with extensive substantive problems. Through a narrative, the teacher can explain step-by-step how the student can address the most significant flaws in the paper. By contrast, when a paper has that many deficiencies, identifying each problem in an interlinear comment would likely result in redundant comments, overwhelm and discourage the student, and take more time.⁵⁸

D. Determine Appropriate Detail for Comments

After choosing an approach to commenting, the teacher must then determine the appropriate level of detail for the student's paper. The comments should include sufficient detail to help the student progress with the analysis while not providing the answer to the student.⁵⁹ The teacher needs to provide suggestions that will help spark the right ideas for the student, but the teacher needs to allow the student enough independence to acquire the skills to reason through issues on her own.⁶⁰

Determining the appropriate depth is the same struggle legal writing teachers face with class discussion. Therefore, the classroom experience is a good guide

56. Enquist, *Advice from Experts*, *supra* note 1, at 1130-32 (discussing the benefits of limiting the number of comments). See *infra* notes 88-96 and accompanying text.

57. See *infra* notes 83-85 and accompanying text.

58. Enquist, *Advice from Experts*, *supra* note 1, at 1147 (quoting Jan Levine, who suggested, "When papers are truly awful, stop!").

59. Gionfriddo, *supra* note 1, at 439; Johansen, *supra* note 5, at 133.

60. See Kearney & Beazley, *supra* note 1, at 900 ("When the teacher responds with Socratic questions ... students realize for themselves the problems that the reader has in understanding the meaning of the writing. This realization makes it more likely that students will take responsibility for their own revisions and learn from them."); Neumann, *supra* note 1, at 756 (discussing student resistance to making analytical choices independently). See also Parker, *supra* note 12, at 573 ("When commenting on papers, a teacher can show students precisely where their writing is unclear, pose questions designed to illuminate thinking problems underlying the unclear communication . . .").

when trying to determine the amount of detail to include in comments when critiquing a student draft.⁶¹ Imagine if during a class discussion a student raised her hand and made a comment about a case. Would a teacher's response ever be something like, "That was too conclusory"? No, because this type of response would end all class discussion. The student would be discouraged and unwilling to continue to participate because the teacher would not be helping the student determine how to more fully explain the response.

In class, teachers intuitively know that their interaction with students must include enough detail to assist the student to work through the ideas. Providing sufficient assistance is equally necessary when providing feedback on student papers. If a teacher provides only label-like comments such as "conclusory," "vague," "awkward," "no topic sentence," etcetera, the teacher is not providing enough information to help the student.⁶² The student obviously did not think she was being "conclusory" or "vague" when she put the words on the page of the draft. Therefore, if the teacher provides only conclusory comments, the teacher is unlikely to see much improvement in the rewritten paper. The student will not have enough guidance to improve the assignment and will likely be very discouraged.⁶³ Therefore, the teacher must provide the type of comments that explain the problems and suggest solutions—just as the teacher would do in class.⁶⁴

Thus, when writing specific comments, the teacher should imagine that he is having a dialogue with the student much like he would in class. What types of comments help students understand the complexity of the issues and their analytical missteps in class? Typically, teachers use a range of questions in class from open-ended inquiries to fairly directed suggestions. This range helps the student focus on the issues she needs to address and, while not giving the student the "answer," the questions provide the students with the necessary support to

61. Kearney & Beazley, *supra* note 1, at 886-87; Neumann, *supra* note 1, at 728-39. *See also* Phelps, *supra* note 12, at 1090 (asserting that teaching legal writing should be seen as a conversation between the teacher and student).

62. Gionfriddo, *supra* note 1, at 447 (noting that comments "that simply label the problem, and do not go further—do not adequately identify the analytical issues behind" problems—and do not provide the student with enough information to correct the analytical problems); Kearney & Beazley, *supra* note 1, at 897 ("For the teacher's response to be useful, it must be specific, and detailed enough for the student to understand the strengths and weaknesses of his or her writing."); Neumann, *supra* note 1, at 768 (noting that "vague and unspecific comments are of little value to students"); Parker, *supra* note 12, at 586 (asserting that "descriptive comments, such as 'poor organization,' or general exhortations, such as 'work on organization'" are not very helpful).

63. Enquist, *What Students Say*, *supra* note 1, at 189 (concluding that "students are more frustrated than challenged by comments" that do not provide adequate information for the student "to determine what problem the instructor is pointing out and what solution would be acceptable").

64. Gionfriddo, *supra* note 1, at 448 ("[T]eachers must give their students the kind of feedback that helps them rethink their analysis so that they will be able to produce more precise ideas on the page."); Neumann, *supra* note 1, at 766 ("The goal of critique is . . . to help the student find manners of thought that are effective . . ."); Parker, *supra* note 12, at 586 ("[A] critique that simply identifies a writing problem ('unclear') for a student probably is insufficient. The teacher must also ask—and encourage students to ask—what caused this problem and what strategies will help fix it."); Rideout & Ramsfield, *supra* note 25, at 73 ("In responding to drafts, the professor should be . . . offering selective comments that point toward the student's revision of the work.").

work their way to a solution to the problems. The teacher should use the same range of comments on student writing.⁶⁵

Open-ended Socratic comments in which the teacher poses leading questions to help guide the student in finding the analytical solutions without providing the answer can be very effective because they help give the student the confidence to face complicated legal issues.⁶⁶ Often, one or two well-designed questions will help many of the pieces of the analysis fall into place for the student. The key with Socratic comments is crafting questions that are open-ended, but designed to lead the student to find the analytical solution on her own. A Socratic comment will fail if it simply poses vague questions just because the teacher does not want to “give the answer.”⁶⁷

At other times, more directed comments are required because the student has hit a substantive roadblock, and the only way to move forward is to get the student over that barrier.⁶⁸ In those situations, open-ended, Socratic-type comments would not be helpful, and the teacher should be more directive.⁶⁹ For example, there are times when the teacher should be as directive as saying something like, “I know the court seems to say ‘x and y,’ but does it really mean that? Or does the court really mean ‘y and z?’” Other times, the teacher may be able to send the student back to a particular piece of authority to help guide the student through the issue without laying out the answer. For example, a teacher might need to be as directive as saying something like, “You seem to miss an important point in Case X and, having missed this point, you have no topic sentence here. Go back to Case X on page 14 and reread the second paragraph so you see that the case addressed this important point. Rereading a portion of the case should help you rethink the idea you need to explain here as your topic sentence.”

Finally, by providing the student with clear direction in one portion of the paper, the teacher may be able to provide less directive comments on other parts

65. See Enquist, *What Students Say*, *supra* note 1, at 181 (explaining that comments that provided a dialogue with students were favorably received by students).

66. Kearney & Beazley, *supra* note 1, at 899-900 (explaining that Socratic questions “encourage the students’ independence as legal writers”).

To respond to the questions, students must confront their failures to communicate and then examine their thought processes on paper. Answering the questions in the context of their own work provides students with the experiential basis that will permit them to understand why the models are useful and to incorporate into their own thinking those aspects of the models that permit more straightforward expression of legal analysis.

Parker, *supra* note 12, at 573. See also Gionfriddo, *supra* note 1, at 451-53 (providing an example of a Socratic comment to a student paper).

67. See Parker, *supra* note 12, at 586 (explaining that well-crafted questions on student drafts help students “become aware that some of the analytic steps they have taken in their thinking do not appear on the written page”).

68. See Gionfriddo, *supra* note 1, at 454 (providing an example of when a directive comment is necessary to guide the student to a more advanced level of analytical understanding).

69. See Enquist, *What Students Say*, *supra* note 1, at 161-64 (providing examples of when students felt they needed more direction than open-ended questions provided).

of the draft.⁷⁰ The teacher can refer back to the directive comments when the teacher finds a similar analytical problem later in the paper. By directing the student to the earlier comment, the teacher helps the student figure out the new problem on her own.

E. Include Summary Comments

Whether the comments are sequential or narrative, open-ended or more directed, a student should always receive a summary of the critique placed at the beginning of the feedback. The summary should provide an overall assessment of the paper and an approach for the student to rewrite it.⁷¹ The summary also should explain the teacher's general impression of the analysis in the draft, including the major strengths and weaknesses. The summary also should communicate the priority of the analytical problems.⁷² Prioritizing the problems for the student is important because the student will probably not be able to determine which problems are most important from reading the specific comments to the different sections of the draft.⁷³ The very reasons that the student struggled with the analysis when writing the draft will make it difficult for the student, on her own, to decipher from individual comments which problems are the most important. However, the overall comment does not need to repeat the detailed explanations that are included in the specific comments. Rather, the teacher can refer to specific comments to help identify and explain the priority of the different issues discussed in the specific comments.⁷⁴

In addition to providing a general impression that outlines the priority of the substantive problems, the overall comment should provide the student with a strategy to begin the rewriting process because the most difficult part of revising a paper that has received a thorough analytical critique is determining where to begin. Therefore, the summary comment must explain to the student how she should begin reworking the draft, including which analytical problems should be handled in which order. Although the teacher should be clear that the strategy is only a suggestion,⁷⁵ that suggestion will help give the student the confidence to begin the revision, rather than making the student feel immobilized by a large number of detailed comments.

70. See Neumann, *supra* note 1, at 736 (“The better practice is to move back and forth between dialogues and explanations. Only a rare and perhaps oppressive critique is made up entirely of Socratic dialogues, one right after another.”).

71. Enquist, *What Students Say*, *supra* note 1, at 156-60. See also Neumann, *supra* note 1, at 768 (“At the end of the critique the student should understand the themes both theoretically and in terms of the performance.”).

72. Enquist, *Advice from Experts*, *supra* note 1, at 1134 (explaining that providing a summary evaluation in an end comment helps students understand the priority of their writing problems).

73. See Neumann, *supra* note 1, at 763 (suggesting that critique is not very productive when it is unthematic).

74. For examples of how experienced teachers refer to specific comments in the overall end comment, see Enquist, *Advice from Experts*, *supra* note 1, at 1139-40.

75. See Neumann, *supra* note 1, at 766 (noting that some student problems can be corrected “in a number of ways—often more ways than the critiquer alone can imagine”).

Additionally, if the teacher uses a sequential line-by-line approach when commenting on the analysis, most students would benefit from a summary comment for each section in addition to the overall comment at the beginning of the critique.⁷⁶ In the summary comments for the different sections, the teacher should communicate the same type of information that is included in the overall comment to the paper: the overall impression of the analysis of the section and how to prioritize the different problems.⁷⁷ Using summary comments for each section of the draft is an effective way to link the specific feedback to the general impression of the student's entire paper in the overall comment. In the overall comment, the teacher can refer to the different summary sections, without repeating the detailed information the teacher provides in the summaries for each section.

