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The “Reasonable Zone of Right Answers”¹: Analytical Feedback on Student Writing

Jane Kent Gionfriddo*

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1. I am indebted to my colleague, Dan Barnett, for coining this phrase, one that I have found very useful in thinking about this issue and in teaching my students. I sometimes phrase it as the “reasonable zone of right *explanations*.”

*. I would like to thank everyone who supported me as I wrote this article. First and foremost, I am especially grateful, as always, to my colleagues in the Legal Reasoning, Research & Writing Program at Boston College Law School, all of whom gave me invaluable feedback on this article: Dan Barnett, Joan Blum, Mary Ann Chirba-Martin, Elisabeth Keller, and Judith Tracy. I also want to thank other faculty colleagues at Boston College Law School for their excellent suggestions and moral support, including Filippa Anzalone, Ingrid Hillinger, Sharon O’Connor, and Deborah Peckham. Thanks also to my research assistants, Eric Belsley, Bernard Posner, and Heather Sobel, for their suggestions and research assistance, as well as to Boston College Law School for providing financial support.

I. INTRODUCTION

Let's imagine a legal writing teacher² giving written comments on first-year law students' drafts of a memorandum written to a work supervisor in law practice. Reading through one student's memo, the teacher encounters the following sentence: "To decide if a plaintiff satisfies this requirement, the courts in this jurisdiction use a totality test where they assess the overall weight of the following four factors." Someone with no knowledge of the relevant legal authority would read this sentence and have every reason to believe that it expresses a precise, accurate thought. But the legal writing teacher is intimately familiar with the legal problem the student is working on and immediately recognizes that the student has not adequately described the test used by the courts in this jurisdiction. Thus, the student has expressed incorrect legal analysis that is not supported by relevant authority. As the teacher knows, in this jurisdiction, the courts do consistently state that they look at the "overall weight of the following four factors," but, in reality, the courts always require that one factor be satisfied before they move on to examine the overall weight of the other three. At this point, the teacher must decide how to provide the kind of written feedback that will help the student revise her written expression.

So how do teachers respond with meaningful written comments that give students sufficient support to revise their writing? Teachers are responsible for contributing to the overall goal of first-year curriculum—to teach students how "to think like lawyers." In that role, the legal writing teachers should respond as those who educate students in the skills of legal analysis³ while alerting the students that the

2. Of course, teachers of non-legal writing classes in the first or upper year curriculum could assign students to write documents used in the practice of law. In this situation, as in a legal writing class, the teacher should consider providing students with the same kind of analytical feedback discussed in this article.

3. By teaching students analytical skills, a legal writing course complements the rest of the conventional first-year curriculum that consists of doctrinal courses teaching analytical skills in the context of a particular legal subject (e.g., like Civil Procedure, Constitutional Law, Contracts, Criminal Law, Property, or Torts). See the following articles that compare the traditional doctrinal course approach to teaching students analytical skills with the approach in legal writing courses: Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 311-17 (1980); Richard K. Greenstein, *Teaching Case Synthesis*, 2 GA. ST. U. L. REV. 1, 7-17 (1985-86); Carol M. Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 568 (1997); David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 136-45 (2003); Marjorie Dick Rombauer, *Regular Faculty Staffing for an Expanded First-Year Research and Writing Course: A Post Mortem*, 44 ALB. L. REV. 392, 393-94 (1980); see also *infra* note 15. Legal writing courses also teach students skills that other first-year classes in general do not teach at all, like legal research and communication of legal analysis in basic law practice documents. See 2004 ASSOCIATION OF LEGAL WRITING DIRECTORS/LEGAL WRITING INSTITUTE SURVEY [hereinafter ALWD/LWI SURVEY], Questions 18-19 (research instruction) and Question 20 (writing instruction), available at <http://www.alwd.org/alwdResources/surveys/2004surveyresults.pdf>.

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analysis is incorrect because when it fails to adequately describe the actual test reflected in the mandatory authority. Teachers must then go on to assist the students in figuring out how to reanalyze the cases, using a methodology that will result in an appropriate analysis.

In this role of educator, the teacher responds to the student with a comment like this:

You're on the right track here because the courts do use a totality test—you clearly recognize that the five relevant cases each state this explicitly. But, do these courts actually *do* exactly what they *say* they are doing and give equal weight to the four factors you set out? Think about the fact that the courts in both 'Case X' and 'Case Y' decide that the plaintiff did not satisfy the overall requirement because factor 'z' was insufficient, and in both of these cases, then, the courts never reached any analysis of the other three factors.

