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A METHODOLOGY FOR MENTORING WRITING IN LAW PRACTICE: USING TEXTUAL CLUES TO PROVIDE EFFECTIVE AND EFFICIENT FEEDBACK

Jane Kent Gionfriddo, Daniel L. Barnett, and E. Joan Blum ∗

I. INTRODUCTION

Becoming a successful legal writer is a process that begins in law school and continues intensively during the beginning years of a lawyer's career. Throughout this process, in both contexts, a writer benefits enormously from feedback on his analysis, and how that analysis is conveyed, from those with more experience.[1] Much has been written about how legal educators should respond to student written work,[2] yet little has addressed the role that supervising attorneys can

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1. Lisa Eichhorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick Up the Pedagogical Baton*, 5 LEGAL WRITING: J. LEGAL WRITING INST. 143, 143 (1999); Kathleen Elliott Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 TOURO L. REV. 507, 535-36, 545-46 (2005).

2. The following articles discuss legal writing teachers' feedback on student written work. *See generally* Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651 (2007) [hereinafter Barnett, *Triage in the Trenches*]; Daniel L. Barnett, *"Form Ever Follows Function": Using Technology to Improve Feedback on Student Writing in Law School*, 42 VAL. U. L. REV. 755, 765-67 (2008) [hereinafter Barnett, *Form Ever Follows Function*]; Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 57 (2000); Anne Enquist, *Critiquing and Evaluating Law Students' Writing: Advice from Thirty-five Experts*, 22 SEATTLE U. L. REV. 1119 (1999) [hereinafter Enquist, *Advice From Experts*]; Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 145 (1996) [hereinafter Enquist, *What the Students Say*] (discussing student reactions to

play in mentoring the writing of less experienced colleagues.[3] This article therefore proposes a methodology to help supervisor-mentors provide, in an efficient manner, effective feedback on junior lawyers' writing.[4]

In the law school context, the primary role of a teacher is to instruct her students, and therefore she is able to focus her full attention on this goal. In a first-year legal writing class, for instance, the teacher instructs students in the skills necessary to draft high quality documents and, as part of that instruction, she provides feedback on students' successes and mistakes.[5] To give this feedback, the teacher must have a sophisticated

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feedback from legal writing teachers); Jane Kent Gionfriddo, *The "Reasonable Zone of Right Answers": Analytical Feedback on Student Writing*, 40 GONZ. L. REV. 427 (2004-05) [hereinafter Gionfriddo, *Reasonable Zone*]; 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 (1991). In addition, the following articles discuss teachers' feedback on student writing across the law school curriculum. *See generally* Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L.J. 1965 (1999); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725 (1989) (discussing giving feedback—both oral and written—on assignments throughout the law school curriculum); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997).

3. Maureen B. Collins, *Mentoring Writers*, 92 ILL. B.J. 491 (2004) (discussing mentors' effective feedback on junior lawyers' written work); C. Edward Good, *The "Writer-In-Residence": A New Solution to an Old Problem*, 74 MICH. B.J. 568, 568 (1995) (describing a program, designed and run by an in-house writing specialist, to teach associates to write more effectively and to assist senior lawyer-mentors to give feedback on written work more effectively); *see also* E. Joan Blum & Kathleen Elliott Vinson, *Teaching in Practice: Legal Writing Faculty as Expert Writing Consultants to Law Firms*, 60 MERCER L. REV. (forthcoming Spring 2009), *available at* http://papers.ssrn.com/abstract=1115852 (discussing how legal writing professionals, on a consultant basis, can help train lawyers to write effectively); Eichhorn, *supra* note 1 (discussing how legal writing teachers can help train mentors in law practice to provide effective feedback on junior lawyers' written work); Bernadette T. Feeley, *Training Field Supervisors to be Efficient and Effective Critics of Student Writing*, 15 CLINICAL L. REV. (forthcoming 2009), *available at* http://ssrn.com/abstract=1205166 (discussing how field supervisors of law school externship programs can use legal writing pedagogical techniques to provide law students with effective and efficient feedback on their writing during their placement); Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225 (2004) (discussing the importance of human relationships in senior lawyers' providing a range of different kinds of effective feedback to junior lawyers).

4. This article assumes that junior lawyers are most effectively trained in legal writing when senior attorneys play a mentoring role in the workplace and, as part of this role, provide effective feedback on written work. However, other models exist. *See supra* note 3 and the sources cited therein.

5. Barnett, *Triage in the Trenches*, *supra* note 2, at 652-53; Gionfriddo, *Reasonable Zone*, *supra* note 2, at 433-34; *see* Kearney & Beazley, *supra* note 2, at 900.

grasp of the analytical foundation of her students' assignments[6] and the communication skills necessary to convey that analysis to the document's law practice audience.[7] The teacher uses this expertise to respond to student writing from two useful points of view. On the one hand, the teacher responds as a reader-educator who has knowledge of the underlying analysis and the actual strengths and weaknesses of the document in expressing those ideas.[8] On the other hand, the teacher responds as a reader-law practitioner whose understanding is completely dependent upon the ideas as expressed on the page.[9] Comments from both of these perspectives help students revise written work: they reinforce students' analytical skills and cause students to internalize the reasons why a complete and precise analysis is critical for law practice readers.[10]

In contrast to the two roles of a legal writing teacher, a supervising attorney in law practice may play two different roles—representing the client and training less experienced lawyers in the office—and the tension between these two roles may affect the supervisor's interaction with a junior person's writing.[11] The principal role of the supervisor is to represent the client. In this role, the supervisor must ensure that the documents produced on behalf of the client are of high quality and are completed efficiently. To accomplish this goal, the supervisor may give feedback simply by copy-editing passages or, instead, may quickly finalize the document herself.[12] Although the supervisor may serve the client by revising in these ways, she does not help the junior lawyer develop better writing skills for the future.[13]

To train less experienced lawyers, the supervisor should also consider playing the role of mentor—that is, teaching the junior lawyer

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6. Barnett, *Triage in the Trenches*, *supra* note 2, at 661 ("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.").

7. Gionfriddo, *Reasonable Zone*, *supra* note 2, at 436.

8. *Id.* at 436-38.

9. *Id*. at 439-40; *see* Kearney & Beazley, *supra* note 2, at 900 (noting that the "legal writing teacher should respond to students' writing not only as the person who designed the assignment, but also as a reader who is seeing the material for the first time").

10. Gionfriddo, *Reasonable Zone*, *supra* note 2, at 436-40.

11. *See* Blum & Vinson, *supra* note 3, at 7 (discussing why efficiency and cost pressures may result in firms hiring legal writing professionals as consultants to teach analytical and writing skills instead of relying on mentoring from senior attorneys).

12. *See id*.

13. *See id*.; Collins, *supra* note 3, at 491.

to refine his analytical and presentational skills[14]—and in this role she should give him effective feedback on his writing. In the law practice environment, however, a mentor must provide this feedback in a manner that takes into account that lawyers must work efficiently.[15] Even if a client is not being charged for the mentor's and junior lawyer's time, the workplace is undertaking the cost of that education. Moreover, the mentor may be taking on training in addition to her other professional responsibilities, and doing so could adversely affect her own compensation or mobility.[16]

Given this situation, a supervisor will likely need to respond to writing when she has not had the time to acquire a complete, independent understanding of the underlying legal analysis; after all, the purpose of assigning the project to the junior lawyer was for him to do this work. While ideally anyone who gives feedback on legal writing

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14. Collins, *supra* note 3, at 491; *see* Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923, 957 (2002) (discussing results from a survey of Colorado lawyers, the authors noted that "*[t]eacher* was the mentoring role mentioned by most of the lawyers in [the] study," and that the skills learned from that teacher included problem-solving and writing skills). This type of mentoring, which involves close interaction between a junior lawyer and a more senior colleague, is consistent with the views expressed in WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 97 (2007) (arguing that apprenticeship "lies at the heart of all education"). Moreover, through mentoring, a supervisor is likely to become a better supervisor, and thus contribute to the overall quality of the law firm's work. *See* ABA Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 315-16 (1992), *available at* http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html.

15. Bruce A. Green, *Professional Challenges in Large Firm Practices*, 33 FORDHAM URB. L.J. 7, 15 (2005) ("One problem is that senior lawyers no longer have time to critique junior lawyers' work, much less to serve as mentors.").

16. *See* Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. Rev. 239, 293-94 (2000) (noting that failure to compensate for "time devoted to mentoring, supervision and training" punishes partners engaging in these activities by decreasing their "monetary rewards from billing and generating business" and by undermining "the supervisors' mobility if time devoted to supervision competes with the time that supervisors spend building their own portable client base"); Reichman & Sterling, *supra* note 14, at 957 (discussing their survey of Colorado lawyers, the authors commented that the "[r]espondents cited the current compensation structure as a disincentive to partners to spend substantial time in mentoring activities: mentoring is not a billable activity" and that "[s]ome of our respondents suggested that senior attorneys who bill the most hours are reluctant to waste time 'training' younger attorneys").

should have a complete and accurate knowledge of the underlying substance,[17] that ideal is often not realistic for law practice mentors.

Even with a limited knowledge of the underlying analysis, however, a supervisor can work with the ideas as they are expressed in the document. She can draw on her experience as a lawyer to recognize textual and structural clues that provide strong evidence of the successes and problems in the author's thinking. These clues allow the mentor to feel relatively confident that she has identified problem areas, even when she does not know exactly what the analysis should have been.[18] She can then use these clues to give effective feedback to the author.[19] In turn, the author can use the mentor's comments to rethink the analysis and successfully revise the writing. And, unlike the situation in which the supervisor fixes the problems in the document herself, this process will help the author develop the analytical and communication skills necessary to write more effectively in the future.[20]

Part II of this Article discusses why a supervisor who is mentoring writers should always focus her feedback initially on the analytical foundation of a document and put off until later copy-editing and commenting on basic clarity of expression.[21] Part III describes, in the context of an objective memorandum, a recommended methodology and discusses in depth the range of textual and structural clues that are most

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17. Barnett, *Triage in the Trenches*, *supra* note 2, at 661; Gionfriddo, *Reasonable Zone*, *supra* note 2, at 437-38.

18. Even a legal writing teacher who has a complete understanding of the underlying analysis of her students' written work must sometimes use textual and structural "clues" to figure out why a student made a particular analytical mistake. Gionfriddo, *Reasonable Zone*, *supra* note 2, at 453-54 (discussing that a student's repeating what appears to be the same idea in three different forms was probably a "clue" that the student didn't understand how to synthesize ideas in a group of cases); *cf.* LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 4 (4th ed. 2006) (noting that lawyers working with legal authority "must engage in an interpretive process, finding clues from the language and decisions of a number of courts, legislatures, agencies; evaluating the meaning and significance of each; and combining the clues to reach an answer that makes sense of those clues").

19. In fact, authors themselves can use this same methodology to identify analytical problems in their own work. The textual and structural "clues" are in the document for anyone to see, including the author. Of course, authors may find it more difficult to identify these clues, given that they are so much more intimately involved with the ideas and how they have been expressed.

20. Reichman & Sterling, *supra* note 14, at 957 (noting that survey respondents thought mentors help junior lawyers with writing and problem-solving skills); *see also* Gionfriddo, *Reasonable Zone*, *supra* note 2, at 430-33 (discussing the analytical and communication skills that law students need to learn to write effective legal documents).

21. *See infra* text accompanying notes 25-35.

likely to indicate analytical problems in legal writing.[22] Part IV explains how, based on these clues, mentors can provide effective feedback and discusses the strengths and weaknesses of different approaches.[23] Finally, Part V illustrates this methodology through a sample problem to demonstrate how a mentor can provide effective feedback on an objective memorandum in a reasonably economical manner, even without knowing the underlying analysis of the document.[24]

II. FEEDBACK SHOULD FIRST FOCUS ON PROBLEMS IN ANALYSIS RATHER THAN ON BASIC PROBLEMS WITH WRITTEN EXPRESSION

A mentor should first focus her feedback on the ideas in a document in order to avoid the classic mistake of emphasizing basic problems in written expression when the author is struggling with the underlying substance.[25] Comments directed to writing issues at this stage are not only unhelpful, they may be harmful: an author will never be able to express himself well unless he understands the content he is trying to convey.[26]

The most important aspect of legal writing is the underlying analysis.[27] Did the author choose the correct legal authority? Did he understand the relationships among the relevant authority? Did the author analyze that authority accurately and in appropriate depth? Did the author convey that analysis accurately and precisely, including organizing the ideas in the document around the structure inherent in the underlying analysis and the real-world needs of the reader? These

22. *See infra* text accompanying notes 36-106.

23. *See infra* text accompanying notes 107-148.

24. *See infra* text accompanying notes 149-191.

25. In the context of a legal writing course, for instance, teachers understand that their feedback on an early draft should focus on the underlying analysis and structure of the document, and that they should save feedback on basic writing issues until near the end of the drafting process. Barnett, *Triage in the Trenches*, *supra* note 2, at 656-59; Kearney & Beazley, *supra* note 2, at 893. In situations where the teacher has only one draft to work with, she knows to physically separate comments on the analysis from comments on basic writing clarity, including grammar, so that the author can focus initially on the substantive comments and then proceed to the "writing" issues when he has the ideas under control.