F. Explain Strengths of Paper

Analytical critique should identify the parts of the student's paper where the student did well to help put the comments that address the weaknesses of the analysis in perspective.⁷⁸ Providing positive comments is often the most challenging part of giving analytical feedback because it forces the teacher to clearly separate the problem areas from the places where the student was successful. The time is well spent, however, because positive comments facilitate the revision by giving the student a balanced perspective of the constructive feedback.⁷⁹

The teacher should summarize the strengths of the analysis in the overall comment at the beginning of the critique and, in addition, the teacher should identify in the individual comments the specific places in the draft where the student successfully explains her ideas. Explaining why certain passages are successful is particularly important early in the year when students may not fully grasp when their legal reasoning is correct or why it is correct.⁸⁰ To be effective, positive comments should not be conclusory. The positive feedback needs to

76. The need for a summary comment to each section depends on the length of the memorandum and the complexity of the analysis. For a discussion of techniques for using a combination of margin comments, summary comments for different sections, and end comments, see Enquist, *Advice from Experts*, *supra* note 1, at 1135-36.

77. See *supra* notes 72-73 and accompanying text.

78. Neumann, *supra* note 1, at 768 ("In a balanced critique, the student's weaknesses and strengths are both identified. If the student has done anything well, the teacher should let the student know, but in a way that suggests that the comment is not an act of charity.").

79. Enquist, *What Students Say*, *supra* note 1, at 166 (explaining that positive comments help students understand the rity of constructive comments).

80. Some experienced legal writing teachers have developed different methods to help identify positive comments and the level of importance of constructive feedback, including a color-coding or numbering system to differentiate positive and constructive comments. For example, critical analytical comments may be in yellow, while basic writing problems would be in blue. Positive comments could be made in green. See Enquist, *Advice from Experts*, *supra* note 1, at 1139-40.

fully explain why the student is doing something well analytically so the student will understand how that success can be repeated when revising the assignment.⁸¹

G. Reinforce Ideas Throughout the Feedback

Many students benefit from seeing how the same analytical problem creates difficulties for the reader in different parts of the draft. By showing how one analytical problem affects other areas, students understand that by clarifying one major substantive misunderstanding, many of the other problems in the paper will be fairly easy to correct. Pointing to the ripple-effect of one analytical problem also reinforces the priority of the issues because it helps the student understand that the major analytical problems must be remedied before the student attempts to address the less important problems.

Additionally, it may take several attempts to show the student what the problem is so the student “gets it.” A student may not fully understand the problems with the analysis in the segment of the student’s draft where the teacher placed the major comment regarding the issue. Therefore, identifying other places in the student’s draft where the same substantive problem confused the reader may help the student comprehend what the teacher was trying to describe in the major comment.

A student may be overwhelmed by repeating the same idea in several individual comments. However, this possibility can be reduced by carefully explaining that a problem is directly connected to the earlier analytical difficulty. If the student recognizes that the same analytical confusion is creating problems throughout the draft, the revising process will seem less daunting. To help avoid overwhelming the student, the explanations in the later comments should not be extensive. The teacher should quickly refer to other comments that deal with the same problem without repeating the details.⁸²

H. Use Student’s Own Writing as Examples

In most student writing, the student will attempt to use the same analytical idea in different points in the draft. Likely, she will do so with varying degrees of success. A student may struggle in one place with an issue, but do much better with the same idea at another spot in the paper. When commenting in one place on a draft where the student is having a hard time, referring to another part of the student’s own writing where the student was more successful with the same idea can be effective.⁸³ Showing an example from the student’s own writing clarifies

81. *See id.* at 1132-33 (asserting that positive comments must explain “specifically ... why something is well done” to be helpful).

82. When referring to the same analytical problem, the teacher can use shorthand references to the earlier comment. The reference could be as simple as saying “see Comment X—you are struggling with that same issue here.” For a discussion of the use of shorthand comments when referring to the same analytical issue, see Gionfriddo, *supra* note 1, at 447 n.76.

83. *See id.* at 448 (providing an example of using student’s own words in one part of student writing to help student correct an inaccurate statement later in the same paper).

what the teacher is trying to explain about the substantive problem. By using the student's own language to explain the analytical point, the student will have a better grasp of what is needed to correct the problem.

In addition, identifying that the student has used the same idea in different ways demonstrates to the student the inconsistency in the student's writing. Pointing out inconsistencies validates the accuracy of the teacher's comment and helps the student accept that changes are necessary to correct the analytical problems.⁸⁴ At the same time, it gives the student confidence that the task can be accomplished because the teacher has used the student's own words as an example of where the student has used and explained the ideas successfully.⁸⁵

I. Refer to Class Discussion and Course Materials

When possible, refer to class discussion and materials used in class to connect the assignment and the critique to the course overall.⁸⁶ For example, when encouraging the student to do something specific, the teacher can refer to a sample used in class.⁸⁷ Similarly, if the student seems to be struggling with a full understanding of a case or an idea, the teacher can refer the student to the student's class notes on the day the particular case or idea was discussed. Asking the student to review a portion of the course text or other readings that were assigned in class also can be an efficient way to provide the student with the information necessary to correct a misstep without having to write a detailed comment about it.

J. Consider Mechanics of Critique

1. Typed or Handwritten Comments vs. Voice Comments

Teachers should consider experimenting with different kinds of comments when providing analytical feedback. While many experienced teachers find handwritten margin comments to be effective,⁸⁸ many have moved to typed or voice comments. Comments should be handwritten only if the teacher has legible writing, and the teacher can keep the handwriting clear through a series of papers with many comments. The last thing a student needs is to struggle with the readability of comments in addition to the analytical challenges.⁸⁹

84. See Kearney & Beazley, *supra* note 1, at 901 (explaining that comments need to help students take responsibility for analytical failures).

85. Gionfriddo, *supra* note 1, at 448.

86. Johansen, *supra* note 5, at 132-33 (discussing the use of class handouts when commenting on student work).

87. See Tracy, *supra* note 45, at 330-31 (discussing the use of class samples to augment feedback on student work).

88. See Enquist, *Advice from Experts*, *supra* note 1, at 1139-40 (explaining the use of margin and interlinear comments).

89. Enquist, *What Students Say*, *supra* note 1, at 177 (explaining student reaction to illegible comments).

Typing comments is good for several reasons, in addition to making feedback easy for students to read. It makes the comments seem more authoritative and shows that the teacher has invested a lot of time in providing feedback. Furthermore, by typing the comments the teacher will be able to process and refine many comments because the teacher has the flexibility to work through ideas as the teacher is providing the feedback. The teacher may insert comments in different places in the memo as the teacher works through the student's paper and may revise and make changes to earlier comments if necessary. Handwritten comments make revision of comments much less likely.

Some teachers prefer voice comments for providing analytical feedback.⁹⁰ Voice comments allow the teacher to provide extensive analytical feedback quickly and efficiently. Transcribing or summarizing the comments for reference is often a valuable experience for the students because it forces the students to use the comments holistically. Students find it much harder to take an idea from a voice comment and stick it in the student's paper without fully understanding how to integrate the idea into the rewrite.

There are some downsides to voice comments. Teachers need to recognize that the teacher's mood is easy to identify in voice comments and, therefore, the teacher must be careful that he does not sound tired or agitated when recording the comments. Making changes also is harder with voice comments.⁹¹

2. *Placement of Comments*

The decision of where to put the comments physically on a student's paper is important. Students may like to see the teacher's immediate reaction on the page when the teacher writes a comment in the margin next to a section that needs the student's attention. Furthermore, circling parts of sentences or using arrows can be an efficient and effective method to help students see a better way to express their ideas. However, too many comments on the paper can be discouraging. A large number of comments and markings on the student's paper can destroy the integrity of the student's work because the comments themselves overpower the student's ideas physically on the page and give the impression that the student has failed, even when the substance of the comments is constructive and supportive.⁹² Therefore, a combination of interlinear comments, margin comments,⁹³ and summary comments is usually the better approach.⁹⁴

90. Voice comments may be recorded using digital recorders. In addition, Microsoft Word includes an option for the insertion of voice comments. See Word 2003 Assistance for "Voice Comment," <http://office.microsoft.com> (follow "Assistance" hyperlink; then follow "Word 2003" hyperlink; then search "voice comment") (last visited Oct. 12, 2006).

91. However, using the voice commenting feature of word processing programs makes changing voice comments easier because the teacher can provide a series of voice comments throughout the paper rather than taping all of the comments in one audio file or on an audio cassette.

92. See Enquist, *Advice from Experts*, *supra* note 1, at 1140 (noting the problems with overuse of margin comments).

93. See *supra* notes 51-52 and accompanying text.

By using a combination of interlinear, margin comments, and summary remarks at the end of sections, the teacher can focus on a specific problem right where the problems are located in the paper, while developing more complex, informative ideas in the summary remarks. The combination provides the teacher with the opportunity to fully address complicated issues without destroying the student's own work. If numbered margin comments are used, the teacher can refer to them quickly in the summary or end comments.⁹⁵

The feature in word processing programs that inserts comments electronically allows a variety of approaches. The teacher can place comments throughout the paper by highlighting the relevant sections and inserting comments. The teacher can choose to have the comments appear as "bubble" comments in the margins or footnotes at the bottom of the page. In addition, the teacher can make editing changes that will be tracked and identified on the student's paper. The ability to insert comments at different places and edit the student's work provides the flexibility of making short comments and changes in the margins, yet adding longer suggestions at other places in the text.

3. *Global Comments*

Distributing global comments to the entire class can be an effective way to supplement individual critique.⁹⁶ Global comments are simply a description of the most typical problems the teacher saw when reviewing all the papers. Identifying the general problems in a set of papers can help students more fully understand the problems in their own drafts. Students can see that they understood some parts of the analysis that created problems for other students. By seeing the range of problems they might have had, students can better understand what their focus should be when revising their paper. The use of global comments also can help clarify a comment the teacher was trying to make on many papers. Often, after critiquing most of a set of papers, the teacher may finally understand the best way to articulate a comment that he was trying to make on many of the papers. Rather than going back and reworking the comment on each paper, the teacher can address the issue in a memorandum to the class that is returned with the student papers explaining the common problems. However, global comments should not replace individualized critique on assignments. There is no substitute for providing students with individual feedback to help students more fully address specific problems in their writing.

94. Enquist, *Advice from Experts*, *supra* note 1, at 1140 (explaining that margin comments should be used in combination with summary end comments).

95. *See supra* notes 72-75 and accompanying text.