This type of comment serves as a powerful tool to help students learn how to “think like lawyers,” because it does not give the students the answer, but instead reminds them of the appropriate analytical process for arriving at the correct analysis.

The teacher makes this process less abstract and more meaningful to the student if the teacher responds by painting a vivid picture of why the correct analysis is so important to the ultimate reader in law practice. Legal writing classes are taught within the academic setting of law school, which prepares students to enter the legal profession and practice law successfully. Thus, the teachers also need to respond to the students from the point of view of those reading the document in that particular context. In this role, the teachers need to communicate *why* accuracy and precision of analysis are so critical to the *readers*, and, specifically, why analytical errors or imprecision can lead to serious problems when readers rely on inaccurate analysis to take action on behalf of their clients.

Thus, the legal writing teacher's comment should also help the student internalize the context of law practice:

Think about your reader, your work supervisor. She is reading this document for a specific purpose—to understand your analysis and what it indicates for the client. Once she has gained this information, she may proceed quickly to the next step. For instance, she may call or write the client; she may send a letter to the opposing attorney; or she may compose a memorandum advocating to a court. These next steps will all be based on the analysis you have expressed in your memorandum. If that analysis is not accurate, or if it is so imprecise that your supervisor draws the wrong conclusion, you have placed your supervisor, and your client, in potential jeopardy.

This comment explains to the student the reason why accurate and precise legal

analysis is so important in a law practice setting.

The vignette above illustrates how legal writing teachers⁴ can give meaningful written feedback on student draft documents.⁵ In the sections below, this article develops the theory behind and practice of this analytical feedback. Section II discusses the theory. It begins by addressing the function of legal writing classes to teach students how to produce the kind of accurate and precise analysis that is the necessary foundation for useful documents crafted in law practice. The section then goes on to discuss how this focus on analysis affects the roles legal writing teachers must play in providing written feedback on their students' draft documents. Section III concludes by providing examples of how this theory should play when giving feedback. This section describes a specific legal problem that is the basis for the examples that follow, including student attempts to communicate analysis, teacher feedback on those attempts, and commentary on why that feedback is pedagogically successful.

II. THE THEORY BEHIND LEGAL WRITING TEACHERS' ANALYTICAL FEEDBACK ON STUDENT DRAFT DOCUMENTS FOR LAW PRACTICE

A. *Legal Writing Classes Train Students in Legal Analysis Because Accurate and Precise Analysis is the Foundation for Good Writing in Law Practice*

Legal writing classes do not teach students to write to a general audience; they teach students to write to an audience of practitioners.⁶ To provide students with an

4. See *supra* note 2.

5. In this article, I use the term "draft document" to mean a piece of writing that is not the student's "final product," but is the best work that a first-year student can achieve at a particular point in the curriculum, given the student's skill level. See, e.g., Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 57, 91 (2000) (discussing the "nearly final draft"). I do not focus in-depth here on drafts that occur before this time when the student explores ideas more freely, since many legal writing courses do not have the resources to allow in-depth teacher feedback on a series of drafts for all major assignments. See *infra* notes 50-54 and accompanying text. I also do not address teacher feedback on a memorandum that is a final product when the student has no opportunity to revise, for two reasons. First, in this situation, the teacher's comments should be much less directed to the student's analysis since the student has no further chance to revise the underlying ideas. In-depth comments on the student's analytical process and its results are very frustrating at this stage, unless they are specifically directed to focusing the student on the analytical skills that are necessary for the next segment of the course. And second, as a corollary, because the student has no further chance to revise, the teacher will tend to provide comments that merely label the success or mistake, just to give the student a sense of the teacher's overall evaluation of the memo's quality.

6. See Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 181-83 (1999); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 S.L.J. 1089, 1092 (1986); Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, 1203-04 (2000);

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intimate sense of this audience's needs, legal writing classes require students to work on simulated problems as if they are practicing attorneys.⁷ Placed in this situation, students internalize the reasons why providing precise analysis is so critical to the success of their writing.⁸

To begin with, students placed in this "real life" environment are forced to confront and explore the critical premise that lawyers solve problems within the specific analytical constraints of our legal system.⁹ These constraints do not allow students to work with ideas in any way that they choose.¹⁰ Specifically, lawyers' ideas, in large part, come from analyzing legal authority.¹¹ It is this authority that dictates the outcome for the client.¹² Lawyers are not free to pick and choose which pieces of this authority form the basis of their analysis. Instead, the pieces which are controlling, or even relevant, depend on the operative jurisdiction and our legal

cf. Debra R. Cohen, *Competent Legal Writing—A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 497-98 (1999) (discussing that lawyers do not always write effectively for their intended audience or audiences).