26. *See* Kearney & Beazley, *supra* note 2, at 893-94 (discussing law students).

27. *See* Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 325 (1980) ("Reasoning unexpressed, or unclearly, imprecisely, or inaccurately expressed, is reasoning uncompleted."); Richard Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 623 (1986) (stating that "good legal writing is . . . clear conceptual thinking, convincingly displayed").

critical questions must be addressed by the mentor's comments before issues of basic writing clarity become relevant or helpful.[28]

In fact, most typical problems in legal writing are analytical in some sense, even if they also have a basic clarity component.[29] If a reader has difficulty understanding what the author has written, then the author has probably not fully figured out what he is trying to say.[30] For example, someone who uses very long sentences, or who orders ideas illogically, or who connects them imprecisely, is probably not just forgetting basic writing rules. Rather, the author has probably not reached the precise, focused level of thinking necessary to produce a quality piece of writing. Giving feedback on writing issues at this point, therefore, may distract the writer from addressing the main problems in the document.[31]

Unfortunately, a writing mentor may feel more comfortable giving comments on basic writing issues than tackling the problems with the author's ideas, and for this reason may focus first on writing issues.[32]

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28. *See* Kearney & Beazley, *supra* note 2, at 893-94; *cf.* Gionfriddo, *Reasonable Zone*, *supra* note 2, 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.").

29. *See* Hyland, *supra* note 27, at 620-21.

30. The following two authors have cogently described this problem. Professors Kearney and Beazley note that "[i]f writing is not 'clear' or 'logical,' . . . the writing often contains unsound analysis rather than faulty grammar. Certainly, sound analysis can be misunderstood if it is expressed ungrammatically. But unsound analysis is just as unsound when it is presented grammatically as when it is presented ungrammatically." Kearney & Beazley, *supra* note 2, at 893 n.30. Along the same lines, Professor Richard Hyland states that "[t]he real problem with the tips for effective legal writing . . . is that they do not address the difficulties of conceptual understanding. To the extent lawyers believe that their problem lies exclusively in an underdeveloped prose style, they are condemned to write poorly forever." Hyland, *supra* note 27, at 621.

31. *See* Berger, *supra* note 2, at 73 (stating that unless the legal writing teacher provides feedback on the underlying analysis, the feedback will not improve "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"); Collins, *supra* note 3, at 491 ("There are countless ways to edit someone else's writing. Some are decidedly more helpful than others. If you want the writer to revise the document herself, don't bother doing a line edit of the piece. Instead, 'diagnose' the problems by identifying where more authority is needed . . . where there is a leap in logic . . . ."); Kearney & Beazley, *supra* note 2, at 893-94 (discussing that writing teachers should offer feedback on a student's underlying analysis).

32. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 37 (1994) ("Within [the unique discourse community of the law], students must acculturate themselves to new uses of language, new paradigms of reasoning, new

Basic grammar mistakes and sentence structure problems are often glaring and thus easier for the mentor to identify to the author or to change quickly by copy-editing.[33]

In contrast, more thought and effort is required to figure out the analytical issues. It also takes more time, without training, to craft written comments that help the author understand where he went right and wrong and, therefore, revise the draft into a more successful final product.[34] Most important, the mentor may be uncomfortable giving analytical comments in this context since she will generally not have had the time to analyze the underlying legal authority herself and, therefore, will not be completely confident that she has identified the analytical strengths and weaknesses of the document.

However difficult, mentors must focus their initial evaluation and feedback on the analytical foundation of the piece of writing. Otherwise, their feedback will not provide sufficient guidance for the author's revision process.[35]

III. FEEDBACK CAN BE BASED ON TEXTUAL AND STRUCTURAL CLUES THAT POINT TO ANALYTICAL WEAKNESSES IN A PIECE OF LEGAL WRITING, SUCH AS AN OBJECTIVE MEMORANDUM

This article proposes, and discusses below, a methodology to help mentors give effective and efficient feedback on the analytical foundation of junior lawyers' written work. Using this methodology, a mentor begins by working with the textual and structural clues of a document to identify problem areas in the junior lawyer's analysis. The mentor then uses information gained from these clues as the foundation for feedback to the author on the substantive problems of the document.

Although this methodology can be used to evaluate a range of different kinds of narrative legal writing in addition to objective memoranda to supervisors—for example, letters to clients and court documents—this article focuses on objective memoranda.[36] These are

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rhetorical considerations, and new conventions. If the focus is too narrow, such as on correcting sentences, students may still write poorly . . . .").

33. *See* Berger, *supra* note 2, at 73 (discussing legal writing teachers who focus too much on grammar, usage, and punctuation for the reason that "correctness can be objectively judged").

34. *See* Barnett, *Triage in the Trenches*, *supra* note 2, at 659.

35. *See* Kearney & Beazley, *supra* note 2, at 893-94.

36. This kind of narrative document is also described in other ways, such as an office memorandum or a predictive memorandum.

the traditional documents used in law practice to analyze a legal issue and, therefore, best illustrate textual and structural clues to an author's thinking.

The purpose of an objective memorandum, at least in its classic form,[37] is to communicate to another lawyer a thorough and accurate neutral analysis of the current status of the relevant law and what that analysis indicates for the client's situation.[38] To provide this information effectively, at a minimum an objective memorandum includes a Facts section, a Discussion section, and a Conclusion section.[39]

To begin her evaluation, the mentor should focus on the ideas explained in the Discussion section to identify textual and structural clues of analytical deficiencies. Next, the mentor can check the consistency of ideas as expressed in the Discussion section with how those same concepts are described and used in the Conclusion section. Finally, the Facts section may also reveal problems in the author's thinking.

A. The Discussion section of an objective memorandum

A mentor should start with the Discussion section, the memo's core, since here is where the author develops the analysis in the

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37. The classic form of an objective memorandum requires the author to neutrally describe the current status of the relevant law and then use that law to neutrally predict the result in the client's situation. *See* Jane Kent Gionfriddo, *Thinking Like a Lawyer: The Heuristics of Case Synthesis*, 40 TEX. TECH L. REV. 1, 8 (2007) [hereinafter Gionfriddo, *Heuristics*]. In this form, an author excludes possibilities in the client's situation that would require moving beyond what the legal authority reasonably allows at that point in time in the jurisdiction. *Id.* at 16. A supervising attorney might, however, request that the junior attorney also produce an analysis that would include possible arguments for and against the client that would stretch the current law or even argue to change the current law based on policy or persuasive precedent. *See id.* at 16-17. This is not, however, the classic form of this type of memorandum.

38. HELENE S. SHAPO, ET AL., WRITING AND ANALYSIS IN THE LAW 171 (5th ed. 2008) (noting that an objective memorandum "is a written analysis of a legal problem" where "[t]he writer analyzes the legal rules that govern the issues raised by that problem and applies those rules to the facts of the case" and "should be an objective, exploratory document"). Other scholars agree with Shapo. ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT 103-04 (2d ed. 2006); Gionfriddo, *Heuristics*, *supra* note 37, at 8 n.27.

39. An objective memorandum may also include other sections, such as a Question Presented and a Brief Answer section. *See* SLOCUM, *supra* note 38, at 107-08.

document.[40] The author begins this section with an introductory paragraph or paragraphs describing the overall analytical structure of the legal problem.[41] Then, in the rest of the section the author develops the analysis in greater depth.[42] To communicate this analysis adequately to the reader, the author must structure and explain ideas logically and precisely.[43]

Because of the purpose, content, and structure of the Discussion section, simply reading it carefully can provide the mentor with textual and structural clues—from the face of the document—that give insight into the quality of the author's thinking.[44] To look for these clues, the mentor should begin by evaluating how well the author explains the overall analytical structure in the introductory paragraph. She should then compare this explanation with the author's articulation of these ideas in later parts of the Discussion section, where the author develops the analysis in more depth. Through this comparison, the mentor would easily pick up on areas of omission, inconsistency and imprecision, which are the major clues that the author is struggling with the analysis.[45]

1. Clues in the introductory paragraph(s) of the Discussion section

Within the Discussion section, the mentor should focus first on the introductory paragraph (or paragraphs), where the author gives an overview of the analytical structure of the rest of the section. This paragraph must pull together all the ideas of the analysis into a coherent whole;[46] therefore, it will likely reflect the author's major successes and problems in grasping the underlying ideas in the document. The following textual and structural clues will help the mentor identify these successes and problems: how the author cites and uses primary authority; whether the author identifies the overall focus of the memo at

40. Terry Jean Seligmann, *Why Is a Legal Memorandum Like an Onion?—A Student's Guide to Reviewing and Editing*, 56 MERCER L. REV. 729, 732 (2005); SLOCUM, *supra* note 38, at 106.

41. *See* EDWARDS, *supra* note 18, at 134-35 (discussing the "umbrella section" that introduces and summarizes the analysis at the beginning of the Discussion section of an objective memorandum); SHAPO ET AL., *supra* note 38, at 161 (discussing the "thesis paragraph"); SLOCUM, *supra* note 38, at 186 (discussing the "overview paragraph").

42. SLOCUM, *supra* note 38, at 106.

43. Gionfriddo, *Reasonable Zone*, *supra* note 2, at 430-33.

44. *See supra* note 18 and the sources cited therein.

45. *See* Gionfriddo, *Reasonable Zone*, *supra* note 2, at 433.

46. *See* EDWARDS, *supra* note 18, at 134-35; Seligmann, *supra* note 40, at 732.

the beginning; whether the author identifies and sufficiently explains all important concepts; and whether the author describes the relationship between these concepts precisely and accurately.

CLUE: Does the author cite and use primary authority well?

A mentor should begin by noting what primary authority is discussed and cited in the introduction and should then assess whether the author appears to understand the precise, accurate relationships among that authority. While this initial step may not identify all problems, such as where the author misses relevant authority completely, it will likely point out if the author is still figuring out how the pieces of authority fit together.[47]

For instance, if there is a controlling statute, does the author begin with that statute and then proceed to relevant case law that interprets it? Or, if the memo is about a common law problem, does the author understand what cases are mandatory and what cases are persuasive? Obviously, if the author is confused as to the fundamental relationships among the relevant legal authority, the analysis of the memo is seriously flawed right from the beginning.[48]

CLUE: Does the author identify the overall focus of the memo at the beginning?

The mentor should evaluate the topic sentence of the Discussion section, which is the first statement a reader probably encounters, to judge whether the author has summarized the focus of the memo clearly. This might be an abstract statement of the legal issue or a conclusion based on the client's facts; but in either case it should articulate the overall focus of the memo.[49] Not setting out a clear focus at the beginning could indicate, especially if the rest of the paragraph is muddled, that the author is still struggling on this very general level. To summarize an idea, an author must have a reasonably good grasp of

47. *See* ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, SOURCEBOOK ON LEGAL WRITING PROGRAMS 14-16 (Eric B. Easton ed., 2d ed. 2006) [hereinafter ABA SOURCEBOOK] (discussing the process of research and analysis that students must learn to become successful practicing attorneys, including understanding the "nature and relationship of different kinds of legal authority" and constructing "the analytical framework for the law necessary to solve their client's problem").

48. *See id*. at 15.

49. SLOCUM, *supra* note 38, at 186-87; Seligmann, *supra* note 40, at 732.

what he is trying to convey; therefore, a summary almost always indicates how far along an author is in his analysis.

CLUE: Does the author identify and sufficiently explain all important concepts?

The introductory paragraph or paragraphs should set out the analytical structure of the analysis in the Discussion section and, therefore, should identify and sufficiently explain all important concepts.[50] Although the mentor will not necessarily be able to verify that all concepts are set out in the introductory paragraph until she evaluates the rest of the Discussion section, she can gain a pretty good sense of the quality of the author's analysis by finding incomplete or vague ideas. In this situation, the mentor simply must use an intuitive sense, based on her legal training and experience, about where a reader needs more explanation and development at this point in the Discussion section. When the mentor needs to stop and think because she needs more information, she has encountered a significant clue that the author has not adequately informed her about important ideas.[51]

CLUE: Does the author describe the relationship between important concepts precisely and accurately?

Another important clue at the beginning of the Discussion section is the nature of the transitions that an author uses between words or sentences.[52] Often when an author uses transitions that indicate equal

50. EDWARDS, *supra* note 18, at 69, 134 (arguing that the beginning paragraph of the discussion section should include not only the "umbrella rule" that governs the legal issue but also all important information connected with that rule that is general in nature); Seligmann, *supra* note 40, at 732 (noting that the beginning paragraph of the Discussion section should contain "the overall legal standards governing the issues covered in the memorandum").

51. *See* SLOCUM, *supra* note 38, at 105 (discussing that insufficient development of analysis will raise questions for the reader of an objective memorandum); *cf.* Gionfriddo, *Reasonable Zone*, *supra* note 2, at 430-33 (discussing why law students must learn that objective memoranda must convey precise and accurate analysis to the reader).