96. Enquist, *Advice from Experts*, *supra* note 1, at 1143 (discussing the use of "master comment sheets"); Johansen, *supra* note 5, at 130-31 (explaining the use of checklist comments).

K. Be Sensitive to the Tone of the Critique

The tone of comments is important because it affects how the student will process the information provided in the feedback.⁹⁷ Even when identifying serious analytical flaws, comments should stay positive so the student remains engaged in the process and feels like the end result is attainable. However, when providing comments on a paper that has many problems, even though the teacher may want to be as positive as possible, the teacher must be clear that there are serious issues so the student does not have a false impression about the overall quality of the paper.⁹⁸

Some teachers have found humor to be an effective tool when commenting on difficult analytical problems in student papers. New teachers should be very careful, however, when using humor in their feedback. Students often feel vulnerable and insecure when receiving criticism about their analysis.⁹⁹ Humor could compound those feelings. Nonetheless, some experienced teachers have found that humor can sometimes help when working on a particularly difficult analytical issue. For example, the teacher may be able to use the way the student has phrased an idea to show that the student has suggested something that is so off-base it is funny, even though that is clearly not what the student meant to communicate. By demonstrating the comical way the student articulated her ideas, the teacher may be able to help the student more fully understand the idea that she was really trying to express.

The level of humor, or how pointed the teacher can be in the comments, depends on the teacher's relationship with the class¹⁰⁰ and whether the student papers are graded anonymously. If the teacher knows who the student is, the teacher may have a better sense of the right approach to take with the student. If, however, the papers are graded anonymously, even an experienced teacher needs to be particularly careful about the tone and amount of humor used.¹⁰¹

L. Assume Good Faith

When critiquing an individual paper, the teacher should assume that the student did her best on the assignment.¹⁰² Assuming that students use their best effort seems like obvious advice to the new legal writing teacher, but most experienced teachers have encountered papers that appear like the students were not fully applying themselves. Reviewing a paper that appears to be carelessly

97. See Berger, *Rhetorical Model*, *supra* note 1, at 82.

98. For a discussion of the tone of comments, see Enquist, *Advice from Experts*, *supra* note 1, at 1148-49.

99. See Parker, *supra* note 12, at 571 (discussing the fear and angst law students experience when beginning to deal with the intellectual challenge of legal reasoning).

100. See Enquist, *Advice from Experts*, *supra* note 1, at 1131 (suggesting that classroom rapport with students may make students more receptive to comments).

101. For a discussion of how anonymous grading affects the type of comments teachers can provide students, see Gionfriddo, *supra* note 1, at 438-39 n.41.

102. Enquist, *Advice from Experts*, *supra* note 1, at 1150-51 (discussing the assumptions about student effort).

put together can be very frustrating. However, no matter what the quality of a student paper, the legal writing teacher should avoid assuming the student failed to apply herself when preparing the paper. Although it may appear that the student was not fully trying, there are many demands on a law student's time and psyche, and the student may have done her best even though the paper seems deficient. Therefore, the teacher should set his frustration aside, assume good faith on the part of the student, and comment on the paper accordingly.¹⁰³

M. Explain Feedback Methods to Students

Before returning critiqued papers, the teacher should take time during class to explain his method of critique so the students will understand how to use the comments to effectively rewrite the assignment. Explaining one's critiquing method is particularly important before returning the first assignment. Many students will never before have received such extensive or such detailed comments.¹⁰⁴ Both the volume and the detail of the comments can make the rewriting process daunting for many students. An explanation of the type of feedback the students should expect will prepare the students to use the individual feedback effectively.

The most important message to convey when explaining the method of critique is that the teacher has not attempted to rework the analysis and rewrite the assignment for the student. Teachers must explain that the students have ownership of the revision process because the students need to understand that, to use the teacher's feedback effectively, they must internalize the teacher's comments rather than mechanically make changes. Students also must understand that the teacher is responding to the students' words on the page and that the teacher is trying to use the students' ideas to help the student determine the best approach for correcting the analysis so the student can revise the assignment. The teacher should explain that, in essence, he is attempting to "get inside" the head of each student through the words on the page of the student's paper. However, the students must understand that the teacher is not able to determine with certainty the thought process each student used to write the ideas in the draft.¹⁰⁵ Therefore, the teacher needs to explain that he may have misunderstood where the student was truly struggling with the analysis. Accordingly, the student herself must make the final determination of how to fix the analytical problems that the teacher has identified. The teacher's comments may be a starting point, but the student may discover that the actual underlying problems were not fully identified by the teacher. Those problems must also be

103. *Id.* at 1146 (quoting Steve Johansen, who suggested that legal writing teachers need to "remember the students are trying" . . . "even if it doesn't always show up in their work").

104. See Parker, *supra* note 12, at 585 (explaining that many students lack the necessary skills to revise legal writing because they are not accustomed to revising or creating multiple drafts).

105. Gionfriddo, *supra* note 1, at 438 n.41 (noting that in most situations, "legal writing teachers . . . will need to figure out the student's actual problem from the words on the page"); Johansen, *supra* note 5, at 142 (explaining that the teacher can only "see the ideas as they are expressed on the page").

solved to effectively rewrite the assignment. If the student rigidly works on only the teacher's comments, rather than working on the analysis holistically, the student may not be able to fully correct the analytical problems that must be changed to write an effective paper.¹⁰⁶

IV. CRITIQUING A STUDENT DRAFT

You will now have the opportunity to use the ideas discussed in sections II and III to critique a student draft of an objective memorandum.¹⁰⁷ To prepare yourself to critique the student paper, you will need to read the memorandum from the senior attorney and the authority in Appendix A. In the memorandum, the senior attorney explains that a client, American Tools, Inc., is concerned about whether it can hire Andy Jones in light of a non-competition agreement Andy signed with a prior employer. The authorities are those that the student will rely on when answering the client's question. Then, you will critique the Student Draft of the problem provided in Appendix B. Finally, you will be able to compare your critique of the Student Draft to the approach in the Sample Critique in Appendix C.

A. *Analysis of American Tools, Inc. Problem*

You need to begin by developing an in-depth understanding of the problem in Appendix A regarding the American Tools, Inc. non-competition issue. As discussed above in section III.B, you need to study the facts and authority so you fully understand the potential problems students would encounter when preparing an objective memo regarding the question. Rather than writing the memo yourself, try to chart out the different areas where you think students would have difficulty. Charting the analytical challenges will help you think about what type of feedback would help the students work through those challenges.¹⁰⁸

By working through the cases, you will quickly see that the students should be able to quickly grasp the overall structure of the court's analysis because each of the cases provides a thorough and consistent discussion of the framework for the overall analysis. To enforce a non-competition agreement, the court requires that the employer have a legitimate interest and that the restrictions of the covenant reasonably protect that interest. In every case, the court explicitly explains that non-competition agreements are disfavored because they restrict a person's right to earn a living. However, the court also recognizes that an employer has a right to protect itself from a former employee if that employee could use an advantage gained during employment to compete against the employer. Therefore, the court attempts to balance the rights of the employee and the employer. To balance those rights, the court will enforce a non-competition agreement only if the employer can show a "legitimate interest" in restricting the employee from

106. Kearney & Beazley, *supra* note 1, at 907; Neumann, *supra* note 1, at 761.

107. For a discussion of objective memorandum writing in the legal writing course, see Tracy, *supra* note 45, at 303-06.

108. See *supra* notes 46-48 and accompanying text.

working and that the restrictions are reasonably tailored to protect that legitimate interest.

The challenge for most students will be explaining how the court determines if each requirement of the two-step test is satisfied. Each requirement can be explained only by synthesizing the cases, since no one case lays out the complete analysis. The analysis of how the court determines whether a covenant reasonably protects the employer's legitimate interest has been omitted from the cases because the student sample does not address this issue.

The students will realize through case synthesis that an employer has a legitimate interest if the employer convinces the court that the employee has acquired enough of a "personal hold" on its customers that the customers would likely follow the employee to a competitor. The court determines whether the employee has a personal hold over the customers by examining the "totality" of the employee's relationship with the customers, including whether the employee was the exclusive or primary contact with the customers, the regularity and frequency of the employee's contact with the customers, and the duration of the employee's relationship with customers.

Based on your understanding of this problem, spend some time thinking about the different analytical challenges students would encounter in this problem. Is the court consistent in its use of language? Or, does the court say the same ideas in different ways? Does the court clearly link the different pieces of the analysis, or do you have to apply implicit steps to fully understand the reasoning? Does the analysis make sense based on the policy the court has articulated in the cases? The more you identify the possible challenges that this problem poses, the more likely you will be able to assist the students with your critique.

B. Critique of Student Draft of American Tools, Inc.

Having spent time to fully understand the problem and the potential challenges it poses for students, you are ready to critique the Student Draft in Appendix B. The Student Draft is an objective memorandum that deals only with the legitimate interest test. When providing comments to the Student Draft, please assume that you will be able to critique the draft and the final rewrite of this assignment. Your comments on the draft should focus on the student's understanding of the law; save comments about grammar and style for a later revision. To help you focus your critique on the analytical problems, please consider the ideas discussed above in sections II and III to provide feedback on the draft. Pay special attention to the level of detail in your comments so you provide the student with sufficient guidance to correct the analytical problems, without simply providing the answers to the students. You also should try to provide an overall comment that summarizes the analytical strengths and weaknesses of the draft and provides a strategy for rewriting the memo.¹⁰⁹ Consider experimenting with different mechanical techniques when critiquing the Student Draft. If you normally handwrite your comments in the margins, try

109. See *supra* notes 71-77 and accompanying text.

typing your comments. Or, you might consider using voice comments to see if that method works for you.¹¹⁰

C. *Comparison of Reader's Feedback with Sample Critique*

Now that you have fully critiqued the Student Draft, this section will help you compare your feedback to the different methods used in the Sample Critique in Appendix C.

1. *Diagnosis of the Student Draft*

Before providing any feedback on the Student Draft, a quick diagnostic will help identify the strengths and weaknesses in the student's paper and determine the priority of those problems. There are many strengths in this memo. The student does a good job with the overall organization: She first explains the law and then separately applies that explanation to the client's facts.¹¹¹ When explaining the law, the student organizes the discussion around ideas by explaining the general principles of the law and then illustrating those principles with factual examples from the cases.¹¹² Finally, her topic sentences accurately reflect the content of each paragraph. Each of these strengths indicates that the student has a good grasp of the basic principles of legal reasoning and objective memorandum writing.