7. In a simulated legal problem in a legal writing class, students "represent" a client with a specific problem based on specific facts and set in a particular jurisdiction. They must find and analyze the relevant law to help solve the client's problem, and then compose a legal document that expresses that analysis for a specific purpose—predicting an outcome on a set of facts for a supervisor by analyzing the relevant law and applying it to the client's case, explaining aspects of a case to a client, or arguing on a client's behalf to a court. *See* Romantz, *supra* note 3, at 138; Rombauer, *supra* note 3, at 394; Rowe, *supra* note 6, at 1194.

8. A legal writing course must teach first-year law students that they are joining a particular social community of legal thinkers and writers. Only in this way will they be able to produce documents that convey the necessary legal analysis effectively to their audience in law practice. *See generally* Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEGAL WRITING: J. LEGAL WRITING INST. 1 (1991). Many students in the beginning of the first-year of law school find, to their dismay, that the expertise they developed in prior, non-law-related academic and work experiences does not easily translate into expertise in the new, different requirements of *legal* thought and the written expression of that *legal* thought. *See* Parker, *supra* note 3, at 568-72; Williams, *supra*, at 20-22. In legal writing classes, students express this dismay as frustration that they are not the same "good writer" they were before law school. Williams, *supra*, at 20-22. Students do not realize that they will only become "good writers," again, when they have begun to master the new discourse community of law and its requirements for thinking about and expressing ideas. *See* Parker, *supra* note 3, at 568-72; Williams, *supra*, at 9. *But see* Jessie C. Grearson, *Teaching the Transitions*, 4 LEGAL WRITING: J. LEGAL WRITING INST. 57 (1998) (discussing why legal writing teachers should focus on helping first-year students, at the onset of the year, use their expertise from prior experiences to make the "transition into" legal writing).

9. *See* Parker, *supra* note 3, at 569-70.

10. *See* Gale, *supra* note 3, at 311; Romantz, *supra* note 3, at 137, 143; Rombauer, *supra* note 3, at 394; *see also* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 59-60 (1994) (noting that "law students are . . . learning to write within a highly conventionalized discourse, law, in which legal arguments are constructed according to certain unwritten discourse rules, or conventions").

11. *See* Gale, *supra* note 3, at 306.

12. *See* Rombauer, *supra* note 3, at 394.

system's rules on the hierarchy of authority.¹³ When lawyers interpret this authority, they must stay within reasonable limits, using standard methods of legal analysis,¹⁴ even as they make novel or creative arguments.¹⁵ Their analysis is further constrained by the specific facts of the client's case. Finally, the procedural aspects of a client's case may affect the appropriate range of analysis.

Working within these constraints as a "practicing attorney," students come to realize that their analysis must fall within a "reasonable zone of right answers"¹⁶ in order to be useful.¹⁷ The law practitioner depends on writing whose ideas are accurate because they fall within a range of analysis—even if creative or novel—that "reasonably" interprets relevant, controlling legal authority, and "reasonably" argues how that interpretation affects the client's problem.¹⁸ Ideas outside this "reasonable

13. See Gale, *supra* note 3, at 306; Romantz, *supra* note 3, at 143; Rombauer, *supra* note 3, at 394.

14. For instance, a lawyer can go beyond what the courts in a jurisdiction have stated on the pages of relevant decisions, as long as the implicit reasoning is supported by the explicit reasoning and the facts and results of all relevant cases in the jurisdiction. See, e.g., Greenstein, *supra* note 3, at 2-7; Judith B. Tracy, *Constructing an Analytical Framework that Captures and Verifies Implicit Reasoning*, 14 THE SECOND DRAFT: BULL. LEGAL WRITING INST. (Macon, GA), No.2, May 2000, at 6-7, available at <http://www.lwionline.org/publications/seconddraft/may00.pdf>; see also ROBIN S. WELLFORD, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT, 93-105 (2002).