52. *See generally* ANNE ENQUIST & LAUREL CURRIE OATES, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER 55 (2d ed. 2005) (discussing the use of transitions in legal writing and noting that "[t]ransitions express the relationship between the ideas" and "serve to connect and signal how the ideas are moving in a line of reasoning"); SHAPO ET AL., *supra* note 38, at 221 ("For a reader to follow your thought processes, you must provide transitions that signal where you are taking your analysis next."); SLOCUM, *supra* note 38, at 224 (noting that transitions "help orient a reader to the relationship between old information and new information").

weight for two concepts in the analysis, the author has not precisely expressed the most accurate relationship between the ideas. The mentor, therefore, should pay special attention to the places where the author uses the following transitions: "and," "in addition," "also," and "as well as." She should also note places where the author uses "listing" transitions, such as "first," "second," and "third." While these types of transitions are very useful and accurate in some circumstances, authors often intuitively use them as "place-holders" while they are still grappling with ideas. Authors commonly use these "listing" transitions as a way to skip over places where they are not far enough along in their thinking to craft a more precise connection.[53]

A mentor should look for these transitions and evaluate whether they reflect a precise relationship between ideas.[54] Although inaccurate or imprecise use of transitions is a clue at any point in a memorandum that the author may be struggling with fundamental concepts, the mentor should pay special attention to the author's inability to link ideas precisely at the beginning of the Discussion section. Failure to introduce adequately the overall analytical structure is almost always a serious signal of flaws in the author's thinking.

2. Clues gained from comparing the introductory paragraph(s) to later analysis in the Discussion section

After the mentor evaluates the introductory paragraph or paragraphs, she should assess whether the author uses the ideas in that paragraph consistently throughout the subsequent analysis in the Discussion section.[55] Consistency could mean that the ideas are incorrect in both places, of course, but other textual or structural clues should confirm that problem.[56] A mentor should begin, therefore, by

53. Any author or teacher of writing can verify that this is true. A high percentage of the time, when questioned, these transitions turn out to be too vague to express the most precise connection between ideas.

54. *See* SHAPO ET AL., *supra* note 38, at 164 (commenting that a "weak [Discussion section] is frequently one which begins with a vague introductory paragraph that leaves the reader unclear about which issues need to be discussed [and] how they relate . . .").

55. Debra R. Cohen, *Competent Legal Writing—A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 521 (1999) (discussing mandated professional responsibility guidelines for effective legal writing and noting in this context that "[c]onsistency in legal writing is important in both choice of language and in format, because inconsistency creates confusion").

56. For instance, a corroborating clue might be that, even though the articulated ideas are consistent, these ideas do not appear to be sufficiently developed. *See infra* text accompanying notes 72-73.

evaluating the consistency with which an author cites and uses primary authority. She should also assess the analytical structure in the two places, including whether the author uses all important concepts consistently, orders them in the same manner, and describes and connects these ideas consistently. Consistency in these areas is a strong indication that the author is confident about his analysis. In contrast, inconsistency is a cogent clue that the author is still figuring out the underlying analytical foundation of the legal issue.

CLUE: Does the author cite and use primary authority consistently throughout?

The mentor should compare the authority cited and discussed in the introductory paragraph with that in the rest of the analysis in the Discussion section. Important inconsistencies in the use of central primary authority throughout the Discussion section likely indicate that the author is not completely clear about the legal authority and its interrelationships, which is the fundamental underpinning to an author's analysis. Confusion concerning the relevant legal authority will obviously result in flawed analysis.[57]

For instance, the mentor could look for the pattern of citation to cases, because this would be helpful in a common law problem or where the courts have interpreted a relevant statute. If the majority of the cases cited in the introduction are different from those cited and described in the rest of the Discussion section, this could be an important clue that the author did not fully understand how the case law fit together or did not choose the most relevant cases to support the analysis.[58]

CLUE: Does the author use all important concepts consistently throughout?

The mentor should also check the analysis in the rest of the Discussion section against the introduction. Introducing fundamental concepts in the introduction and completely omitting them later on is a likely indication of confusion on the part of the author. Similarly, an author is probably confused if he develops fundamental concepts later on

57. *See* ABA SOURCEBOOK, *supra* note 47, at 14-16; Gionfriddo, *Heuristics*, *supra* note 37, at 4-6.

58. *See* ABA SOURCEBOOK, *supra* note 47, at 14-16; Gionfriddo, *Heuristics*, *supra* note 37, at 4-6.

that were not included in the introduction.[59] The former indicates that the author believed these fundamental concepts were important, but had not completely worked out how they related to the other concepts. The latter raises the question of whether the author fully understood how all the pieces of the analytical puzzle[60] fit together, or whether the author began to understand it later on but did not fully understand it as he drafted the introduction.

CLUE: Does the author order concepts consistently throughout?

Another clue arises when the author fails to order concepts consistently throughout the Discussion section, from the introduction through their later development.[61] Inconsistent ordering of ideas shows that the author is probably unclear about what the important concepts are, as well as uncertain about how they relate. This clue is easy to spot and, again, is strong evidence that the author does not fully understand how the pieces of the analysis fit together.

CLUE: Does the author describe and connect concepts consistently throughout?

Inconsistent description of core concepts or their relationship also indicates that the author is unsure of the underlying analysis.[62] Writers tend to use different labels for the same concepts when they are trying out different formulations to search out meaning and are therefore using writing to explore ideas.[63] This kind of writing works well for many

59. Seligmann, *supra* note 40, at 732 (noting that the first paragraph of the Discussion section should contain "the overall legal standards governing the issues covered in the memorandum in the order the memorandum discusses them").

60. Gionfriddo, *Heuristics*, *supra* note 37, at 12 n.56 (giving credit to Daniel Barnett for coining this phrase and using this concept to explain analytical skills to his students).

61. SHAPO ET AL., *supra* note 38, at 207 (discussing that an author should compare the introductory (thesis) paragraph with the analysis that follows and "check" that the same issues appear in both places in the same order).

62. ENQUIST & OATES, *supra* note 52, at 110 (discussing the importance of a legal writer using the same term for key ideas); *see* SHAPO ET AL., *supra* note 38, at 203-04 (implying that the introductory (thesis) paragraph that begins the Discussion section must be consistent with the rest of the Discussion section as to included ideas and as to how those ideas are connected).

63. *See* Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 140 (1987) ("[T]he writing process itself can serve as an independent source, or critical standard, that alters and enriches the nature of legal thought" because "the actual writing of the analysis, be it an appellate brief, law review article, memorandum, or estate

writers during very early drafting stages, but it does not belong in material that is intended to be used by another reader.[64] If the mentor sees exploration writing, even in a preliminary draft, she has a clue that the author has not reached the end point in his analysis. These clues include the situation where the author articulates one relationship between core concepts in the introductory paragraph and another later on in the Discussion section's analysis or the situation where the author describes individual concepts inconsistently at different points in the Discussion section.[65]

In these situations, the inconsistency between the introductory paragraph and the rest of the Discussion section allows the mentor to identify possible analytical flaws in the document in an efficient manner. While the mentor may not have any knowledge of the actual analysis of the underlying legal issue, she will be fairly confident that she has located problems in the author's thinking.

3. Clues from the abstract analysis of the law in the Discussion section

After the introduction to the Discussion section, an author must develop an analysis of the current status of the law that is abstract and separate from an analysis of what the law indicates for the client's situation.[66] An evaluation of the textual and structural clues from this part of the Discussion section will probably identify more problems in the author's thinking or simply confirm problems already found in the introductory paragraph.

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plan, will allow *the writer as thinker* to develop new connections or new ideas about what the law is and how it should be applied in particular situations") (emphasis in original); *see generally* Janet Emig, *Writing as a Mode of Learning*, 28 C. COMPOSITION & COMM. 122 (1977) (discussing why writing develops ideas); SHAPO ET AL., *supra* note 38, at 204-05 (discussing same).

64. SHAPO ET AL., *supra* note 38, at 204-06 (discussing a writer's process in initially getting analysis down on paper in order to think through ideas and then rewriting that analysis for the intended reader).

65. While an author of a legal document must use consistent phrasing to describe core concepts, obviously descriptions for common ideas can vary without confusing the reader. For instance, in this article the difference between "assess" and "evaluate" is not important. In contrast, the difference between a "totality" test and a test based on a "series of factors" is critical in the author's sample memo in the Appendix. *See infra* Appendix Part A and text accompanying notes 166-68.

66. *See, e.g.*, SHAPO ET AL., *supra* note 38, at 171; SLOCUM, *supra* note 38, at 103.

CLUE: Does the author develop an analysis of the law in general principles separately from applying that law to predict a result in the client's situation?

A mentor needs to assess how effectively the author uses general principles to set out his thinking, because these principles are the primary manner in which an author initially informs the reader about the analysis.[67] If the analysis includes case law and the author focuses too soon on describing details of individual cases, for instance, the author will likely have truncated the synthesis of the authority in general principles and, therefore, failed to provide the reader with a complete understanding of what the authority indicates about the law.[68] When this occurs, the reader must spend her own time to figure out the analysis from the case descriptions.[69] Failing to set out a complete analysis in general principles, therefore, is a strong clue that the author was not completely sure about the collective import of the cases.

In addition, the mentor should evaluate whether the author has fully developed each aspect of the relevant analysis in abstract general principles before applying those principles to the client's situation to predict a result. Separating these into two distinct steps for each important issue in the analysis helps the reader. When a reader is fully informed about the law in the Discussion section, she is then better able to understand the author's analysis of his client's situation.[70] For the same reason, authors who do not separate these two critical analytical steps are much more likely to fail to sufficiently develop important ideas in their analysis. In addition, they are more likely to be writing to

67. *See* SHAPO ET AL., *supra* note 38, at 145-46 (discussing how to explain the "governing rule of law" and providing an example); Seligmann, *supra* note 40, at 736 (stating that "[w]ith respect to each legal issue, the memorandum should fully educate the reader on the applicable law" and proceeding to elaborate on what should be included); *cf.* EDWARDS, *supra* note 18, at 103 (describing applying the law to the client's facts and stating that this skill requires "applying a general, often abstract principle to a particular situation . . .").

68. *See generally* Gionfriddo, *Heuristics*, *supra* note 37 (discussing the process that lawyers must use to synthesize groups of cases into an accurate, complete analysis).

69. Seligmann, *supra* note 40, at 734-35 (giving an example of a reader encountering a case description before she had been sufficiently informed about why that case was relevant to the analysis).

70. *Id.* at 744 ("A good memorandum is remarkably simple. It tells the reader what she needs to know about the law in a clear and logical way, and explains how the writer reasons with that law to reach a prediction about the client's situation.").

explore—moving back and forth from abstract ideas to the client's case, again and again, to figure out the important pieces of the analysis and how they fit together.[71]

CLUE: Does the author fully explain all important concepts in general principles?

The mentor should also evaluate whether the analysis set out in general principles appears to be complete and internally consistent. First, she should evaluate whether the analysis in general principles appears complete because it includes all important ideas and is developed with sufficient specificity.[72] Since the mentor will probably not have analyzed the legal authority herself, she will have to rely on her intuition as an experienced attorney. While reading, she should note the passages where she has questions that are not answered by the general principles as articulated by the author[73]—these may be strong clues about problems in the author's analysis.

Second, in the same way that the mentor compares the consistency of the ideas in the introductory paragraph with the ideas in the Discussion section, the mentor should assess whether the general principles of analysis are internally consistent. Does the author order ideas consistently throughout?[74] Does the author describe the same ideas in the same way throughout?[75] Does the author explain the relationship between concepts consistently throughout?[76] Inconsistency in one or more of these areas is a clue that the author is probably still working out his understanding of the analysis.

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71. This is one of the reasons why the authors do not teach their students to analyze and write about legal issues using the IRAC formula or any of its variations. The IRAC formula stands for Issue (legal issue for the client); Rule (law); Application (applying the law to the client's facts); and Conclusion (stating the conclusion on the client's facts). While teachers use IRAC in different ways, too often this formula causes students to fail to fully develop an abstract analysis of the law separately from applying that law to their client's situation. *See generally* Christine M. Venter, *Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills*, 57 MERCER L. REV. 621, 624-26 (2006) (discussing why legal writing teachers' use of formulas like IRAC do not sufficiently teach students legal analytical skills).

72. *See supra* note 67.

73. *See supra* note 51.

74. *See supra* note 62 and accompanying text.

75. *See supra* notes 62-65 and accompanying text.

76. *Id*.

CLUE: Does the author use strong topic sentences with transitions that connect the parts of the analysis?

An important indication of the quality of an author's thinking is whether each paragraph or sub-issue begins with a strong topic sentence that sets out accurately the focus of that part of the analysis.[77] A paragraph or sub-issue that fails to begin with a clearly expressed focus is strong evidence that the author is probably struggling to understand the proper analysis.[78]

Furthermore, each topic sentence should include a precise transition from the prior paragraph or sub-issue. Without precise transitions, the document does not provide the necessary connections between parts of the analysis and, therefore, fails to make clear how those parts fit together cohesively.[79] Authors who use very general transitions are likely not at an end-point in their thinking. Novice legal writers tend to choose transitions from a list, perhaps from a writing text, instead of figuring out the word or phrase that connects two concepts precisely, based on an accurate analysis of the legal authority.