Having identified the overall strengths of the Student Draft, the analytical problems become clear. The first analytical problem manifests itself in the introductory paragraph. There, the student has misstated the overall analysis. The student does not accurately explain that the court's two-step analysis. An accurate description of the law would explain that the way the court balances the rights of the parties is to enforce non-competition agreements only if the employer has a legitimate interest and the covenant reasonably protects that interest. Rather, the student sets out the two-step analysis as an "addition" to the balancing idea. The cases, however, are clear that the interests of the parties are adequately balanced if, under the two-step analysis, the employer has a legitimate interest and the covenant reasonably protects that interest.

The student has other analytical problems in the second paragraph. There, the student has not accurately explained how the court determines if the employer has a legitimate interest. The student needs to explain that an employer has a legitimate interest if the employee has acquired enough of a "personal hold" on the employer's customers that the customers would likely follow the employee to a competitor. The court determines personal hold by examining the "totality" of

110. *See supra* notes 90-91 and accompanying text.

111. Imagine that the student was taught in her legal writing course to separate the discussion of law from the application of the law to the client's facts. Therefore, she is applying what she learned in class.

112. The vocabulary used to describe the analytical steps required in an objective memo, including "general principles of law" and "illustrating" those principles with cases, would have been taught in class so the student would understand the meaning of these ideas.

the employee's relationship with the customers, including several factors: whether the employee was the exclusive or primary contact with the customers; the regularity and frequency of the employee's contact with the customers; and the duration of the relationship.

First, the student does not distinguish between the overall question of the test (whether the employee had such a personal hold on the customers) and the specific factors the court uses to determine whether the overall test is met (regular contact, duration of contact, and whether the employee was the primary contact). Furthermore, the student did not include the "totality" idea that explains how the court uses the factors included in the analysis.

Failing to accurately explain the analysis of legitimate interest creates problems in the paragraphs that follow. In the case illustrations, the student only explains facts of the certain cases without explaining the result with the relevant explanation of the requirement, i.e., the student does not apply the analysis to demonstrate the reasoning supporting the outcome. The student probably was unable to completely explain the cases because she did not fully understand how the court was using the legitimate interest analysis to reason to its result. Similarly, in the section where the student applies the law to the client's facts, the student immediately compares the facts of the problem to cases without explaining why the comparisons are relevant. The student should have applied the explanation of the legitimate interest requirement to the client's facts and then moved into factual comparisons. However, if the student did not fully understand the analysis for legitimate interest, she would have been unable to apply the correct analysis to explain her prediction based on the client's facts.

2. *Method of Feedback*

The teacher chose to provide feedback to the Student Draft by providing numbered comments at the end of the draft, starting with an overall comment that summarizes the teacher's general sense of the draft. As discussed above, a combination of line-by-line margin comments with a summary comment is helpful because it allows the teacher to work through the draft chronologically to provide the teacher's reaction to the student's writing as he works through the paper, yet provides a quick synopsis of his overall impressions at the beginning of the critique.¹¹³

The teacher could have used another approach, however. The teacher could have provided narrative feedback in one comment. The narrative comment would focus the student on her explanation of legitimate interest, which is the most serious analytical problem in the Student Draft. To create a narrative comment, the teacher would expand the Overall Comment, referring to specific places in the Student Draft to help the student work through all of the issues.¹¹⁴

113. See *supra* note 74 and accompanying text.

114. See *supra* notes 76-77 and accompanying text.

3. *Overall Comment: Analytical Priorities and Rewriting Strategy*

In the Overall Comment, the teacher identifies the strengths of the draft, then explains the major analytical difficulties in the paper, and finally provides a strategy the student can use to begin the rewriting process.¹¹⁵ The teacher begins by outlining the strengths of the memo:

Overall Comment: This is a good first draft. You have done a good job with the overall organization. You organize the memorandum around the court's analysis. You begin with a thesis paragraph where you provide an introduction to the overall structure of the analysis and a road map to the rest of the discussion section. When explaining each issue, you explain the law for the issue, both the general legal principles and case illustrations, and then you apply the law to your client's facts separately. When explaining the law, you organize your discussion around ideas (general principles) rather than cases. You use strong topic sentences at the beginning of paragraphs. This is exactly how you should organize an objective memorandum. As we've discussed in class, it's your job to make it easy for your supervisor (a very busy person in an intense environment) to grasp your analysis quickly and accurately.

Identifying the strengths in the student's paper reinforces the basic skills the student has successfully learned and exhibited in writing the memo.¹¹⁶

After summarizing the strengths, the teacher focuses the student on the main analytical problem of the draft: the inaccurate explanation of "legitimate interest." In this part of the Overall Comment, the student is directed by number to the specific portion of the student's draft:

The main problem with your draft is analytical—you struggled to fully explain how the court determines if an employer has a legitimate interest at 3. Without a clear explanation of this idea, your reader will not understand the rest of your discussion of legitimate interest. Therefore, you must figure out and clearly explain the analysis before you try to fix any of the other problems.

Referring to the specific comment by number allows the student to quickly turn to that part of the paper to more fully understand the teacher's comment.¹¹⁷ Pinpointing to the student's draft in the Overall Comment highlights the problem for the student and should help the student understand that her explanation of the employer's legitimate interest is the most important analytical problem to be addressed when rewriting the assignment.

After the teacher has summarized the strengths and major analytical problems, he ends with a strategy for the student to rewrite the assignment.¹¹⁸

115. *See supra* notes 71-77 and accompanying text.

116. *See supra* note 75 and accompanying text.

117. *See supra* note 74 and accompanying text.

118. *See supra* notes 74-77 and accompanying text.

OK. Here's how I think you should approach the rewrite. Begin with the thesis paragraph. See 1. That shouldn't take long. Then, work on the analysis for legitimate interest. Once you fully explain the analysis for legitimate interest, you should expand your case illustrations in your analysis of the law section. Then, as I explain at 8, you must apply the analysis to your client's facts to explain your prediction. That is a critical step! Then work on making the case comparisons in the application section more complete.

That may sound like a lot of work, but I think you'll quickly realize that once you fix the problems at 3, the other problems will be fairly easy to correct.

A strategy must be fully explained in the first comment to the draft before the student reads the specific margin comments. By explaining the strategy in the Overall Comment, the specific comments to the draft will be less daunting because the student will understand that most of the individual comments relate to the major analytical problem regarding legitimate interest that has already been identified. The idea that the problem with the legitimate interest causes most of the other analytical issues in the student's writing is reinforced by references to other specific comments to the draft. Once the student corrects the problem with legitimate interest, she will find it easier to address the other related problems identified in the specific comments.

4. *Level of Feedback: Directive and Socratic Comments*

The level of detail for the individual comments varies depending on the type of analytical assistance the teacher determined the student needed to work through the problems. In the margin comments, the teacher uses a combination of direct suggestions that should help the student quickly see how to correct the problem and Socratic questions that will force the student to confront her confusion about the issues in a way that should help lead her to the solutions.¹¹⁹

Comment 1 is a directive comment. It clearly identifies the problem: The ideas introduced in the draft of this paragraph were not accurately explained.

1) The problem with the introductory paragraph is that you have not accurately explained how the court's concern about balancing the different interests of the parties relates to the court's two-step analysis that the employer must have a legitimate interest and that the covenant must reasonably protect that interest. You explain that the court balances the interests "in addition to" requiring that the employer satisfy the two-step analysis.

However, by posing questions, the student must reread the cases to determine the correct analysis. The comment continues by asking the following questions:

Do the cases suggest that the court determines if the interests are balanced separately from the two-step analysis? Or, do the cases explain that the interests of the parties are adequately balanced if, under the two-step analysis, the employer has

119. See *supra* notes 59-70 and accompanying text.

a legitimate interest and the covenant reasonably protects that interest? Those are very different ideas!

By verifying which explanation is accurate, the student should more fully understand the analysis. This process helps reinforce the fundamental analytical skills that are necessary to fully understand the overall structure of this analysis.¹²⁰

Comment 3 uses a more Socratic approach than was used in the comment to the introductory paragraph.¹²¹ In Comment 3 the teacher attempts to help the student rework the most important analytical problem in the draft. The teacher begins the Socratic dialogue by identifying what the student did well when in this part of the analysis:

3) Good—you try, in general principles, to explain how the court determines if the employer has a legitimate interest. You clearly understand that this explanation must be extrapolated from the cases as a group because the court does not clearly explain this idea in any one case. . . . [Y]ou are on the right track.

Reinforcing what the student did well is important because the student was clearly on the right track. Using the student's ideas that were correct will help set up the open-ended comments that follow because the student should understand that she needs to continue on that track, but the analysis needs to be more complete.¹²²

Next, the comment helps identify the substantive problems with the student's explanation of this issue:

Now, you need to work on explaining how all of the ideas fit together. Notice how you lump very specific ideas (regular contact, duration of contact, and whether the employee was the primary contact) with broader ideas (whether the employee had such personal hold on the customers that they would likely follow the employee to a competitor) without explaining how the ideas relate. Notice that you did not include the court's "totality" idea from the cases.

Here, the comment focuses the student on several important analytical questions that created problems for the student, but the teacher does not lay out the analysis for the student.¹²³ Instead, the teacher poses key questions to help the student identify and correct the analytical flaws in the student's explanation:

How does all of this fit together? What is the court's overall question when determining if the employer has a legitimate interest? How do the specific ideas fit into this overall question?

120. *See supra* notes 68-69 and accompanying text.

121. *See supra* notes 66-67 and accompanying text.

122. *See supra* notes 78-81 and accompanying text.

123. *See supra* notes 66-67 and accompanying text.

Finally, the comment ends by referring to the student's own writing later in the draft where the student explains these ideas more accurately.¹²⁴

Notice how you use many of the same ideas you included at this point in your analysis to explain the *Wilson* case—see 5 below—as well as later points in your analysis—see 6, 7 and 11 below—but that at all of these later points you order and connect the ideas much more precisely. That demonstrates that you understood the analysis much better than you explained it here. Use your analysis in these later places—again, see 5-7 and 11 below—to help revise your explanation here. When reworking this, make sure you explain how the “totality” idea from the cases fits into the analysis. I think you have a sense of this key idea, but you need to explain your analysis more clearly.

By referencing the student's own work, the teacher continues the Socratic dialogue by reinforcing that the student understood the analysis better than she explained it here without directing the student to the answer itself. Encouraging the student to revise the analysis by using the student's own writing later in the memo identifies for the student that the explanation of analysis in this part of her draft was inaccurate, while at the same time validates the student. The student is validated because she can see that her own analysis was better explained later in her memo. Yet the student understands that even though the correct analysis was eventually explained, it was confusing for the reader because the explanation was incomplete at a critical place in the memo and was contradicted by the student's own analysis later on.