15. See Gale, *supra* note 3, at 327 n.110.

16. See *supra* note 1.

17. In contrast to legal writing classes, most first-year doctrinal classes based on a particular subject (e.g., Civil Procedure) are not taught using simulated problems; instead, teachers of these classes tend to blend the goal of helping students learn legal analysis, "how to think like a lawyer," with the goal of helping students learn the doctrine of the particular subject under consideration. See Gale, *supra* note 3, at 311-17; Romantz, *supra* note 3, at 136-145; Rombauer *supra* note 3, at 392-94. To achieve these combined goals, the teacher holds class discussion, using the Socratic Method, aimed at helping students analyze individual cases and work through hypotheticals that provide factual variations on those cases. Because the cases in the casebook that are the basis for these class discussion are generally chosen for what they add to helping the teacher teach the doctrine of the particular subject, these cases may be from any state (or federal jurisdiction, if relevant). Moreover, class hypotheticals are not based in any particular jurisdiction. Thus, a doctrinal teacher would have a difficult time teaching students about many of the constraints that actual lawyers deal with in analyzing legal authority to solve a problem for a particular client, because the authority does not come from one jurisdiction and there are no client's facts or procedural context that cannot be changed. See Gale, *supra* note 3, at 311 (noting that "if students [in legal writing courses] deal with the law as it actually exists, paying attention to jurisdictional boundaries, legal writing and research courses can counteract 'the tendency of a national law school to underemphasize the degree to which the law of a particular jurisdiction limits and controls a given case'" (quoting Harry Kalven, Jr., *Law School Training in Research and Exposition: The University of Chicago Program*, 1 J. LEGAL EDUC. 107, 119 (1948))); Greenstein, *supra* note 3, at 10-11 (discussing why "substantive [doctrinal] courses" are not well-structured to teach students how to synthesize cases in the manner of an actual lawyer dealing with cases from a particular jurisdiction); see also *supra* note 3.

18. See Gale, *supra* note 3, at 325 (commenting that "[r]easoning unexpressed, or unclearly, imprecisely, or inaccurately expressed, is reasoning uncompleted"); Richard Hyland, *A Defense of*

zone” are incorrect,¹⁹ and the student will be forced to confront the stark reality that the consequences of such mistakes can be serious. In the fast-paced environment of law practice, for instance, a supervisor may quickly act on a document’s analytical errors, resulting in danger to the client and embarrassment for the supervisor.

Students learn that a technically “accurate” analysis, in the sense that it is within the “reasonable zone,” merely functions as the first step. They also discover that their analysis must be sufficiently precise to convey a correct impression to their intended readers.²⁰ Vague analysis may not be “wrong” per se, but will ultimately be incorrect if it fails to capture and communicate critical nuances. A supervisor who acts upon such a misunderstanding may end up in the same embarrassing or even dangerous situation as one who acts on analysis that is actually wrong. Likewise, a judge who misunderstands the underlying substance of a written argument may be less likely to come to the conclusion desired by the attorney who authored the document.²¹

In sum, students will create high quality legal documents only when they have learned how to produce an analysis that is accurate, precise and thereby useful to the legal community. This backdrop influences the theory behind legal writing teachers’ written feedback on their students’ draft documents, discussed in the section below.

*B. The Focus on Teaching Legal Analysis Within the
Constraints of Law Practice Affects the Theory Behind
Legal Writing Teachers’ Written Feedback on Student Draft Documents*

A legal writing teacher’s feedback on a draft document must assist students in two ways: (1) to learn the process of legal analysis—“thinking like lawyers”²²—and

Legal Writing, 134 U. PA. L. REV. 599, 621 (1986) (commenting that “[t]he problem is that lawyers cannot write clearly unless they can think clearly, unless they can recognize and construct a convincing legal argument—unless, in other words, they understand the structure of the law”); Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 138 (1987) (“[M]any legal transactions should be stated as *accurately and precisely* as possible in some kind of relatively permanent form.” (emphasis added)).

19. See Greenstein, *supra* note 3, at 5 (observing, within a discussion of the process of synthesizing a group of cases in a particular jurisdiction, that “it can be said that while there may be no single synthesis that all lawyers would agree is correct, there will be many syntheses that are clearly wrong”).

20. See sources cited *supra* note 16.

21. Ollivette E. Mencer, *Unclear Consequences: The Ambient Ambiguity*, 22 S.U. L. REV. 217, 223-26 (1995) (discussing, under Louisiana law, the legal consequences of ambiguously drafted contract provisions); cf. Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 257, 264-72 (2002) (discussing the results of a survey where federal judges ranked the analytical foundation of a brief as most important).