In particular, the mentor should look for transitions that are a form of "and" because in most situations these transitions are overly general. Often ideas have a more complex and specific relationship than the equal relationship conveyed by "and,"[80] and need to be connected by a transition that conveys that relationship more precisely. For the same reason, the mentor should also evaluate transitions between sentences and even words.

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77. *See, e.g.*, SHAPO ET AL., *supra* note 38, at 209-10 (stating that a topic sentence summarizes "the basic idea developed in that paragraph," and that "[w]ithout this summarizing sentence, the reader may have difficulty understanding the paragraph and its place in the analysis").

78. *See* SLOCUM, *supra* note 38, at 107 ("Because the organizational structure of [a] memo is the most visible part of [an] analysis, an unstructured memo invites a reviewing attorney to doubt whether the analysis itself is reliable and credible.").

79. EDWARDS, *supra* note 18, at 92 ("Being explicit about the relationships between the theses of succeeding paragraphs will help [the author] insure that [his] reasoning is logical and complete.").

80. *See supra* notes 52-53 and accompanying text.

CLUE: Does the author describe cases effectively to provide illustrations of general principles?

When the legal analysis includes case law, case descriptions that illustrate the core concepts set out in general principles[81] also provide clues to the quality of the author's analysis. Clues to author confusion include when case illustrations are inconsistent in content or phrasing with the previously identified core concepts, or when illustrations of the same concept are inconsistent with each other. If the author describes a case, then he obviously felt it supported the analysis in general principles and illustrated those concepts well. Any important inconsistency, therefore, raises a red flag about the accuracy of the general principles, the relevance of the cases, or the accuracy of the case descriptions themselves.

Furthermore, a mentor might encounter the situation where the general principles and case descriptions are consistent but are incomplete because ideas are missing or are not developed with sufficient specificity in either place. While the mentor would not necessarily know whether ideas were missing and, if so, what those ideas were, her experience as a legal reader and writer would likely raise questions for her about the analysis as expressed in the document.[82]

4. Clues from where the author applies the analysis of the law to the client's situation to predict results

In the Discussion section of an objective memo, the author must apply the analysis of the law to the client's situation and predict a result, or potential results, under that law.[83] The nature of this part of the Discussion section, therefore, makes it a prime place to locate problems with the author's thinking. These problems will be apparent if the author does not provide a clear prediction for the client; does not immediately support that prediction with sufficient reasoning; in a fact-dependent analysis, does not develop sufficient analogies between the client's situation and precedent; or does not apply reasoning throughout the section that is consistent with his previous discussion of the law.

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81. SHAPO ET AL., *supra* note 38, at 146 (noting that a case description should "shed light on the legal principle" under consideration); Seligmann, *supra* note 40, at 734-35 (commenting that a "reader should know from [the author's] writing why a particular case warrants discussion and how it fits into the legal analysis").

82. *See supra* note 51.

83. SHAPO ET AL., *supra* note 38, at 171; Seligmann, *supra* note 40, at 736.

CLUE: Does the author begin with a clear prediction for the client's situation?

A mentor should check whether the author begins with a clear prediction (or predictions if more than one could result).[84] A missing prediction may indicate that the author has an insufficient grasp of the analysis and is therefore having trouble concluding what that analysis requires in his client's situation. When this occurs, the mentor should advise the author to continue to work on the abstract analysis of the law in the Discussion section.

CLUE: Does the author immediately support the prediction with sufficient reasoning?

When the author does provide a prediction, he should immediately support that prediction with sufficient reasoning.[85] The purpose of this part of the Discussion section is to provide the reader with not only the result (or results) for the client but also a well-developed discussion, based on the abstract analysis, of why that result might reasonably occur.[86] When an author does not use his earlier explanation of the law to support his prediction for the client, therefore, the mentor should question whether the author fully understands the analysis.[87]

CLUE: Does the author support the prediction with well-developed analogies to cases?

When the outcome on an issue depends on how the client's situation compares with the facts of precedent, the mentor should pay special attention to whether the author sufficiently explains, on the basis of concepts developed in the abstract analysis, why some cases are similar to the client's situation and why others are not.[88] If the author

84. LAUREL CURRIE OATES & ANNE ENQUIST, JUST MEMOS 116 (2003).
85. *Id.* at 116-17; EDWARDS, *supra* note 18, at 112-13.
86. *See* EDWARDS, *supra* note 18, at 112-13.
87. *Id*. at 112 (making the point that the author should compare the abstract analysis of the law with the law being applied to the client's facts—and vice versa—because locating any important inconsistency will help the author sufficiently develop both parts of the analysis).
88. *Id*. at 106-07.

strains to articulate the bases of these analogies, then he is likely still unsure of his analysis.[89]

CLUE: Does the author support the prediction with reasoning that is consistent with the abstract analysis of the law presented earlier?

The mentor should also assess whether the legal concepts applied to the client's situation are consistent with the ones explained earlier in the Discussion section. Since the goal of the application portion of the Discussion is to apply the same law that has already been described in the abstract beforehand, inconsistency of the law in content and phrasing in the two places may be an important clue to help determine whether the author's thinking is flawed.[90] For this reason, the mentor should evaluate whether the legal concepts the author applies to the client's situation are the same concepts he identified in the abstract analysis of the law;[91] whether the concepts are described and connected using the same language throughout; and whether the descriptions of the facts, holding, and reasoning of any relevant cases are consistent in both places.[92]

By pointing out inconsistencies to the author, the mentor may be able to help him diagnose the root of the problem and revise his analysis. On the one hand, some authors struggle with developing the law and leave that part of the Discussion with ideas that are still imprecise or incomplete, but develop a more sophisticated understanding later when applying those ideas to the client's situation. A better analysis may result simply from the author's continued process of thinking as he reuses the concepts to predict a result, or results, on the client's facts.[93] It may also result because some authors think more clearly when working with concrete ideas, as when applying abstract legal concepts to

89. *See id*.

90. *See supra* note 87.

91. *See* EDWARDS, *supra* note 18, at 112.

92. *See id*. (noting that the content of the law and application of that law to the client's situation must be consistent and implying in that context that the descriptions of general principles and their relationship, as well as case descriptions, must also be consistent in both places).

93. *See* SLOCUM, *supra* note 38, at 189 (stating that "the writing process itself often reveals that some ideas that seemed so clear in the abstract are in fact only partially-formed" and, therefore, "not infrequently reveals unanticipated gaps in thinking").

the specific situation of the client.[94] On the other hand, some authors are more adept at working with the abstract ideas as they explain the law—in both general principles and case descriptions of those principles—and the inconsistency as to imprecision or incompleteness of the content arises from their discomfort when dealing with the more concrete aspects of their client's situation.

In these situations, assuming that the author has been more successful in one area than the other, the mentor will be able to use the author's success in one place to help him work with the problems in the other. If it appears that the author has come to a better understanding of the law as he applies it to the client's situation, for instance, he may be able to use analysis developed there to help him rethink and revise that part of the Discussion section where he focuses on an abstract discussion of the law.[95]

Of course, inconsistencies between the analysis of the law and application of that analysis to the client's situation may sometimes indicate that the author has not reached a final understanding of the analysis in either place. Struggling with the analysis himself, the author may include, describe, and connect key concepts in different ways in different parts of the discussion. In this situation, the mentor must identify these inconsistencies and leave it to the author to develop a more cohesive analysis to be used throughout the Discussion section. Without knowing the underlying analysis of the legal problem, the mentor cannot be sure which scenario above accounts for the problem. She must simply use her legal experience and general knowledge of the law to come to the best conclusion about the cause of the problem, given the textural and structural clues from the document, and give feedback to the author. It is then the author's responsibility to fix the problem.[96]

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94. *See* EDWARDS, *supra* note 18, at 104 (discussing that some authors may benefit from writing initially more impressionistically about how the law affects a client's case so that they react more intuitively to the possibilities).

95. *See id*. at 112 (discussing this same idea in terms of the author's ability to recognize the clue of inconsistency and thereby revise his work).

96. *See infra* note 121.

B. The Conclusion section

The mentor should also compare the analysis in the Discussion section to that in the Conclusion section.[97] The Conclusion section summarizes the overall analysis of the client's problem,[98] and for this reason its analysis must be entirely consistent with the Discussion above.[99] Inconsistency between these two parts of an objective memo, therefore, may indicate that the author's grasp of the substance is incomplete.

CLUE: Does the author explain concepts, and relationships between concepts, in the Conclusion section consistently with how they are explained in the Discussion section?

The mentor should look for places where the author does not describe core concepts consistently in both the Discussion and the Conclusion sections.[100] One kind of inconsistency arises when core ideas discussed in the Discussion section are omitted in the Conclusion. When this occurs, the author may not be convinced of the necessity of the idea or may not be exactly sure where that idea falls within the overall analytical puzzle.

Another kind of inconsistency arises when a core idea is included in the Conclusion section but is omitted in the Discussion. In this situation, the author, at the end of his intellectual journey, may have had an "aha" moment, given the extensive prior drafting,[101] but failed to see that he needed to integrate his insight into the Discussion, the main analytical section of the memo.

Such "aha" moments occur in the Conclusion because, in general, authors draft a summary after struggling with the analysis in the Discussion section. While the author's struggles in the Discussion section are not helpful for the reader, they can bring an author to a

97. The same is true for the Brief Answer section that "answers" the Question Presented, although the analysis will be even more summary and, therefore, potentially less useful as a place to locate clues to an author's analytical strengths and weaknesses.

98. EDWARDS, *supra* note 18, at 156-57; SHAPO ET AL, *supra* note 38, at 203.

99. *Id*. ("The Conclusion . . . summarizes your analysis [in the Discussion section], so it should not include material that is not in the Discussion section.").

100. *See id*. (discussing the order in which an author might choose to write the different sections of an objective memo and suggesting that writing the Discussion first and Conclusion second is logical since the latter section simply summarizes the analysis in the Discussion section).

101. *See supra* text accompanying note 93.

higher level of analysis as he drafts the Conclusion.[102] Therefore, a mentor may locate the best analysis in the document in the Conclusion section and can use that analysis as an excellent foundation for comments to the author.

C. The Facts section

Reviewing the Facts section in light of the Discussion may also reveal problems in the author's thinking

CLUE: Does the author efficiently describe all necessary facts in the Facts section?

An objective memorandum's Facts section should set out the "story" of the client's situation in order to prepare the reader for the analysis in the Discussion section.[103] Given this purpose, this section must include all legally significant facts in the client's situation and other facts that provide the reader with a context to understand the legally significant facts.[104] In addition, the section should exclude information that is not relevant and, therefore, distracting to the reader. When a mentor encounters a Facts section that includes many unnecessary facts, especially when it excludes legally significant facts, she should question whether the author has the necessary grasp of the underlying legal analysis to differentiate between facts that the reader needs to prepare her for the Discussion section's analysis and those she does not.

CLUE: Does the author include all legally significant facts in both the Facts and Discussion sections?

The mentor should also check whether the author includes all legally significant facts in both the Facts section and the Discussion section. Legally significant facts belong in the Facts section because they are the most important part of the client's "story" for purposes of the analysis in the Discussion. They also belong in the portions of the Discussion section where the author applies the law to his client's situation because without them he cannot accurately predict a result for

102. *See id*.
103. SLOCUM, *supra* note 38, at 206.
104. *Id*. at 207.

his client.[105] Therefore, when an author omits legally significant facts in either section, the mentor should question whether the author is unsure about aspects of the legal analysis and is therefore unclear about which facts of his client's situation are legally significant and which are not.[106]

IV. USING TEXTUAL AND STRUCTURAL CLUES TO GIVE EFFECTIVE AND EFFICIENT FEEDBACK

Once the mentor has worked through the memo and identified textual and structural clues, she will be able to give the author feedback that will help him take the next step in thinking through problematic aspects of the analysis and revising the document. Without analyzing the relevant legal authority herself, the mentor will not be completely sure how the analysis should be developed or changed; however, she will be relatively confident that the clues point to important problems in the author's thinking, and on that basis she will be able to fashion effective comments. In so doing, the mentor should consider the tone and depth of the feedback; its form; and its structure.

A. Tone and depth of feedback

The relationship between mentor and junior lawyer is likely to be that of professional colleagues who are working collaboratively, even given the hierarchical nature of most workplaces. Given this working environment, the mentor should attempt to strike the right balance with the tone of her comments: she needs to be clear about the problems with the author's document, yet convey that she and the author are colleagues working together to finalize the piece of writing. Both clarity and collegiality are important if the mentor is to succeed in helping the author revise the current document while also helping him develop skills to write more effectively in the future.[107]

To begin with, a mentor should identify the analytical strengths of a document as well as the problems.[108] Figuring out the strengths helps

105. *See id*.