5. *Positive Comments*

The teacher reinforces the analytical and presentational successes in the draft throughout the comments.¹²⁵ Positive comments help the student understand that, despite the analytical problems identified by the teacher, in many parts of the discussion the student successfully used the skills discussed in class. To begin, the teacher outlines the overall strengths of the paper in the Overall Comment:

Overall Comment. This is a good first draft. You have done a good job with the overall organization. You organize the memorandum around the court's analysis.

In the comments that follow, the teacher includes several references to places in the draft where the student was successful. The teacher quickly explains why the student's writing was helpful to the reader:

2) Good. You begin with a strong topic sentence that identifies the first “topic” that you are addressing—legitimate interest.

124. See *supra* notes 83-85 and accompanying text.

125. See *supra* notes 78-81 and accompanying text.

- 3) Good—you try, in general principles, to explain how the court determines if the employer has a legitimate interest.
- 6) Good transition to the negative case illustrations. Notice that you have done a good job setting out the overall question the court uses to determine if the employer has a legitimate interest.
- 7) Good. You are using the analysis to explain the cases. See 4.
- 8) Good. You begin the application section with a topic sentence that clearly states your prediction of the legitimate interest requirement.
- 10) I see that you are trying to explain the case comparisons with the analysis of legitimate interest. This is exactly what you need to do.
- 11) You do a fairly good job with this comparison, despite the problems at 3.

The positive comments combined with the constructive comments will help the student stay focused on the major analytical work regarding the issue of legitimate interest, while giving the student the confidence that providing a more accurate explanation is an attainable goal. Moreover, the student can use the successful parts of the draft to rework the places that need to be expanded and reworked.

6. *Reinforcement of the Major Analytical Problem*

The teacher specifies the major analytical problem regarding the analysis in the Overall Comment and then reinforces that idea in several margin comments. In the Overall Comment, the teacher identifies that the problem with the explanation of legitimate interest is the key problem that should be the focus of the rewriting process:

Overall Comment. . . . The main problem with your draft is analytical—you struggled to fully explain how the court determines if an employer has a legitimate interest at 3. Without a clear explanation of this idea, your reader will not understand the rest of your discussion of legitimate interest. Therefore, you must figure out and clearly explain the analysis before you try to fix any of the other problems.

The teacher refers by specific number to the margin comment regarding legitimate interest so the student can immediately jump to that part of the memorandum to see an explanation of the major analytical flaw in the student's draft.¹²⁶ However, the teacher provides the details of the problem with legitimate interest in Comment 3, which is the margin next to the place in the memo where the student should have fully laid out that explanation:

- 3) In rethinking your explanation for legitimate interest, notice that you have included most of the relevant ideas. Now, you need to work on explaining how all of the ideas fit together. Notice how you lump very specific ideas (regular contact, duration of contact, and whether the employee was the primary contact) with

126. See *supra* note 82 and accompanying text.

broader ideas (whether the employee had such personal hold on the customers that they would likely follow the employee to a competitor) without explaining how the ideas relate. Notice that you did not include the court's "totality" idea from the cases. How does all of this fit together? What is the court's overall question when determining if the employer has a legitimate interest? How do the specific ideas fit into this overall question?

In addition, the teacher identifies throughout the draft the places in the student's writing where this same analytical flaw created problems for the reader. The student should understand that by fixing this problem, many of the issues in the draft will be fairly easy to correct. Realizing that many of the problems are related reinforces the priority of the problems that was outlined in the Overall Comment. The teacher explains in all of the margin comments that follow, that the student should only attempt to fix the other problems once the issues with legitimate interest are fully corrected. This advice will help guide the student to revise the assignment because the student will understand that she should not focus on reworking a case illustration, for example, until she has fixed the explanation of legitimate interest. The comments regarding legitimate interest are:

- 5) However, notice that you use the "personal hold" and "likely follow" ideas differently than you explained them at 3.
- 6) Again, notice how you use the ideas differently here than you did at 3. Use this to help rework your explanation at 3.
- 7) Again, notice how you use the "personal hold" and "likely follow" ideas here. Is this how you used those ideas at 3? If not, is this the correct relationship of these ideas? Go back to 3 and think about it.
- 10) You are struggling, however, because of the problems at 3.
- 11) Again, notice that you use the ideas here differently than the way you explained them at 3.

Referencing the same problem in several places should also help the student because the student may not fully understand the problems with the explanation of legitimate interest at Comment 3, the place where the teacher first identified this major analytical problem. Identifying other places in the student's draft where the same analytical issue created problems for the reader may help the student understand what the teacher was trying to explain at Comment 3. However, to avoid overwhelming the student with repetitious comments, the teacher carefully restates in each comment that the problems being identified in the later portions of the student's draft are directly related to the earlier difficulty regarding legitimate interest. To emphasize this point, the teacher provides fairly short comments with a reference to the earlier, more complete, comment by number. Linking the later comments to the earlier comment reinforces the idea that the student must focus on that major part of the analysis before attempting to fix the other parts of the memo.

7. *Use of the Student's Own Writing as Examples*

The teacher also refers to the student's own writing to help the student think about how to correct the problems. Often, when the teacher indicates where the draft must be expanded, the teacher notes that the student has put the ideas together differently in later parts of the draft. In doing so, the teacher helps the student access the necessary ideas through the student's own work.¹²⁷ For example, in the comments that refer to case illustrations and the application, the teacher points out how well the student has used the analysis there:

5) Notice how you use the analysis from 3 to explain the outcome of this case, *Wilson*. This is a good start with the explanation of *Wilson*. However, notice that you use the "personal hold" and "likely follow" ideas differently than you explained them at 3. Why were the customers "likely to follow" the employee? Because he was the primary contact, etc.? Is that how you explained the analysis at 3?

7) Good. You are using the analysis to explain the cases. See 4. Again, notice how you use the "personal hold" and "likely follow" ideas here. Is this how you used those ideas at 3? If not, is this the correct relationship of these ideas? Go back to 3 and think about it.

11) You do a fairly good job with this comparison, despite the problems at 3. Again, notice that you use the ideas here differently than the way you explained them at 3. Your discussion here, therefore, may help you expand the analysis of legitimate interest there.

The teacher encourages the student to compare the way the student has used the analysis in these parts of the draft with the way the student explained the ideas at the beginning of the section. Using these comments, in combination with Comment 3 where the teacher explains the major analytical flaw in the student's explanation of legitimate interest, the student will see that the analysis is explained differently in different places. The teacher in Comment 3 suggests that the later parts of the student's draft are more accurate:

3) ... Notice how you use many of the same ideas you included at this point in your analysis to explain the *Wilson* case—see 5 below—as well as later points in your analysis—see 6, 7 and 11 below—but that at all of these later points you order and connect the ideas much more precisely. That demonstrates that you understood the analysis much better than you explained it here. Use your analysis in these later places—again, see 5-7 and 11 below—to help revise your explanation here.

So now the student must take her own work in these later segments and reconcile them with what she wrote earlier in the paper. By reinforcing this idea in several places, the teacher provides the student with several opportunities to correct the problem through her own writing.

When referring back to the student's own work, the teacher points the student to a very precise portion of the paper. By highlighting specific passages where

127. See *supra* notes 83-85 and accompanying text.

the student contradicts the earlier explanation, the teacher is forcing the student to deal with the inconsistencies of the student's own writing. Although the teacher has provided some guidance, the student must take the final sophisticated step of reconciling all of the contradictory ideas to correct the analysis. That process will help the student explain and use the ideas consistently, which will help the student successfully rewrite the paper.

In addition to using the student's own words to help correct the major analytical problems in the draft, the teacher also uses the student's writing to explain to her how to accurately use a case as an example of the analysis for the reader.

4) The problem with this case illustration is that you only explain the facts of the case without explaining the court's result on these facts in relation to the relevant explanation of the legitimate interest requirement. . . . You do a much better job taking all of these steps when you explain *Wilson* at 5.

5) Notice how you use the analysis from 3 to explain the outcome of this case, *Wilson*. This is a good start with the explanation of *Wilson*. . . .

In one part of the draft, the student does not fully illustrate a case, yet a few sentences later, the student does a better job when using another case example. The teacher explains what was missing in the explanation of the first case and then directs the student to the better-developed illustration to show that she does understand how to illustrate cases completely.

8. *Tone of Comments and References to Class Discussion*

The tone of the comments in the Sample Critique is fairly neutral. The use of a neutral tone helps encourage the student, yet does not give a false impression of the analytical flaws by being overly positive. The one place where the teacher uses tone to emphasize a point is in Comment 9:

9) Careful. You KNOW that you cannot simply compare your client's facts with facts of the cases to explain your prediction. You MUST apply the explanation of the legitimate interest analysis from above to your client's facts before a comparison with a case will be helpful.

The teacher feels free to use all capital letters to express, in a gentle way, some frustration with the mistake the student has made at that point in the draft. The teacher is comfortable expressing a little frustration because he is able to refer to a specific exercise in class that should have helped the student realize this mistake as she was writing the draft:

Think about the very first hypothetical we did in class: we could only predict whether the future court would see a Granny Smith apple as similar to the Bartlett pear or the Macintosh apple when we figured out what the court was concerned about—color or shape or kind of fruit. Although that example was very simple,

your prediction here is exactly the same—you are missing a key step of what the courts have been concerned about in the legitimate interest analysis.

All capital letters, which can be interpreted as raising one's voice, is appropriate only because of the classroom experience shared by the teacher and student and because the teacher is confident that the urging tone of the comment will be understood by the student to be encouraging and not scolding. Many teachers might not be comfortable making this type of comment, but because of the shared experiences and the specific reference to the classroom discussion, the all-capitals could be a very effective way to make a point that will help the student in future writing.¹²⁸

9. *Mechanics of Critique*

The comments in the Sample Critique are typed. However, other critique techniques could have been used to successfully critique the draft. Using voice comments, for example, would have been an easy way to communicate all of the necessary ideas to the student.

Whether handwritten comments would have been effective depends on the teacher's approach. Imagine what the critiqued memo would look like if this level of comments were handwritten in the margins or on the blank sides of the pages. Handwritten comments might have overwhelmed and discouraged the student. Nonetheless, handwritten comments might have worked if the teacher had provided a list of global analytical problems to the students in a separate document.