106. *See* SHAPO ET AL., *supra* note 38, at 203 ("The Facts section is supposed to include the 'relevant' facts. To determine the relevant facts, [an author] must know how [he is] going to analyze the issues in the Discussion section.").

107. A mentor, therefore, has a very different relationship with the author than a law professor has with her students, since students expect that their teacher will be "correcting" analytical issues with their work.

108. Barnett, *Triage in the Trenches*, *supra* note 2, at 667-68; Enquist, *Advice From Experts*, *supra* note 2, at 1132; Enquist, *What the Students Say*, *supra* note 2, at 166.

the mentor identify more accurately the weaknesses and what led to those weaknesses.[109] In turn, comments that point to both strong and weak points in the document help the author. The author will be clear about what is successful and should be repeated in future projects; he will also understand what is less successful and needs to be revised for the current document and avoided for future projects.[110] Receiving comments on the strengths of the memo also makes it less daunting for an author to confront his mistakes.[111]

The mentor's comments should also describe in sufficient detail the successes and the serious problems of the document.[112] For instance, a comment might explain why certain phrasing confused the reader-mentor: "You used 'also' here between these two concepts but later on you used 'balancing.' These two words indicate very different analytical relationships and, therefore, I'm unclear about the relationship of these two ideas." In contrast, the mentor should not use short "labeling" words or phrases to communicate complex substantive points, unless these comments simply refer the author back to a prior, well-developed narrative comment on the same issue.[113] A word like "vague," for instance, would not by itself communicate exactly what the reader found problematic in the example above and would therefore leave too much to

109. *See* Barnett, *Triage in the Trenches*, *supra* note 2, at 667 ("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.").

110. Collins, *supra* note 3, at 491 (stating that the opportunity for a junior lawyer simply to write is "helpful, but not nearly enough" and that "[a supervising attorney] must prepare to provide meaningful feedback and useful, practical suggestions in order to foster and nurture [a] future Learned Hand"); Enquist, *What the Students Say*, *supra* note 2, at 166-69 (giving examples of survey students' positive reaction to feedback on a memo's strengths and concluding that "[o]ver and over again [the survey students] said that they needed to know what they were doing right, as well as what they were doing wrong, . . . because they needed help identifying their strengths so that they could build on them").

111. Enquist, *What the Students Say*, *supra* note 2, at 166 (noting one survey student's response to positive feedback as "[p]raise is always welcome & uplifting!"); *see also* Barnett, *Triage in the Trenches*, *supra* note 2, at 672 (discussing generally the tone of comments).

112. Barnett, *Triage in the Trenches*, *supra* note 2, at 663-66 (discussing why well-developed feedback is important); Enquist, *What the Students Say*, *supra* note 2, at 160-66, 188 (discussing same point and giving examples of positive student reaction to well-developed comments); Kearney & Beazley, *supra* note 2, 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.").

113. Gionfriddo, *Reasonable Zone*, *supra* note 2, at 447 n.76.

the author's imagination in rethinking the analysis and then revising the document.[114]

The mentor should frame her comments from the point of view of the reader to make clear whether she was able to understand the ideas in the document. Comments from this point of view help the author learn why the successes and problems in the document are so important to the reader and, therefore, motivate the author to revise.[115] Comments framed in this way are also effective because they focus on the person giving feedback instead of on the author, and thus may be less threatening.[116] In the example above, the mentor does not just describe the problem—that the relationship between ideas is not clear—she also points out that the problem undermined her ability as the reader to *understand* the connection between the ideas.

In general, comments from the point of view of a reader should be framed as questions, whether open-ended or more directive, and not as mere assertions. Questions presume the author will solve the problem and, therefore, set up a dialogue between mentor and author as professional colleagues working together on the project.[117] Having the sense that he is collaborating with his mentor, the author will be less

114. *See* Barnett, *Triage in the Trenches*, *supra* note 2, at 664 (discussing the problems with using vague or conclusory comments); Enquist, *Advice From Experts*, *supra* note 2, at 1149 (describing comments to be avoided, including "ambiguous comments, either because they consisted of one-word labels, such as 'awk,' 'unclear,' or 'vague,' or because they consisted of stray marks, underlining, or excessive abbreviations"); Enquist, *What the Students Say*, *supra* note 2, at 188 (concluding that students do not find "[s]hort, cryptic, coded, or labeling comments" effective).

115. Berger, *supra* note 2, at 91-93 (discussing feedback written from the point of view of an "average legal reader"); Gionfriddo, *Reasonable Zone*, *supra* note 2, at 439-40 (discussing feedback written from the point of view of lawyers and judges—readers who lack the same familiarity with the analysis as the author).

116. *See* Rosenberg, *supra* note 3, at 1246 (noting, in discussing feedback in a law practice context generally, that "[i]f I give feedback as a description of my own internal reaction to specific behaviors I have identified, I will be giving feedback that is significantly less threatening to the hearer (because it does not purport to label them) and that is significantly more accurate (because it honestly describes my reaction, rather than (probably inaccurately) describing your motivation)").

117. Barnett, *Triage in the Trenches*, *supra* note 2, at 664 (stating that "when writing specific comments, the teacher should imagine that he is having a dialogue with the student much like he would in class" and that "[t]ypically, teachers use a range of questions in class from open-ended inquiries to fairly directed suggestions"); *cf.* Enquist, *What the Students Say*, *supra* note 2, at 181 (noting that students had a very positive reaction to comments that "suggested an on-going dialogue with the student" but that questions that were "terse or cryptic" undermined that dialogue).

likely to be defensive and perceive the comments as patronizing.[118] Moreover, questions require the author to do the work himself to figure out the answers as he revises the document,[119] and this helps the author gain confidence in his ideas.[120] This process therefore helps the author revise his current document as well as write more successfully in the future.[121]

Furthermore, comments framed as questions are appropriate in a situation in which the mentor does not have a complete understanding of the actual analysis of the legal problem being addressed in the document. While the mentor will be able to recognize textual and structural clues to weaknesses in the author's thinking, she will not be completely sure what the actual problem is, or the best method to solve it. Thus, she can only ask a question and rely on the author to think through the analysis and revise the document.

B. Form of feedback

To the extent feasible, given the time constraints of law practice, a mentor should give feedback in a tangible manner—written or voice-recorded—that allows the author to go back to read it or listen to it again.[122] Feedback in this form is usually more helpful than feedback during a conversation where the author takes his own notes. For most authors, their own notes about the mentor's responses to the document, and what they remember from a conversation, will be more general and less accurate than the mentor's own comments.[123] An author needs a

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118. *See* Rosenberg, *supra* note 3, at 1251 ("[L]earning to give effective feedback replicates the process of effectively conveying almost any information and arguments in the way least likely to make the listener defensive and most likely to be taken in—by presenting the information as one's understanding, rather than as a 'reality.'").

119. Kearney & Beazley, *supra* note 2, at 890, 899-900 (discussing why the use of Socratic questions in giving written feedback on student work better helps students to learn legal analytical skills than giving students the answers to questions and, therefore, encourages "students' independence as legal writers").

120. Barnett, *Triage in the Trenches*, *supra* note 2, at 665.

121. *See* Kearney & Beazley, *supra* note 2, at 902 (commenting that "[w]henever the teacher revises for the student" instead of asking appropriate questions, "the teacher robs the student of the opportunity to engage in independent decision-making, and thus stunts the student's growth as a writer").

122. *See generally* Barnett, *Form Ever Follows Function*, *supra* note 2, at 759-79 (discussing a range of feedback in tangible form, including handwritten, typed, and taped comments as well as different forms of electronic critique and how a teacher can evaluate their relative usefulness).

123. *Cf. id*. at 765-67 (discussing the strengths and weaknesses of live conferences where the professor reads through a student's written work for the first time during a one-to-one

complete and accurate record of the mentor's evaluation of the writing to revise his document successfully, especially since he may need to return to the mentor's feedback multiple times during the revision process; often, for instance, an author will not understand some comments early on but will come to appreciate their import as the revision process progresses.[124] Of course, a mentor could provide comments in a tangible form as well as meet with the junior person about the document;[125] however, both may not be possible given time pressures in law practice.[126]

The actual form of tangible comments—whether they are typed, digitally recorded voice comments, or handwritten—may have a significant impact on how useful they are to the author, and each has its advantages.[127] The mentor might use the method of typing comments in a separate document, at the end of the memorandum,[128] or throughout the document itself.[129] Typed comments, because they are so easily made, encourage mentors to provide detailed explanations of the document's strengths and problems. For the same reason, they also encourage mentors to focus on analytical clues instead of copy-editing and commenting on basic writing and grammar issues too soon in the author's process.[130] Typing allows the mentor to check comments quickly for accuracy and clarity, and typed comments are easy for the author to read and refer to during the revision process.[131]

Instead of typing comments, the mentor might record digital voice comments, either inserted into the document[132] or recorded in a separate electronic file.[133] Recorded voice comments have similar advantages to

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meeting and reacts as a reader to what she encounters, and, within this discussion, making the point that students find it difficult to take accurate notes and, without them, may have difficulty in revising their written work).

124. *Id*. at 767.

125. *See generally* Robin S. Wellford-Slocum, *The Law School Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255 (2004) (discussing giving feedback during student-teacher conferences).

126. *See supra* notes 15-16 and accompanying text. Of course, if a mentor does not have the time to give the author written or voice-recorded comments, she could still discuss the textual and structural clues with the author during a one-to-one meeting. Though providing tangible feedback is in general much more helpful, an author would still benefit from this kind of "live" feedback. *See supra* note 123.

127. *See* Barnett, *Form Ever Follows Function*, *supra* note 2, at 758-74.

128. *Id*. at 763-65.

129. *Id*. at 770-71.

130. *See supra* Part II.

131. Barnett, *Form Ever Follows Function*, *supra* note 2, at 763-74.

132. *Id*. at 771-73.

133. *Id*. at 767-69 (taped comments) and 773-74 (voice comments with digital recorder).

typed comments, but they may have some additional benefits. First, some authors might find them easier to understand and to work with during the revision process. Second, unlike typed comments, voice-comments by their nature include a human element that may support the author through the revision process without the time commitment that meeting several times would require.[134]

Finally, the mentor could handwrite comments, if her handwriting is legible enough.[135] Handwritten comments may seem more personal than typed comments and can have all the advantages of typed comments. However, this kind of feedback also has some serious potential disadvantages. The mentor must resist the temptation simply to write brief, superficial comments that do not fully inform the author of the strengths and weaknesses of the document. In addition, writing comments by hand may encourage the mentor simply to copy-edit passages throughout the document, instead of articulating the problems clearly and requiring the author to do the revision himself. This is a major disadvantage: with much of the revision done, the author will not learn the skills necessary to avoid repeating the same mistakes in future projects.[136]

C. Structure of feedback

To structure feedback most effectively for the author during his revision process, a mentor should consider the following issues. The mentor should separate comments on the more complex issues of analysis and structure from those on simpler issues, such as citation and basic issues of writing clarity.[137] For instance, a mentor who uses a typed comment at the end of the document should first address all analytical and structural issues and then, in a separate section, address basic writing issues.[138] Keeping complex issues separate from simpler

134. *Id*. at 768.

135. Barnett, *Form Ever Follows Function*, *supra* note 2, at 759-62.

136. *Id*. at 761; Collins, *supra* note 3, at 491 (writing to mentors in law practice with the caveat that "[o]nly line edit if you plan to give the document to someone else to simply make the word processing changes. If you must line edit, do it sparingly. It is helpful to see how you would have written it in the first place, but not at the expense of knowing what the problem is").

137. *See* Barnett, *Triage in the Trenches*, *supra* note 2, at 663 (commenting that providing separate "narrative comments may be the best approach when addressing a draft with extensive substantive problems" because "[t]hrough a narrative, the teacher can explain step-by-step how the student can address the most significant flaws in the paper").

138. *See infra* Appendix Part C (sample mentor's comments to sample author's memo).

ones will likely help the mentor spend sufficient time developing substantive comments on the most important problems, and resist becoming distracted by less important issues.[139] Separating these comments also helps the author focus on the issues most critical to the success of the document.[140]

The mentor should strongly consider including a well-developed comment that summarizes her overall sense of the memo and gives the author a revision strategy.[141] A summary comment provides a context for all individual comments and gives the author a holistic sense of the successes and problems in the document.[142] A revision strategy indicates which comments are more important than others and helps the author logically order the steps in the revision process.[143]

Another important issue is that, when feedback involves complex ideas, the mentor needs enough "space," whether physical or electronic, to develop comments that sufficiently explain her point of view.[144] For instance, the mentor might type comments at the end of the document or in a separate document; digitally record voice comments; write comments by hand on the back of a page in the author's document; or insert typed or voice comments electronically at the relevant point in the text. In contrast, a mentor should avoid writing complex comments by hand in the margins throughout the document. Forced into small spaces, these comments are then not easy for the author to grasp. They also cause the pages of the author's document to be literally covered with feedback, and this visual "look"—focusing as much on the mentor's

139. *See* Barnett, *Triage in the Trenches*, *supra* note 2, at 663; *see also supra* notes 113-15 and accompanying text (discussing the importance of well-developed comments) and notes 26-36 and accompanying text (discussing the importance of a mentor's focusing initially on the substantive issues of a document).