V. CONCLUSION

It takes experience and practice for legal writing teachers to develop their own methods of critiquing that provide effective feedback on student writing in the legal writing course. To be successful, legal writing teachers need to learn to prioritize their efforts by focusing on major analytical issues in student drafts, while saving basic writing and other presentational issues for comments on the final product. Analytical critique should help the student fully understand the strengths and weaknesses of the student's draft so the student will be able to successfully rewrite the assignment. Therefore, the feedback must be complete and detailed enough to assist the student in identifying underlying analytical problems to provide the student with guidance to work her way through the problems. Most often, to be sufficiently helpful, the feedback should include a combination of directive comments and Socratic questions that will lead the student through the analysis without simply giving the student the answer. Furthermore, the comments should reinforce the analytical issues when possible in various places in the student's writing and use the student's own words to help the student think of ways to refine the student's analysis and presentation.

128. See *supra* notes 86-87 and accompanying text.

While the mechanics of critique will vary, all legal writing teachers should consider the pros and cons of different critiquing techniques when critiquing a set of papers. The more legal writing teachers perfect their critiquing methods, the more effective the legal writing academy will become in the delivery of its most critical contribution to the legal community: training law students to be effective legal writers.

APPENDICES

APPENDIX A: PROBLEMS AND CASES: AMERICAN TOOLS, INC.¹²⁹

TO: Associate
FROM: Partner
RE: American Tools, Inc.: Non-competition Agreement
DATE: July 2004

American Tools, Inc. (“ATI”) distributes a line of farm equipment manufactured in Russia. ATI would like to hire Andy Jones as a sales representative in the State of Hamilton. Andy currently works in Hamilton as a sales representative for Midwestern Farm Equipment, Inc. (“Midwestern”). Midwestern distributes domestically manufactured farm equipment that is the same type of equipment ATI markets. When discussing the new position with Andy, ATI learned that Andy’s original employment contract with Midwestern included a non-competition clause that restricts Andy from “working as a sales representative for another farm equipment distributor in the State of Hamilton for two (2) years after termination of employment” with Midwestern.

To help me advise ATI about hiring Andy, please write a memo explaining if the non-competition agreement is enforceable against Andy. Although I have not researched this issue in Hamilton, I have dealt with this question in other states. I think I remembered all the questions to ask the client to give you the information you need to write the memo. I’ve included the information below. To help save you time, I have already checked and Hamilton does not have a statute dealing with non-competition clauses in employment agreements, so you can get started with a print digest search of Hamilton cases since our client is concerned about paying the expense for on-line research at this time. Here’s the information I obtained from the client:

- Andy started with Midwestern in 1991 and has been servicing most of his customers for at least 6 years.
- Andy had no experience selling farm equipment before he took the job with Midwestern.
- After Andy took the job, Midwestern provided on-the-job training for about two years.
- In Andy’s capacity as a Midwestern sales representative, he makes all contacts with his customers. If a dealer needs technical assistance when servicing the equipment, Andy arranges the necessary support.
- Andy meets with his customers at least once every month.
- Andy is not a personal friend of any of his customers.

129. The cases for this problem are based loosely on Minnesota opinions dealing with enforceability of non-competition covenants in employment agreements. *See, e.g.,* Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127 (Minn. 1980); Jim W. Miller Constr., Inc. v. Schaefer, 298 N.W.2d 455 (Minn. 1980); Walker Employment Serv. v. Parkhurst, 219 N.W.2d 437 (Minn. 1974); Bennett v. Storz Broad. Co., 134 N.W.2d 892 (Minn. 1965).

William BILLINGS
v.
PARIS FASHIONS, Inc.
316 N.E.4th 100

Supreme Court of Hamilton

April 2, 1965

MURPHY, Justice.

Factual background

Plaintiff operates a chain of clothing stores in several large cities around the country. The defendant became the manager of the plaintiff's store in Mercy Springs on April 4, 1960. At the time the defendant was hired, he signed an employment agreement that included a noncompetition clause. The clause provided that the defendant would not directly or indirectly enter into or engage in the same business as plaintiff in the city of Mercy Springs for a period of four years after his employment with plaintiff ceased. The defendant's main responsibility was to assist customers who came into the store to buy clothing. He was also responsible for managing the other store employees. At most times, the store was staffed with a minimum of 10 salespeople. In March, 1963, the employee quit his job with plaintiff and opened a competing clothing store in Mercy Springs. The employer filed this action to enjoin defendant from carrying on that business in the city of Mercy Springs. The trial court dismissed the action. The plaintiff appeals.

Discussion

The question is whether the noncompetition clause in the employment agreement is enforceable. In this connection it should be immediately recognized that the agreement is one in partial restraint of trade since it limits the right of a party to work and to earn a livelihood. Such contracts are looked upon with disfavor, cautiously considered, and carefully scrutinized. *Arthur Murray Dance Studios v. Witter*, Ohio Com.Pl. 62 Ohio L.Abst. 17, 105 N.E.2d 685. This approach has been influenced by a concern for the average individual employee who, as a result of his unequal bargaining power, may be found in oppressive circumstances. It may well be surmised that such a covenant finds its way into an employment contract not so much to protect the business as to needlessly fetter the employee, and prevent him from seeking to better his condition by securing employment with competing concerns. One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable. On the other hand, it is important to allow businesses to protect themselves from unfair competition. Accordingly, the enforceability of each such clause must be determined on its own facts and a reasonable balance must be maintained between the interests of the employer and the employee.

*101 Therefore, the test applied is whether the employer has a legitimate interest in restricting the employee, and if so, whether the non-competition clause reasonably protects the employer's legitimate interest, in terms of the time, territory and subject matter. 35 AM.JUR., Master and Servant, s 99; 36 AM.JUR., Monopolies, Combinations, and Restraint of Trade, §§78 and 79. See, *Combined Ins. Co. v. Bode*, 247 Minn. 458, 77 N.W.2d 533.

This case fails the first part of this test. A restraint is necessary for the protection of the employer when the employee obtains a personal hold on the employer's customers. In this case, the plaintiff is unable to show that defendant had such a relationship with its customers. Plaintiff's business is selling men's and women's clothing to walk-in customers. The employee did not meet with the same customers regularly. Any salesperson could assist the customers when they walked into the store. If an employee's job requires him to work with the same customers regularly, those customers may be attracted to him personally, and therefore are likely to go with him should he enter the service of a competitor. The employee in this case did not have that type of relationship with the employer's customers.

Because the employer did not have a legitimate interest in restricting the employee, there was no need for a noncompetition clause. Therefore, we do not need to analyze the reasonableness of the restrictions.

Affirmed.

DANIELS v. DANIELS, Inc.**515 N.E.4th 310**Supreme Court of Hamilton
Oct. 17, 1980

WAHL, Justice.

Richard Daniels (the “employee”) brought suit against Daniels, Inc. (the “agency”) seeking declaratory judgment declaring a non-competition clause in his employment contract to be unenforceable. After a trial, the district court held that the clause was enforceable. The employee appeals.

Factual Background

The agency is a family-run insurance company. The employee is the eldest son of the owner, Everett Daniels. The employee began working for the agency in June 1967. At the beginning of his employment, the employee signed an employment agreement that included a non-competition clause. The non-competition clause precluded the employee, upon termination of his employment with the agency for any reason, from engaging in the insurance business for a period of five years within a 50-mile radius of Minneapolis, St. Paul, or Duluth.

Over a period of years, the employee was trained and acquired expertise in the sale of probate and court bonds. As the employee was entrusted with greater responsibility, the father phased himself out of that part of the business. By 1972, the employee was in charge of the agency’s bond business and was often the exclusive contact between the agency and its bond customers. He met most of his clients a few times each month. Most of the bond clients had been clients for several years.

Due to a conflict between the employee and his father about the business, the employee left the agency on January 13, 1978. At the time of trial, the employee had not accepted employment with any other insurance agency.

Discussion

The only question in this appeal is whether the non-competition clause was enforceable. The test of enforceability of a non-competition clause in an employment agreement was well stated in *Billings v. Paris Fashions*, 316 N.E.4th 100, 101 (1965):

[T]he test applied is whether the employer has a legitimate interest in restricting the employee, and if so, whether the non-competition clause reasonably protects the employer’s legitimate interest, in terms of the time, territory and subject matter.

*311 In this case, the trial court found that the agency had a protectable interest in its client relationships and the non-competition clause reasonably protected that interest. We agree and affirm the trial court’s decision.

In *Billings*, the court found that the employer did not have a protectable interest in restricting the employee from working because the employee did not have a personal hold on the employer's clients. This case is very different. Here, the employee was the exclusive contact with his customers for a long period of time, meeting with them often. *See Billings*, 316 N.E.4th at 101.

[Analysis of the reasonableness of the agreement deleted.]

Affirmed.

Thomas W. KLINGER
v.
HAMILTON STATE BANK

545 N.E.4th 619

Supreme Court of Hamilton

Aug. 6, 1985

LESLIE, Justice.

Plaintiff brought suit seeking declaratory judgment declaring a non-competition clause in his employment contract to be unenforceable. After a trial on the matter, the district court held that the clause was unreasonable and therefore invalid. The defendant appeals.

Factual Background

In October of 1983, Hamilton State Bank (defendant) and Thomas W. Klinger (plaintiff), entered into an employment contract. Under the terms of the written contract the plaintiff would become a vice president responsible for servicing commercial accounts. The employee was the only employee of the bank who called on the commercial clients. He met with his clients several times a month. The employment contract contained a non-competition clause. Under the provisions of this clause, the plaintiff could not accept employment with any financial institution within a defined trade area for a period of three years following termination of his employment.

Approximately four months after the plaintiff began working for the defendant he received what he considered a better offer from another bank and asked to be released from his contract with the defendant. The defendant refused. The plaintiff immediately brought this suit to declare the non-competition clause invalid. Following a trial, the court entered judgment declaring that the non-competition clause was unenforceable. The defendant appeals, claiming that the clause was reasonable and enforceable. Because we find the defendant's arguments unpersuasive, we affirm.

Discussion

Non-competition clauses like the one involved here have long been carefully scrutinized by courts and have been traditionally disfavored as restraints on an individual's ability to make a living. *See Billings v. Paris Fashions, Inc.*, 316 N.E.4th 100 (1965). As we said in *Billings*: "[o]ne who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable." However, a court may enforce a non-competition clause if it is necessary to protect reasonable interests of an employer, and does not impose unreasonable restraints on the rights of the employee. *Billings*, 316 N.E.4th at 100, 101.