140. *See* Barnett, *Triage in the Trenches*, *supra* note 2, at 663.

141. *Id*. at 666.

142. *Id*.; *see also* Enquist, *Advice From Experts*, *supra* note 2, at 1133-37 (discussing experts' opinions on the advantages and form of summary comments); Enquist, *What the Students Say*, *supra* note 2, at 156-60 (discussing survey students' positive response to summary comments because this type of feedback "gave . . . a 'big picture' look at their writing").

143. Barnett, *Triage in the Trenches*, *supra* note 2, at 666; Enquist, *Advice From Experts*, *supra* note 2, at 1134-35; Enquist, *What the Students Say*, *supra* note 2, at 160 (noting that students were positive about summary comments because students perceived these comments as helping to "develop some priorities to work on the next time").

144. *See* Barnett, *Form Ever Follows Function*, *supra* note 2, at 761 (noting that, although margin comments can be helpful, they "naturally break up the writing and revision process for the student because they focus on individual issues in the paper," and "[i]f the professor relies too heavily on [them], she may not take the necessary time to understand and explain the true problem").

ideas as those of the author—may undermine the author's sense of control over his revision process.[145]

Shorter comments on simple issues can be effective, however, when they are handwritten in the margins next to the text to which they apply.[146] These might be short phrases that refer back to the same issue in an earlier comment that fully articulates the problem.[147] They might also be notations about simpler issues, such as citation or a grammar issue. Finally, the mentor might copy-edit a short passage in the text of the document to show the author how to correct a recurring problem that she has already discussed in-depth in a prior comment.[148]

V. APPLYING THEORY TO PRACTICE: IDENTIFYING TEXTUAL AND STRUCTURAL CLUES IN A SAMPLE DRAFT MEMO TO CRAFT EFFECTIVE FEEDBACK

The discussion below uses a sample memo, based on the law of the mythical jurisdiction of Hamilton regarding covenants not to compete,[149] to illustrate how a mentor might read through an objective memo and, purely on the basis of textual and structural clues in the memo, provide meaningful, efficient feedback to the author. Before reading the sections below, you should consider working through the sample memo in the Appendix[150] without reading the mentor's sample comments in the

145. *Id.*; Barnett, *Triage in the Trenches*, *supra* note 2, at 670.

146. *See* Barnett, *Form Ever Follows Function*, *supra* note 2, at 775 ("Electronic comments might be best for long, detailed comments, while handwritten comments could be the most practical technique for providing feedback with shorter specific comments.").

147. Gionfriddo, *Reasonable Zone*, *supra* note 2, at 447 n.76.

148. Barnett, *Form Ever Follows Function*, *supra* note 2, at 759 ("[A] combination of handwritten margin comments along with editing suggestions and summary end comments can be effective.").

149. *See infra* Appendix: Sample Draft Memo by Author With Feedback From Mentor. Daniel Barnett developed these materials for the Basics Critique Workshop at the biennial conference of the Legal Writing Institute (www.lwionline.org) and subsequently discussed them in an article. *See* Barnett, *Triage in the Trenches*, *supra* note 2. The *Triage* article includes in its Appendix A four cases from the mythical jurisdiction of Hamilton discussing covenants not to compete. *Id.* at 689-96. The *Triage* article also includes in its Appendix C a sample author's memo with sample feedback from a legal writing teacher. *Id.* at 700-04; 38 UTOLR 700. The sample memo and critique in the Appendix to this article is based on the same four cases included in the *Triage* article. Although the memo and critique in the appendix to this article are also generally based on the sample memo and teacher feedback in *Triage*, the authors made some changes to reflect the difference between feedback in law practice (the focus in this article) and feedback to first-year students in a legal writing class (the focus of the *Triage* article).

150. *See infra* Appendix Part A.

General Summary and Revision Strategy and Specific Comments on Analysis at the end of the sample memo. Begin by identifying, based on the discussion in the sections above, the textual and structural clues that indicate strengths and weaknesses of the author's analysis and organization.[151] Then, craft your own comments using these clues.[152] Finally, read through the discussion below to evaluate your own feedback.

A. Using clues to provide feedback on the strengths of the sample draft memo

Using the clues discussed above, the mentor would conclude that the author's memo appears to have many strengths and could use these strengths in her comments to help the author revise the memo. When an author understands what works in a document, he should be more able to revise the problematic areas. In addition, knowing that the document has effective aspects helps the author's morale, which will likely make the revision process go more easily.[153] For these reasons, therefore, the mentor's General Summary comment to the sample memo's author begins with many of the positive aspects of the document:

> I found your overall organization in the Discussion section very helpful. You began with an introductory paragraph that identified the structure of the analysis and therefore prepared me for the rest of the section. When explaining each issue, you first discussed the law for the issue, both the general legal principles and case illustrations, and only then did you go on to apply the law to the facts of your client's case. You organized your explanation of the law around ideas stated in general principles and not around descriptions of cases. You used strong topic sentences at the beginning of paragraphs. When you applied the law to our client's situation, you began with a strong statement that clearly set out your predicted result. All these features contributed to my ability to understand your ideas easily and quickly.
>
> In addition, you made clear that this legal issue is not governed by a statute but by case law. You cited to what appeared to be the relevant cases consistently, using the same group of cases in your introductory paragraph and throughout the rest of the Discussion section.[154]

151. *See supra* Part III. The sample memo was crafted to show the kinds of strengths and weaknesses that a mentor might encounter. It is unlikely, however, that a mentor in actual practice would encounter as many problems in one document.

152. *See supra* Part IV.

153. *See supra* note 111 and accompanying text.

154. *See infra* Appendix Part B.

The mentor would also, however, encounter strong evidence in the memo that the author has not reached a fully developed and precise analysis. A range of textual and structural clues indicate that, despite the strengths noted above, the author is still struggling with some of the basic ideas and how they relate to each other. Thus, the mentor would also need to address the document's problem areas, which are primarily analytical.

B. Using clues to provide feedback on the analytical weaknesses of the sample draft memo

1. The Discussion section

a. Evaluating the introductory paragraph and comparing ideas there to the later analysis in the Discussion section

Using textual and structural clues, the mentor would find the following apparent strengths in the author's introductory paragraph for the Discussion section. The author appears to understand the question he is writing about since he identified the precise legal issue of the memo—covenant not to compete—at the beginning.[155] The author appears to have a good grasp of the nature of the underlying primary authority because he makes clear that in this jurisdiction this issue is governed by case law and not by statute.[156] Finally, he sets out an overall analytical structure to the analysis,[157] including what appear to be all the important concepts. The author articulates the underlying policy tension, which is the balance of the employer's and employee's rights. He also describes the courts' test for evaluating a covenant not to compete—that of "legitimate interest in restricting the employee with a non-competition clause" and "reasonableness of the restriction."

CLUE: Concepts are not connected precisely

Despite the strengths of the introductory paragraph, the mentor would be unclear about the precise relationship between some of the important legal concepts and would wonder whether this might be a clue

155. *See supra* note 49 and accompanying text.
156. *See supra* notes 47-48 and accompanying text.
157. *See supra* notes 50-51 and accompanying text.

that the author is confused.[158] She would question whether she was being accurately informed about how the "balance" of rights relates to the two issues of "legitimate interest" and "reasonableness" because the author connects them with the phrase of "in addition," a transition that indicates that the ideas before and after play the same role in the analysis. Given her experience with legal analysis, the mentor would question whether the policy that drives the courts' analysis is likely to be an "equal" idea to the test the courts use. Instead, she would suspect that the courts use the underlying policy to figure out whether the covenant first serves a legitimate interest and second is reasonable. Without reading the cases, of course, the mentor could not be sure whether "in addition" was accurate or inaccurate, but she would have a serious question that she would want to identify for the author.

Before writing a comment, however, the mentor would quickly skim the rest of the Discussion section to see whether there were further clues that would help her understand the connection between these ideas and would help her write a more helpful comment.[159] The mentor would find that the author never brings up the idea of the "balance" of rights at any time after the introductory paragraph, which potentially confirms that he is not entirely sure what role this idea plays in relationship to the ideas of "legitimate interest" and "reasonableness."

At this point, the mentor would craft a comment to focus the author on the possible issue that his use of "in addition" raises and make it clear from her point of view as the reader of the document that she needs clarification about this connection. While quickly writing a comment like "your phrase of 'in addition' may be too vague" would be economical, that comment would not sufficiently describe the problem to the author. Instead, the following narrative comment pinpoints the precise issue by asking a question about the ideas that confused the mentor. This question does not, however, assume the answer, since the mentor does not know the answer. Additionally, using a question communicates to the author that the revision process is his to control.[160]

> I was able to follow the analysis in your introductory paragraph fairly well overall. But I want to double-check that you have explained the precise relationship between the courts' concern about balancing the different interests of the parties and the courts' two-step analysis that the employer must have a legitimate interest and that the covenant reasonably protects that interest. You

158. *See supra* notes 52-54 and accompanying text.
159. *See supra* notes 59-60 and accompanying text.
160. *See supra* notes 117-21 and accompanying text.

> explain that the court balances the interests of the parties "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, which is what "in addition" indicates? 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?[161]

b. Evaluating the Discussion section where the author sets out an abstract analysis of the law

CLUE: Concepts are not described consistently

Once past the introductory paragraph, the mentor would find that the author organizes around the two legal issues of legitimate interest and reasonableness of the covenant, and this appears analytically logical since it is consistent with the introductory paragraph where the author makes clear that these issues are two separate requirements. Yet a potential clue that the author is not entirely sure about his analysis is that he has been inconsistent in describing these core legal concepts as either requirements or something less than a requirement.[162]

In the introductory paragraph, the author indicates clearly that legitimate interest and reasonableness are requirements by using the words "required" and "must." Supporting this idea, the author structures the main body of the Discussion section around separate sub-issues, each discussing one of these issues. Contradicting the idea of "requirement," however, is the fact that the very first topic sentence of the first sub-issue analyzing "legitimate interest" in the second paragraph does not use a word indicating "required" but states that this issue "is first considered by" the courts. Again, the mentor does not, and cannot without reading the legal authority, know for sure whether legitimate interest and reasonableness are requirements or not. Instead, she simply focuses her comment on her confusion as a reader and leaves the responsibility to the author to fix this analytical problem.

> From reading your introduction, I understood clearly that you thought the courts require the employer to have a legitimate interest and the covenant to reasonably protect that interest because you used the words "require" and "must." But, in your first sentence of paragraph 2, where you began to analyze legitimate interest in more depth, you raised a question for me concerning

161. *See infra* Appendix Part C.1.
162. *See supra* notes 62-65 and accompanying text.

> whether you do actually see legitimate interest as a requirement because you used the verb "consider." Do the courts "require" that the employer have a legitimate interest? Or, do the courts just "consider" (generally evaluate without requiring) this issue?[163]

CLUES: Concepts are not developed sufficiently nor ordered, described, and connected consistently

In addition to being confused about whether the legitimate interest issue is required, the mentor would also not feel fully informed about how the courts determine whether the legitimate interest requirement is satisfied. As she reads the author's discussion of this issue, the mentor would encounter places where concepts are not developed with sufficient specificity as well as places where the author describes, connects, and orders ideas inconsistently.[164] These problems would be strong evidence that the author is still struggling with the analysis. Authors who are not at an end point in their thinking tend to leave out important ideas in some places, and at others "try out" different formulations, yet they never reach firm conclusions concerning which formulation is the most accurate. Again, while this type of "writing to think" is valuable for authors during an early drafting phase, it does not communicate analysis well to a reader in law practice and is a potent clue that the author needs help in finalizing his analysis.[165]

Given these problems, the mentor would recognize that, while the author has identified a "test" for legitimate interest, he does not develop that test sufficiently. The author does describe two separate ideas that appear to be very important: first, whether the employee has a "personal hold on the customers" and, second, that the courts use some kind of a "factors" test. But the author never makes clear how the "personal hold" idea relates to the test, what "personal hold" means, and the precise kind of "factors" test the courts use.