Defendant argues that the restriction imposed was necessary to protect the interests of the bank. We disagree. The defendant did not have a legitimate *620 interest in restricting the plaintiff. The relevant inquiry is whether the employee had a personal hold on the

defendant's customers like the employee in *Daniels*. 515 N.E.4th 310 (1980). Although the regularity and quality of contacts the plaintiff had with the defendant's customers is similar to the type of relationship we found sufficient in *Daniels*, in that case the employee worked with the employer's customers for several years. Here, the plaintiff did not have a personal hold on the defendant's customers. He worked for defendant for only four months before being discharged. Therefore, he established no special connections with the bank's customers as a result of his employment. It is unlikely that any of the defendant's customers would follow the plaintiff to a competitor. *See Daniels*, 515 N.E.4th at 310-11.

Affirmed.

WILSON PUBLISHING COMPANY

v.

Neal T. FOSTER**561 N.E.4th 815**

Supreme Court of Hamilton

June 21, 1988

LANSING, Justice

Plaintiff brought suit seeking declaratory judgment declaring a non-competition clause in his employment contract to be unenforceable. The district court held that the clause was reasonable and therefore valid. The plaintiff appeals.

Factual Background

Wilson's custom publishing division creates, designs, prints and distributes custom magazines for companies across the United States. Wilson is one of approximately 12 major national custom publishers, although there are several smaller operations. In January 1980 Wilson hired Neal Foster, who had 27 years of experience in marketing, as an account executive. Foster solicited business and assisted Wilson's clients in developing marketing strategies, spending at least one day a month with each customer. Foster was the primary contact between Wilson and all of the clients to which he was assigned. Most of his clients had been doing business with Wilson for at least five years. On September 28, 1987, Wilson terminated Foster's employment, allegedly because his aggressive style conflicted with corporate policy. In October 1987 Foster joined another custom publishing corporation. Wilson threatened action based on the following non-competition clause that was included in the employment agreement Foster signed at the time he was hired:

For a period of 18 months from termination of employment, I shall not, directly or indirectly, engage in or solicit or have any interest in any person, firm, corporation, or business that engages in or solicits, the publication or marketing of any custom publication, promotion piece, catalog, calendar, or any other printed material for any customer that has done business with the custom publishing division of Wilson within the period of one year immediately prior to my termination of employment.

Foster brought this action seeking a declaratory judgment that the non-competition clause is unenforceable. After a trial, the trial court found that the clause is enforceable. Foster appeals.

Discussion

Because restrictive covenants are *816 agreements in restraint of trade, we have consistently held that such agreements should be strictly construed. Therefore, they are

enforced only to the extent reasonably necessary to protect the goodwill of the employer. *Billings v. Paris Fashions, Inc.*, 316 N.E.4th 100, 101 (1965). Foster argues that the noncompetition agreement does not protect any legitimate interest of Wilson's because he did not have a sufficiently close relationship with Wilson's customers. He also argues that the agreement itself is unreasonable in scope and duration. We disagree.

1) Client relationships. Employers have a legitimate interest in protecting themselves against the deflection of customers by their employee if the employment has provided the employee with the opportunity to establish a personal hold on the employer's customers. *Billings*, 316 N.E.4th at 101. Although Foster disavows any "sensitive relationship" with his customers, the totality of Foster's relationship with Wilson customers was sufficient to give Wilson a legitimate interest in protecting itself against him. Foster worked regularly for at least five years with most of his clients. He was the primary contact between the business and the customers. Clearly, it was likely that his customers would follow him to a competitor. Therefore, he had a personal hold on the employer's customers. *See Klinger v. Hamilton State Bank*, 545 N.E.4th 619, 620 (1985) (evidence showed that employee did not develop any special relationships with customers).

2) Reasonableness of restriction. The subject matter, temporal duration and geographic area of the restriction do not appear unreasonable, given the national character of Wilson's business and the time required to establish a relationship between Foster's former customers and his replacement. *See Klinger*, 545 N.E.4th at 620.

Affirmed.

APPENDIX B: STUDENT DRAFT MEMORANDUM

TO: Partner
FROM: Associate
RE: American Tools, Inc.: Non-competition Agreement
DATE: July 2004

QUESTION PRESENTED

[omitted]

BRIEF ANSWER

[omitted]

FACTS

[omitted]

DISCUSSION

Hamilton has not enacted a statute regarding non-competition clauses in employment agreements, thus, these clauses are governed by decisions of the Hamilton Courts. In evaluating these clauses, the Hamilton courts have stated that they disfavor them because they are restraints on trade and restrict an employee's right to earn a living. *See Klinger v. Hamilton State Bank*, 545 N.E.4th 619 (Ham. 1985); *Billings v. Paris Fashions, Inc.*, 316 N.E.4th 100 (Ham. 1965). The courts, therefore, balance the right of the employee to earn a living with the right of the employer to protect itself from unfair competition from a former employee. *See Wilson Publ'g Co. v. Foster*, 561 N.E.4th 815, 816 (Ham. 1988); *Daniels v. Daniels, Inc.*, 515 N.E.4th 310 (Ham. 1980); *Billings*, 316 N.E.4th at 100. In addition, the courts require the employer to have a legitimate interest in restricting the employee with a non-competition clause and the clause itself must reasonably protect that legitimate interest. *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101.

The courts first consider whether the employer has a legitimate interest in restricting the employee. *See id.* To determine if the employer has a legitimate interest, the courts look to see whether the employee had regular contact with the customers, whether the employee had a personal hold on the customers over a long period of time, whether the contact was frequent, whether the customers would likely follow the employee to a competitor and whether the employee was the primary or exclusive contact with the employer's customers. *See Wilson*, 561 N.E.4th at 816; *Klinger*, 545 N.E.4th at 619; *Daniels*, 515 N.E.4th at 310; *Billings* 316 N.E.4th at 100. If the employer has a legitimate interest, the employer should be able to protect its clients from the former employee. *See Wilson*, 561 N.E.4th at 816; *Klinger*, 545 N.E.4th at 619; *Daniels*, 515 N.E.4th at 310; *Billings* 316 N.E.4th at 100.

In *Daniels*, the Court found that the employer had a legitimate interest in restricting the employee because the employee was the exclusive contact between the business and

the customers over several years. *See* 515 N.E.4th at 311. The employee met with his clients a few times a month. *Id.* at 310. Similarly, in *Wilson*, the Court determined that the employer had a legitimate interest in the employee's relationship with its customers because it was likely that the customers would follow the employee to a competitor. *See* 561 N.E.4th at 816. In that case, the employee was the primary contact between the employer's business and the customers and he met them at least one day a month for several years. *Id.* at 815.

On the other hand, if an employee does not have a personal hold on the customers, the employee does not have a legitimate interest in restricting the employee because the customers would not likely follow the employee to a competitor. *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101. Thus, the employee would not be a threat to the employer's customers. *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101. The Court found that the employee did not have sufficient contacts with the employer's customers in *Klinger*. 545 N.E.4th at 620. In *Klinger*, the employee was hired as a bank vice-president who was responsible for the bank's commercial clients. *Id.* at 619. The employee was the exclusive contact between the bank and the commercial clients and met with his customers several times a month. *See id.* However, the Court found that the employee could not have established a personal hold on the bank's customers because the employee only worked for the bank for four months before quitting. *See id.* Therefore, it was unlikely that the customers would follow the employee to a competitor. *See id.*

In *Billings*, the Court found that a clothing store salesperson did not have a personal hold on the employer's customers because all of the customers were walk-in customers. *See* 316 N.E.4th at 101. Any salesperson could assist the customers who walked into the store. *Id.* at 100. Therefore, the salesperson did not have regular and exclusive contact with the same customers. *Id.* Therefore, it was not likely that the customers would follow the employee to a new clothing store. *See id.*

In this case, the court will probably find that Midwestern does have a legitimate interest in restricting Andy. *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101. Andy's relationship with Midwestern's clients is similar to the relationship of the employee with the employer's customers in *Daniels* and *Wilson* where the Court found a legitimate interest. *See Wilson*, 561 N.E.4th at 815; *Daniels*, 515 N.E.4th at 311. Andy is the exclusive contact between the employer and his customers. This is like the employees in *Daniels* and *Wilson* who were either the exclusive or primary contact between the employer's business and the customers. *See Wilson*, 561 N.E.4th at 815; *Daniels*, 515 N.E.4th at 311. In addition, Andy has been meeting with his customers for six years about once a month. This is as long and regular as the employee in *Daniels* who met with his customers a few times a month for several years and the employee in *Wilson* who met with his customers monthly for five years. *See Wilson*, 561 N.E.4th at 815; *Daniels*, 515 N.E.4th at 311. Andy's contacts with the customers are unlike *Klinger* where the court found that the employee did not have sufficient contacts with the customers because the employee only worked for the employer for four months. *See* 545 N.E.4th at 620. Andy worked with the customers over 6 years. Furthermore, Andy's relationship with his customers is stronger than the relationship in *Billings*. *See* 316 N.E.4th at 101. In that case the employee only had contact with walk-in customers. *Id.* at 100. He was not responsible for meeting with specific customers on a regular basis. *Id.* Andy is responsible for meeting with the same customers regularly. He meets with

his customers about once a month and is the only contact the customer has with his employer. Therefore, his customers are likely to follow him to a competitor.

CONCLUSION

[omitted]

Appendix C: Sample Critique of Student Draft Memorandum

TO: Partner
FROM: Associate¹
RE: American Tools, Inc.: Non-competition Agreement
DATE: July 2004

QUESTION PRESENTED

[omitted]

BRIEF ANSWER

[omitted]

FACTS

[omitted]

DISCUSSION

Hamilton has not enacted a statute regarding non-competition clauses in employment agreements, thus, these clauses are governed by decisions of the Hamilton Courts. In evaluating these clauses, the Hamilton courts have stated that they disfavor them because they are restraints on trade and restrict an employee's right to earn a living. *See Klinger v. Hamilton State Bank*, 545 N.E.4th 619 (Ham. 1985); *Billings v. Paris Fashions, Inc.*, 316 N.E.4th 100 (Ham. 1965). The courts, therefore, balance the right of the employee to earn a living with the right of the employer to protect itself from unfair competition from a former employee. *See Wilson Publ'g Co. v. Foster*, 561 N.E.4th 815, 816 (Ham. 1988); *Daniels v. Daniels, Inc.*, 515 N.E.4th 310 (Ham. 1980); *Billings*, 316 N.E.4th at 100. In addition, the courts require the employer to have a legitimate interest in restricting the employee with a non-competition clause and the clause itself must reasonably protect that legitimate interest. *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101.²

The courts first consider whether the employer has a legitimate interest in restricting the employee.³ *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101. To determine if the employer has a legitimate interest, the courts look to see whether the employee had regular contact with the customers, whether the employee had a personal hold on the customers over a long period of time, whether the contact was frequent, whether the customers would likely follow the employee to a competitor and whether the employee was the primary or exclusive contact with the employer's customers. *See Wilson*, 561 N.E.4th at 816; *Klinger*, 545 N.E.4th at 619; *Daniels*, 515 N.E.4th at 310; *Billings* 316 N.E.4th at 100. If the employer has a legitimate interest, the employer should be able to protect its clients from the former employee. *See Wilson*, 561 N.E.4th at 816; *Klinger*, 545 N.E.4th at 619; *Daniels*, 515 N.E.4th at 310; *Billings* 316 N.E.4th at 100.⁴

In *Daniels*, the Court found that the employer had a legitimate interest in restricting the employee because the employee was the exclusive contact between the business and the customers over several years. *See* 515 N.E.4th at 311. The employee met with his clients a few times a month. *Id.* at 310.⁵ Similarly, in *Wilson*, the Court determined that the employer had a legitimate interest in the employee's relationship with its customers because it was likely that the customers would follow the employee to a competitor. *See* 561 N.E.4th at 816. In that case, the employee was the primary contact between the employer's business and the customers and he met them at least one day a month for several years. *Id.* at 815.⁶

On the other hand, if an employee does not have a personal hold on the customers, the employee does not have a legitimate interest in restricting the employee because the customers would not likely follow the employee to a competitor. *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101. Thus, the employee would not be a threat to the employer's customers. *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101.⁷ The Court found that the employee did not have sufficient contacts with the employer's customers in *Klinger*. 545 N.E.4th at 620. In *Klinger*, the employee was hired as a bank vice-president who was responsible for the bank's commercial clients. *Id.* at 619. The employee was the exclusive contact between the bank and the commercial clients and met with his customers several times a month. *See id.* However, the Court found that the employee could not have established a personal hold on the bank's customers because the employee only worked for the bank for four months before quitting. *See id.* Therefore, it was unlikely that the customers would follow the employee to a competitor. *See id.*⁸

In *Billings*, the Court found that a clothing store salesperson did not have a personal hold on the employer's customers because all of the customers were walk-in customers. *See* 316 N.E.4th at 101. Any salesperson could assist the customers who walked into the store. *Id.* at 100. Therefore, the salesperson did not have regular and exclusive contact with the same customers. *Id.* Therefore, it was not likely that the customers would follow the employee to a new clothing store. *See id.*

In this case, the court will probably find that Midwestern does have a legitimate interest in restricting Andy.⁹ *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101. Andy's relationship with Midwestern's clients is similar to the relationship of the employee with the employer's customers in *Daniels* and *Wilson* where the Court found a legitimate interest. *See Wilson*, 561 N.E.4th at 815; *Daniels*, 515 N.E.4th at 311.¹⁰ Andy is the exclusive contact between the employer and his customers. This is like the employees in *Daniels* and *Wilson* who were either the exclusive or primary contact between the employer's business and the customers. *See Wilson*, 561 N.E.4th at 815; *Daniels*, 515 N.E.4th at 311. In addition, Andy has been meeting with his customers for six years about once a month. This is as long and regular as the employee in *Daniels* who met with his customers a few times a month for several years and the employee in *Wilson* who met with his customers monthly for five years. *See Wilson*, 561 N.E.4th at 815; *Daniels*, 515 N.E.4th at 311.¹¹ Andy's contacts with the customers are unlike *Klinger* where the court found that the employee did not have sufficient contacts with the customers because the employee only worked for the employer for four months. *See* 545 N.E.4th at 620. Andy worked with the customers over 6 years. Furthermore, Andy's relationship with his customers is stronger than the relationship in *Billings*. *See* 316 N.E.4th at 101. In that case the employee only had contact with walk-in customers. *Id.* at 100. He was not responsible for meeting with specific customers on a regular basis.

Id. Andy is responsible for meeting with the same customers regularly. He meets with his customers about once a month and is the only contact the customer has with his employer. Therefore, his customers are likely to follow him to a competitor.¹²

CONCLUSION

[omitted]

¹ Overall comment: This is a good first draft. You have done a good job with the overall organization. You organize the memorandum around the court's analysis. You begin with a thesis paragraph where you provide an introduction to the overall structure of the analysis and a road map to the rest of the discussion section. When explaining each issue, you explain the law for the issue, both the general legal principles and case illustrations, and then you apply the law to your client's facts separately. When explaining the law, you organize your discussion around ideas (general principles) rather than cases. You use strong topic sentences at the beginning of paragraphs. This is exactly how you should organize an objective memorandum. As we've discussed in class, it's your job to make it easy for your supervisor (a very busy person in an intense environment) to grasp your analysis quickly and accurately.

The main problem with your draft is analytical—you struggled to fully explain how the court determines if an employer has a legitimate interest at 3. Without a clear explanation of this idea, your reader will not understand the rest of your discussion of legitimate interest. Therefore, you must figure out and clearly explain the analysis before you try to fix any of the other problems.

OK. Here's how I think you should approach the rewrite. Begin with the thesis paragraph. See 1. That shouldn't take long. Then, work on the analysis for legitimate interest. Once you fully explain the analysis for legitimate interest, you should expand your case illustrations in your analysis of the law section. Then, as I explain at 8, you must apply the analysis to your client's facts to explain your prediction. That is a critical step! Then work on making the case comparisons in the application section more complete.

That may sound like a lot of work, but I think you'll quickly realize that once you fix the problems at 3, the other problems will be fairly easy to correct.

² The problem with the introductory paragraph is that you have not accurately explained how the court's concern about balancing the different interests of the parties relates to the court's two-step analysis that the employer must have a legitimate interest and that the covenant must reasonably protect that interest. You explain that the court balances the interests "in addition to" requiring that the employer satisfy the two-step analysis. Is this accurate? Do the cases suggest that the court determines if the interests are balanced separately from the two-step analysis? Or, do the cases explain that the interests of the parties are adequately balanced if, under the two-step analysis, the employer has a legitimate interest and the covenant reasonably protects that interest? Those are very different ideas! You must figure this out because otherwise you have not adequately prepared your supervisor.

³ Good. You begin with a strong topic sentence that identifies the first "topic" that you are addressing—legitimate interest. However, does the court "consider" this? Or does the court "require" the employer to have this interest?

⁴ Good—you try, in general principles, to explain how the court determines if the employer has a legitimate interest. You clearly understand that this explanation must be extrapolated from the cases as a group because the court does not clearly explain this idea in any one case. (Good, you didn't just stick in a quote from a case!) Please realize how important it is that you tried to take this step! Don't be discouraged that you didn't get it completely right the first time—you are on the right track.

In rethinking your explanation for legitimate interest, notice that you have included most of the relevant ideas. Now, you need to work on explaining how all of the ideas fit together. Notice how you lump very specific ideas (regular contact, duration of contact, and whether the employee was the primary contact) with broader ideas (whether the employee had such personal hold on the customers that they would likely follow the employee to a competitor) without explaining how the ideas relate. Notice that you did not include the court's "totality" idea from the cases. How does all of this fit together? What is the court's overall question when determining if the employer has a legitimate interest? How do the specific ideas fit into this overall question?

Notice how you use many of the same ideas you included at this point in your analysis to explain the *Wilson* case—see 5 below—as well as later points in your analysis—see 6, 7 and 11 below—but that at all of these later points you order and connect the ideas much more precisely. That demonstrates that you understood the analysis much better than you explained it here. Use your analysis in these later places—again, see 5-7 and 11 below—to help revise your explanation here. When reworking this, make sure you explain how the "totality" idea from the cases fits into the analysis. I think you have a sense of this key idea, but you need to explain your analysis more clearly.

⁵ The problem with this case illustration is that you only explain the facts of the case without explaining the court's result on these facts in relation to the relevant explanation of the legitimate interest requirement. Once you fully explain the relevant analysis at 3, rework this case illustration. Make sure you explain the outcome and apply the analysis from 3 to demonstrate the reasoning supporting the outcome on the facts before the court. You do a much better job taking all of these steps when you explain *Wilson* at 5.

⁶ Notice how you use the analysis from 3 to explain the outcome of this case, *Wilson*. This is a good start with the explanation of *Wilson*. However, notice that you use the "personal hold" and "likely follow" ideas differently than you explained them at 3. Why were the customers "likely to follow" the employee? Because he was the primary contact, etc? Is that how you explained the analysis at 3? Use this to help rework your analysis there. In addition, you'll need to expand this some after you rework the analysis at 3. Think about how the "totality" idea will help make this illustration even clearer.

⁷ Good transition to the negative case illustrations. Notice that you have done a good job setting out the overall question the court uses to determine if the employer has a legitimate interest. Again, notice how you use the ideas differently here than you did at 3. Use this to help rework your explanation at 3.

⁸ Good. You are using the analysis to explain the cases. See 4. Again, notice how you use the "personal hold" and "likely follow" ideas here. Is this how you used those ideas at 3? If not, is this the correct relationship of these ideas? Go back to 3 and think about it. Once you figure that out, fully explain it at 3 and then revise these illustrations using the complete revised explanation from 3. Make sure you explain how the "totality" idea was used in these cases. Remember that sometimes analysis is explicit in cases and sometimes it's implicit.

⁹ Good. You begin the application section with a topic sentence that clearly states your prediction of the legitimate interest requirement.

¹⁰ Careful. You KNOW that you cannot simply compare your client's facts with facts of the cases to explain your prediction. You MUST apply the explanation of the legitimate interest analysis from above to your client's facts before a comparison with a case will be helpful. In the future, realize that you are probably failing to do this here because your explanation of the analysis of the law was not complete or accurate. That means you are not ready for the prediction! Go back and rework the analysis and then use that analysis to explain your prediction. Then, and only then, provide case comparisons. It will help you if you review your class notes on the hypotheticals we worked through when we were learning how to apply the courts' analysis to our client's facts and predict how a future court might come out. Think about the very first hypothetical we did in class: we could only predict whether the future court would see a Granny Smith apple as similar to the Bartlett pear or the Macintosh apple when we figured out what the court was concerned about—color or shape or kind of fruit. Although that example was very simple, your prediction here is

exactly the same—you are missing a key step of what the courts have been concerned about in the legitimate interest analysis.

¹¹ I see that you are trying to explain the case comparisons with the analysis of legitimate interest. This is exactly what you need to do. You are struggling, however, because of the problems at 3. Once you rework the explanation of the analysis at 3, come back and use the expanded analysis to make these comparisons. I think you'll find the comparisons are fairly easy to explain based on the complete explanation of the requirement.

¹² You do a fairly good job with this comparison, despite the problems at 3. Again, notice that you use the ideas here differently than the way you explained them at 3. Your discussion here, therefore, may help you expand the analysis of legitimate interest there.