One clue to the problems in the author's thinking is that the author does not use consistent language when describing the test that the courts use for legitimate interest.[166] After the introductory paragraph, the author begins to analyze legitimate interest in general principles and appropriately sets out the courts' test. At this point, the author describes this test as a "series of factors." Contradicting this phrase, however, the

163. *See infra* Appendix Part C.2.
164. *See supra* notes 72-76 and accompanying text.
165. *See supra* notes 63-64 and accompanying text.
166. *See supra* notes 62-65, 75 and accompanying text.

author describes this test as a "totality of factors" at the beginning of the fourth paragraph. Further compounding the reader's problem, the author continues to switch back and forth between these two formulations of the test as he describes the cases.[167] By the end of the author's analysis of legitimate interest, the mentor is unsure which description of the test is more accurate but could write the following comment to identify this serious analytical issue for the author:

> The inconsistent language that you used here was what initially made me think that I wasn't getting a complete and accurate analysis of legitimate interest. You say at the beginning of paragraph 2, and later on in your description of the *Daniels* case in paragraph 3, that the court considers a "series of factors." In contrast, you say that the court considers a "totality of factors" when you describe the *Wilson* case in paragraph 2 and as you transition into discussing the *Klinger* case in paragraph 4. Which is it? Right at the beginning of paragraph 2, where you set out your analysis of legitimate interest in general principles, I needed to know which kind of test the courts are using and then to encounter this idea described in a consistent fashion throughout the rest of your analysis.[168]

Another clue is that the author does not describe an important idea with sufficient specificity in the general principles. The author describes the test for legitimate interest as either a "series of factors" or a "totality of factors" but never identifies those factors in the general principles of his analysis, although he does begin to deal with them within the case descriptions and as he applies the test to the facts of the client later on. In this situation, the reader is left to locate the parts of the analysis strewn throughout the author's discussion of legitimate interest, forcing her to piece together the ideas and, therefore, leaving her concerned that the author's analysis does not accurately spell out the courts' reasoning.[169]

In the sample comment below, the mentor's feedback on this issue tracks the mentor's confusion, and why that confusion is problematic. By linking her confusion to specific parts of what the author has written, the mentor not only focuses the author on the general issue but shows him exactly in the text where her confusion arises. This kind of comment is much more helpful than simply stating a more general

167. *See supra* note 81 and accompanying text.
168. *See infra* Appendix Part C.4a.
169. *See supra* notes 67-71 and accompanying text.

concern of "factors are vague" or slightly better, "I was confused about the factors. What are they?"[170]

> Regardless of whether this is a "series of factors" or a "totality of factors" test, I needed you to identify in the second paragraph the specific factors the courts use. Because this idea was missing in your initial analysis, I had to search for the answer to this question in the case descriptions and where you apply the legitimate interest analysis to our client's case. I did find references to the "factors" in these later sections, but I wasted valuable time. See your description of the *Wilson* case and your use of "exclusive, regular and frequent contact over a long duration of time" when you applied the legitimate interest analysis to our client's case.[171]

Still another clue is the manner in which the author uses the "personal hold" idea, which appears very important to the analysis but is inconsistently described throughout the general principles and case descriptions.[172] On the one hand, in every instance but one, the author uses the following phrase: "personal hold on the employer's customers *so that* customers would likely follow the employee to a new employer." This articulation uses a connection of "so that" between the "personal hold" idea and the "customers would likely follow" idea. Contradicting this, however, the author switches the transition to "and" when describing the *Daniels* case, resulting in a very different meaning. In this situation, the mentor might be fairly certain that "so that" was accurate, given the number of times it is repeated throughout the analysis of legitimate interest; however, she could not be entirely sure, given that the discussion of the *Daniels* case describes a different relationship between these critical ideas and given that she has not read the underlying authority—the four relevant cases—herself.

A final clue is that the author does not order the ideas of "personal hold" and the "factors" test consistently, and therefore the reader cannot gain a clear enough picture of how all the pieces of the legitimate interest analysis fit together into a coherent, accurate whole.[173] In the beginning in the general principles, and in the *Wilson* case description, the author fits these ideas together in the following manner: to figure out whether the employee has a personal hold, the courts must assess several factors either in a totality or as a series. The author changes this formulation, however, as he describes the first case in illustration, the

170. *See supra* notes 112-14 and accompanying text.
171. *See infra* Appendix Part C.4b.
172. *See supra* note 81 and accompanying text.
173. *See supra* notes 61, 74 and accompanying text.

Daniels case. Here, the author fits these ideas together as follows: to figure out whether the employer has a legitimate interest, the courts evaluate a series of factors, one of which is whether the employee has a personal hold on the customers. These two formulations are completely different, and the lack of consistent ordering and connection of ideas would raise serious questions for the mentor about the correct analysis. Therefore, the mentor's comment focuses on her confusion and identifies the precise analytical questions about personal hold for the author to grapple with as he rethinks the analysis and revises the document in this regard:

> I also ended up with some questions about the obviously central idea concerning the "employee's personal hold on the employer's customers" because you didn't consistently describe where this idea fit into the overall legitimate interest analysis and didn't consistently describe the concept itself.
>
> First, is this an overarching idea that explains "legitimate interest" (see paragraph 2 and your description of the *Wilson* case)? Or, is it one of the "factors" in the test (whether a "series of factors" or a "totality of factors") that the courts use for legitimate interest (see your description of the *Daniels* case)? You don't seem to be using this idea consistently, so I didn't come away with a clear understanding of just how the courts use all these ideas to figure out whether the employer has a legitimate interest.
>
> Second, what is the relationship between the idea of "personal hold on the employer's customers" and the idea that "customers would likely follow the employee to the new employer"? At the beginning of paragraphs 2 and 4, you use "so that" to connect these ideas. In contrast, in your case description of the *Daniels* case in paragraph 3, you use "and." Which formulation accurately reflects how these ideas relate?[174]

c. Evaluating the Discussion section where the author applies the analysis of the law to the client's situation to predict a result

By the time the mentor reaches the portion of the Discussion section where the author applies the law to the client's facts and predicts a result, she has encountered many clues that the author still had some serious thinking to do about how all the ideas in the "legitimate interest" analysis fit together. Reading through this final section, then, would simply support this conclusion.

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174. *See infra* Appendix Part C.4c.

CLUE: The prediction is not immediately supported with sufficient reasoning

The author begins well with a prediction that Midwestern would have a legitimate interest,[175] but the author does not immediately articulate a clear analysis of why that would be so.[176] As in the abstract analysis of the law beforehand, the author does not provide the reader with a sufficient understanding of the overall analytical structure; furthermore, he does not explain how this structure supports the prediction that Midwestern would have a legitimate interest.[177] Thus, the reader would not have a clear idea about the relationship between the "personal hold" idea and the "factors" test the courts use or how the courts evaluate the "factors," either in a totality or in a series. Consequently, although the author does support his prediction with comparisons of the client's case to precedent, the reader would have no context for understanding why a future court would view the client's situation as similar to some cases and dissimilar to others,[178] even though here, unlike the analysis beforehand, the author does describe and use the specific factors.

Therefore, the mentor frames her final comment to the author to make this point. In particular, she refers back to prior comments that address the same analytical deficiencies in the analysis of the law so that the author will see the important themes of problems throughout the Discussion section of the memo:[179]

> You began this section well by stating clearly your prediction that Midwestern would have a legitimate interest in restricting Andy Jones with the non-competition clause.
>
> You had trouble in this section, however, because of the issues noted above (see comment 4) in your analysis of legitimate interest. You set out clearly the overall result for the client, but you were not able to develop in sufficient depth why that result would occur. Instead, you focused too much on comparing our client's case to similar and dissimilar precedent. I needed this step to be confident about your prediction, but I wasn't able to fully understand *why* a future court would see our client's case as similar or dissimilar to precedent because you weren't clear enough using the "personal hold" idea in

175. *See supra* note 84 and accompanying text.
176. *See supra* notes 85-87 and accompanying text.
177. *See id.*
178. *See supra* notes 88-89 and accompanying text.
179. Barnett, *Triage in the Trenches*, *supra* note 2, at 668 (discussing how to use themes to reinforce ideas throughout feedback).

relationship to the "factors test."[180]

CLUE: The prediction is not supported with reasoning that is consistent with the earlier analysis of law

As she reads through the analysis of the client's situation, the mentor would also be aware of a range of inconsistencies between this section and the earlier abstract analysis of the law. Some ideas, like the factors test the court uses, are included in the "law" but not here. Other ideas, like the specific factors, are included here as the author discusses the client's situation but not beforehand. Since the mentor's comment focuses the author on the overall lack of sufficient reasoning to support his prediction, though, she could decide that she has communicated the most important point to him: that he needs to figure out how all the pieces of the analysis fit together. Therefore, the mentor might decide to highlight for the author only one important inconsistency between the analysis of the law and this section:[181] that in this section he has articulated, for the first time, the specific factors and that he should use this idea to help him rethink the overall structure of the analysis.

> Note that you do seem to use specific factors here (see, for instance, your third sentence). If your discussion of these factors in this paragraph is complete and accurate, use these ideas to help develop your analysis in general principles and case descriptions in paragraphs 2-4 (see comment 4b above).[182]

2. The Conclusion section

CLUE: Concepts in the Conclusion section are not described consistently with the Discussion section

At this point the mentor could use the Conclusion section as a triple-check for further clues. In the sample memo, this summary section appears to be a place where the author put all the pieces of the analysis into a more cohesive, precise framework than at any point in the Discussion section. Therefore, while the mentor cannot be entirely sure whether the Conclusion section is completely accurate, she can make clear to the author that she felt better informed by this section and that

180. *See infra* Appendix Part C.6.
181. Barnett, *Triage in the Trenches*, *supra* note 2, at 654 (discussing prioritizing comments).
182. *See infra* Appendix Part C.6.

the author should evaluate whether his thinking finally "arrived" at this later point in his drafting. If so, explaining that the Conclusion section seemed more complete would help the author use the analysis here as the analytical foundation for his revision of the entire document. At the very least, the mentor's comment demonstrates another inconsistency in the document and why a reader would be very confused:

> Although I was quite confused by some analytical issues in the Discussion section, I felt as if you may have articulated here in the Conclusion section a complete description of the overall analytical framework and why that supports the conclusion you come to for our client, ATI. Here, you discuss legitimate interest, personal hold, a totality test, and the specific factors of that test—and you make clear precisely how they all fit together. See the general summary comment above about using your analysis in this section as the beginning point for your revision.[183]

3. The Facts Section

In the sample memo, the mentor would not locate any clues from the Facts section. Again, however, comparing the facts used in that section with the facts of the client used in the Discussion section can often highlight strengths or problems in the author's analysis.[184]

C. Effective aspects of the mentor's feedback

The mentor's comments to the author discussed above would be effective in helping the author rethink his analysis and revise his draft memorandum for several reasons. The comments about the analysis and structure are completely separate from comments on basic writing issues.[185] This separation helps the mentor focus her feedback on the analytical problems in the author's memo and, consequently, helps the author concentrate on these issues as he rethinks the analysis to revise the memo.[186] Few authors write well until they have figured out the underlying ideas.

In addition, the feedback begins with an overview—the General Summary and Revision Strategy. These summary comments give the author an overview before he works through individual comments. They

183. *See infra* Appendix Part C.7.
184. *See supra* notes 103-06 and accompanying text.
185. *See infra* Appendix Parts C and D.
186. *See supra* notes 137-40 and accompanying text.

also provide the author with a strategy to revise the document.[187] In the situation of the author of the sample memo, this strategy may help the author a great deal since the mentor has a strong intuition that the author has actually expressed a coherent analysis in the Conclusion section and, therefore, that the author may be able to use that section as the foundation for his revision of the entire document:

> The main problem with your draft, however, is that you struggled throughout the Discussion section to explain clearly how the court determines if an employer has a legitimate interest. This problem then required me to spend a lot of time myself trying to figure out exactly what you meant. To help you revise, I've included some questions below to demonstrate the areas where I had serious questions as your reader.
>
> Note that it appears as if your Conclusion section might set out the best analysis in the memo as to the issue of legitimate interest (see below). You should consider beginning your revision by reviewing the cases in conjunction with your summary of analysis in this section. If your review of these cases corroborates your analysis there, then use that section to help you revise the Discussion section. You might begin with the introductory paragraph (see below) and then move on to the general principles that set out your developed analysis of legitimate interest (see below), your case descriptions as illustrations of those general principles (see below), and finally the application of that "law" to our client's case (see below).[188]

The mentor's comments are also effective because they are supportive but clear about the apparent analytical problems. They include specific examples from the text and express precisely why in certain places the problems make it very difficult for the reader. They are narrative comments that fully explain the mentor's thoughts and are not simply short phrases that are too general to accurately communicate the mentor's reaction as a reader.[189]

Finally, the mentor's comments clearly describe the problems of the author's thinking, but are also designed to leave control of the revision process to the author. The mentor describes her own reaction as a reader and then asks questions that pinpoint the issue for the author. This strategy makes it less likely that the author will be defensive and view the mentor's comments as condescending, which would be more likely if the comments were more authoritative and directive.[190] For instance, instead of saying "you needed to be clear that the legitimate interest and

187. *See supra* notes 141-43 and accompanying text.
188. *See infra* Appendix Part B.
189. *See supra* notes 112-14 and accompanying text.
190. *See supra* note 116 and accompanying text.

reasonableness issues were requirements," the mentor crafts her comments to focus on the discrepancy between "must" and "require" and "consider" and links it to her own confusion as the reader.[191]

VI. CONCLUSION

Mentors should provide effective feedback on the writing of the lawyers they supervise. High quality feedback will result in better documents and, therefore, better representation of clients. Mentors, however, work within a context that requires careful attention to the time of both mentor and author and the costs that time represents. Because of these efficiency pressures, mentors cannot always devote the time necessary to gain a complete understanding of a document's analysis before providing feedback to the author and, for this reason, need a way to craft meaningful comments without this knowledge. This article provides such a methodology. Working with textual and structural clues, mentors can identify the apparent successes and analytical weaknesses in a document. They then can use this knowledge to efficiently craft comments that will assist the author in finalizing his current document successfully and learning the skills to write better documents in the future.

191. *See supra* note 163 and accompanying text.

APPENDIX: SAMPLE DRAFT MEMO BY AUTHOR WITH FEEDBACK FROM MENTOR

A. Sample Draft Memo

RE: American Tools, Inc: Non-Competition Agreement
Date: March 29, 2001

FACTS

Our client, 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 Jones 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 Jones, ATI learned that Andy's original employment contract with Midwestern included a non-competition clause that restricts him 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.

The following information was obtained from our client and will be relevant to whether the non-competition clause will be enforceable:

- Andy Jones started with Midwestern in 1991 and has been servicing most of his customers for at least six (6) years.
- Andy Jones 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 (2) years.
- In Andy Jones' 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 Jones meets with his customers at least once every month.
- Andy is not a personal friend of any of his customers.

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 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, 619 (Ham. 1985); *Billings v. Paris Fashions, Inc.*, 316 N.E.4th 100, 100 (Ham. 1965). The courts, therefore, balance the right of the employee to earn a living with the right of the employer to protect themselves 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, 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.

Whether the employer has a legitimate interest in restricting the employee is first considered by the courts. *See id.* To determine if the employer has this interest, the courts look at a series of factors to see whether the employee had a personal hold on the customers so that they would likely follow the employee to a new employer. *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. 515 N.E.4th at 311. To reach this decision, the court analyzed a series of factors. There, the employee had a personal hold on the employer's customers and the customers would likely follow the employee to a competitor. *Id.* In addition, the employee was the exclusive contact between the business and the customers over several years. *Id.* The employee also met with his clients a few times a month. 515 N.E.4th at 310. Similarly, in *Wilson*, the court found that the employee had a personal hold on the employer's customers so that they would likely follow the employee to a new employer, based on the totality of factors relevant to the relationship between the employee and customers. *See* 561 N.E.4th at 816. In that case, the employee was the primary contact between the business and his customers, he met with them regularly and frequently, at least one day a month, and the duration of time when he did so was over several years. *See id.* Therefore, the court found that the employer had a legitimate interest in the employee's relationship with its customers. *See id.*

In contrast, an employer will not have a legitimate interest in restricting the employee if, based on the totality of the relationship, the employee does not have a personal hold on the employer's customers so

that they would likely follow the employee to a new employer. *See Wilson*, 561 N.E.4th at 816; *Billings*, 316 N.E.4th at 101. In this situation, the employee would not be a threat to the employer's customers. *See id.* 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 regularly and frequently since he met with them 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.*; *see also Billings*, 316 N.E.4th 100-01 (reasoning that employee did not have regular and exclusive contact with the same customers because all customers were walk-in and any salesperson could assist them).

In our client's case, the court will probably find that Midwestern does have a legitimate interest in restricting Andy Jones from working with our client, ATI. *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 has been the exclusive contact between Midwestern and its customers, meeting regularly and frequently with each customer about once a month for the long duration of time of six years. Thus, Andy Jones's relationship with Midwestern's customers is similar to the relationship the employees had with customers in *Daniels*, where the employee was the exclusive contact with his customers a few times a month for several years. 515 N.E.4th at 311. It is also like the relationship the employees had with their customers in *Wilson*, where the employee was the primary contact with his customers, meeting them monthly for five years. *See* 561 N.E.4th at 816.

As Andy Jones had contact with the customers over a period of six years, his relationship with his employer's customers is different from that of the bank vice president in *Klinger*, who had contact with customers of the bank for only four months. *See* 545 N.E.4th at 620. Moreover, Andy's relationship with his customers is stronger than the customer relationships 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.* Unlike *Billings*, Andy Jones is responsible for meeting with the same customers regularly. *See id.* He meets with his customers about once a month and is the only contact the customers have with his employer. *See id.* Therefore, his customers are likely to follow him to a competitor. *See Klinger*, 545 N.E.4th at 619; *Billings*, 316 N.E.4th at 100.

> [Omitted from Discussion: analysis of whether the covenant reasonably protects the legitimate interest of Midwestern.]

CONCLUSION

Midwestern will be able to enforce the covenant not to compete against its employee Andy Jones since the court would reason that Midwestern does have a legitimate interest in restricting Andy Jones and would further reason that the clause itself reasonably protects that interest.

Midwestern does have a legitimate interest in restricting Andy Jones because he has a personal hold on his customers so that they would follow him to his new employer, our client ATI. Courts in Hamilton determine personal hold by evaluating a totality of the factors, including whether the employee is the primary or exclusive contact with the customers; the duration of the relationship of the employee with the customers; and the regularity with which the employee meets with the customers. Applying these factors to Andy Jones' relationship with Midwestern's clients, the court would find that overall he did have a personal hold. Andy is the exclusive contact with his Midwestern customers and the duration and regularity of his relationship with these customers are equivalent to relationships the courts have already found sufficient.

> [Omitted from Conclusion: summary of analysis as to whether the covenant reasonably protects Midwestern's legitimate interest.]

B. Feedback: General Summary and Revision Strategy

I found your overall organization in the Discussion section very helpful. You began with an introductory paragraph that identified the structure of the analysis and therefore prepared me for the rest of the section. When explaining each issue, you first discussed the law for the

issue, both the general legal principles and case illustrations, and only then did you go on to apply the law to the facts of your client's case. You organized your explanation of the law around ideas stated in general principles and not around descriptions of cases. You used strong topic sentences at the beginning of paragraphs. When you applied the law to our client's situation, you began with a strong statement that clearly set out your predicted result. All these features contributed to my ability to understand your ideas easily and quickly.

In addition, you made clear that this legal issue is not governed by a statute but by case law. You cited to what appeared to be the relevant cases consistently, using the same group of cases in your introductory paragraph and throughout the rest of the Discussion section.

The main problem with your draft, however, is that you struggled throughout the Discussion section to explain clearly how the court determines if an employer has a legitimate interest. This problem then required me to spend a lot of time myself trying to figure out exactly what you meant. To help you revise, I've included some questions below to demonstrate the areas where I had serious questions as your reader.

Note that it appears as if your Conclusion section might set out the best analysis in the memo as to the issue of legitimate interest (see below). You should consider beginning your revision by reviewing the cases in conjunction with your summary of analysis in this section. If your review of these cases corroborates your analysis there, then use that section to help you revise the Discussion section. You might begin with the introductory paragraph (see below) and then move on to the general principles that set out your developed analysis of legitimate interest (see below), your case descriptions as illustrations of those general principles (see below), and finally the application of that "law" to our client's case (see below).

Once you've figured out the analysis and communicated it fully, you should do some editing. I've included several basic writing reminders at the end of these comments.

C. Feedback: Specific Comments on Analysis[192]

1. Discussion section—introductory paragraph

I was able to follow the analysis in your introductory paragraph fairly well overall. But I want to double-check that you have explained the precise relationship between the courts' concern about balancing the different interests of the parties and the courts' two-step analysis that the employer must have a legitimate interest and that the covenant reasonably protects that interest. You explain that the court balances the interests of the parties "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, which is what "in addition" indicates? 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?

2. Discussion section—whether legitimate interest is a requirement

From reading your introduction, I understood clearly that you thought the courts require the employer to have a legitimate interest and the covenant to reasonably protect that interest because you used the words "require" and "must." But, in your first sentence of paragraph 2 where you began to analyze legitimate interest in more depth, you raised a question for me concerning whether you do actually see legitimate interest as a requirement because you used the verb "consider." Do the courts "require" that the employer have a legitimate interest? Or, do the courts just "consider" (generally evaluate without requiring) this issue?

3. Discussion section—overall comment on analysis of legitimate interest analysis—paragraphs 2-4

I found your organization in this part of the memo very helpful. You began with a strong first sentence that identified the first topic you are addressing: legitimate interest. You went on to explain how the court decides whether the employer has a legitimate interest in general

192. The mentor could number the comments and insert the corresponding number into the text of the author's document to help the author relate each comment to the specific part of the text to which it applies.

principles and then you illustrated those principles with descriptions of representative cases—good.

From what you've written, however, I was left with some serious questions about your analysis of legitimate interest—see below comment 4 (addressing your general principles of analysis) and 5 (addressing your case descriptions).

4. Discussion section—general principles developing legitimate interest analysis

From what I read in paragraphs 2-4, I did understand that the courts evaluate whether there is a legitimate interest, but right at the beginning of the second paragraph I needed you to explain *how* the courts make this determination. I really wasn't sure from reading this second paragraph and had to look to the case illustrations to answer my questions. These case descriptions, then, simply raised more questions for me. Therefore, I've identified these questions—see below—to help you develop a more complete and accurate explanation of the legitimate interest analysis.

4a. Describing the same ideas consistently

The inconsistent language that you used here was what initially made me think that I wasn't getting a complete and accurate analysis of legitimate interest. You say at the beginning of paragraph 2, and later on in your description of the *Daniels* case in paragraph 3, that the court considers a "series of factors." In contrast, you say that the court considers a "totality of factors" when you describe the *Wilson* case in paragraph 2 and as you transition into discussing the *Klinger* case in paragraph 4. Which is it? Right at the beginning of paragraph 2, where you set out your analysis of legitimate interest in general principles, I needed to know which kind of test the courts are using and then to encounter this idea described in a consistent fashion throughout the rest of your analysis.

4b. Describing ideas precisely

Regardless of whether this is a "series of factors" or a "totality of factors" test, I needed you to identify in the second paragraph the specific factors the courts use. Because this idea was missing in your initial analysis, I had to search for the answer to this question in the case

descriptions and where you apply the legitimate interest analysis to our client's case. I did find references to the "factors" in these later sections, but I wasted valuable time. See your description of the *Wilson* case and your use of "exclusive, regular and frequent contact over a long duration of time" when you applied the legitimate interest analysis to our client's case.

4c. Describing precise relationships among ideas

I also ended up with some questions about the obviously central idea concerning the "employee's personal hold on the employer's customers" because you didn't consistently describe where this idea fit into the overall legitimate interest analysis and didn't consistently describe the concept itself.

4c1. First, is this an overarching idea that explains "legitimate interest" (see paragraph 2 and your description of the *Wilson* case)? Or, is it one of the "factors" in the test (whether a "series of factors" or a "totality of factors") that the courts use for legitimate interest (see your description of the *Daniels* case)? You don't seem to be using this idea consistently, so I didn't come away with a clear understanding of just how the courts use all these ideas to figure out whether the employer has a legitimate interest.

4c2. Second, what is the relationship between the idea of "personal hold on the employer's customers" and the idea that "customers would likely follow the employee to the new employer"? At the beginning of paragraphs 2 and 4, you use "so that" to connect these ideas. In contrast, in your case description of the *Daniels* case in paragraph 3, you use "and." Which formulation accurately reflects how these ideas relate?

5. Discussion section—case descriptions in legitimate interest analysis

5a. Making general principles of analysis and case descriptions consistent

After you rework your explanation in general principles of "legitimate interest" (see 4 above), you need to revise the case illustrations so they are consistent in content and phrasing with your explanation. The illustrations should show how the analysis you have

identified in paragraph 2 in general principles explains the results on the specific facts before the court in each case you describe.

5b. Making case descriptions consistent among themselves

As should be evident now from these comments, I was confused by the case descriptions because they did not use a consistent analysis of legitimate interest. Once you finalize your analysis, however, you should have no problem making all of these descriptions consistent not only with your general principles of analysis but also consistent with each other.

6. Discussion section—application of the legitimate interest analysis to our client's situation

You began this section well by stating clearly your prediction that Midwestern would have a legitimate interest in restricting Andy Jones with the non-competition clause.

You had trouble in this section, however, because of the issues noted above (see comment 4) in your analysis of legitimate interest. You set out clearly the overall result for the client, but you were not able to develop in sufficient depth why that result would occur. Instead, you focused too much on comparing our client's case to similar and dissimilar precedent. I needed this step to be confident about your prediction, but I wasn't able to fully understand *why* a future court would see our client's case as similar or dissimilar to precedent because you weren't clear enough using the "personal hold" idea in relationship to the "factors test."

Note that you do seem to use specific factors here (see, for instance, your third sentence). If your discussion of these factors in this paragraph is complete and accurate, use these ideas to help develop your analysis in general principles and case descriptions in paragraphs 2-4 (see comment 4b above).

7. Conclusion section

Although I was quite confused by some analytical issues in the Discussion section, I felt as if you may have articulated here in the Conclusion section a complete description of the overall analytical framework and why that supports the conclusion you come to for our client, ATI. Here, you discuss legitimate interest, personal hold, a

totality test, and the specific factors of that test—and you make clear precisely how they all fit together. See the general summary comment above about using your analysis in this section as the beginning point for your revision.

D. Basic Writing Reminders

[Here, the mentor might address a series of basic writing reminders, such as proper use of commas, apostrophes, active and passive verbs, and other similar issues.]