22. 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, 898 (1991); Parker, *supra* note 3, at 573; see also Norman Brand, *Legal Writing, Reasoning & Research: An*

(2) to acclimate students into the new community of law practice where written analysis has a profound effect, either positive or negative, on the reader.²³ The legal writing teacher, therefore, encounters challenges that are somewhat different from those of a teacher giving commentary on written ideas in other rhetorical contexts.²⁴ To illustrate these challenges, and their effect on the teacher's feedback, let's begin by comparing two teachers. First, imagine a first-year legal writing teacher making written comments on a draft of an objective memorandum written to a hypothetical work supervisor.²⁵ Second, imagine a freshman English teacher writing a critique of a draft essay entitled "Telling the Truth Versus Lying."

It is true that teachers in both situations must recognize the intimate connection between thinking about ideas and expressing them.²⁶ Obviously, without ideas there

Introduction, 44 ALB. L. REV. 292, 295 (1980) (observing that "the aim of legal writing courses, properly understood, is to integrate knowledge, clarify analysis and crystallize abstract thinking into concrete documents").

23. See Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 726-27 (1989); Parker, *supra* note 3, at 582-83; Williams, *supra* note 8, at 13; cf. Rideout & Ramsfield, *supra* note 9, at 42-43 (noting that "[l]egal writing is the reflection of a complex series of problem-solving decisions; it is the battle among disparate ideas; it is the effort of a creative mind trying to work within the rhetorical confines of the discourse").

24. The excellent social science paper, or English composition or journalistic report, does not eschew the techniques of reason. But it does not require their use, their expression, or their ordering in the same sense. Most of all, it does not require that the reasoning advance by frequent appeals to the doctrine of stare decisis.

Gale, *supra* note 3, at 307;

Because of the ways that text, contexts, and intertextual relations are so inextricably tied up with one another, the ability to compose an exceptionally powerful historical analysis of the dismantling of the Berlin Wall, for example, in no way guarantees that the same person could compose even an adequate closing statement for use in a court of law.

Parker, *supra* note 3, at 569 n.29;

The real problem with the tips for effective legal writing, and especially with the implication that lawyers should write like novelists, 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 16, at 621; see also Williams, *supra* note 8, at 10 ("What counts as good thinking in a literary analysis of Iago's criminal behavior in *Othello* would not count as good thinking in the analysis of alleged criminal behavior in a court room, and vice versa.").

25. In this article, I use the term, "objective memorandum to a supervisor", to describe the type of memorandum in law practice that presents an objective analysis of the relevant legal authority and then applies that analysis to the client's situation in order to predict what the future court would find, or arguably find, on the client's facts.

26. See Kissam, *supra* note 16, at 140 (noting that "the actual writing of the analysis, be it an appellate brief, law review article, memorandum, or estate 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));

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is no writing. In both situations, sophisticated teachers recognize that they need to focus their feedback on the ideas themselves—at least until their students have sufficiently generated and developed thoughts on the subject at hand.²⁷ Beyond this similarity, however, there are significant differences in the two settings as to the relative freedom student-authors enjoy to generate and develop those ideas,²⁸ and these differences affect teacher feedback on student written work in some critical ways.

In the freshman English assignment, an essay entitled “Telling the Truth Versus Lying,” the student-author must think through her feelings about the subject of “lying,” including what her opinions are on what “telling the truth” and “lying” mean. She must then develop a thesis and provide support for those ideas, including counterarguments. The teacher can support the student throughout this process by using written feedback. This feedback can help the student focus and expand thoughts, develop a sharper thesis, elaborate on supporting points, clarify points that are not clear enough to an unknowledgeable reader (or perhaps even to the student-author), rethink aspects of the argument not logically thought out or presented, organize ideas logically, and ultimately express ideas grammatically and eloquently.

But in this circumstance, there is no absolute range of “right and wrong” answers, notwithstanding the teacher’s own moral beliefs about “telling the truth versus lying.” Therefore, there is little risk that the reader will act in a harmful way to others as a result of what the student has written. This gives the teacher greater freedom in choosing the roles that she assumes as the person giving feedback to the student-author. It allows the teacher to focus more on the student’s own process in coming up with original ideas, ideas constrained only in the sense of logic and development.

In contrast, the legal writing teacher and the law student function within a set of more severe constraints imposed by the nature of legal analysis and its use in law practice.²⁹ The teacher’s concern is to respond to the student’s legal analysis.³⁰

Thinking is not merely inseparable from writing: writing enlarges and fills out the thinking it expresses, and it exposes analytical problems and demands that they be solved. Because the written product is static and lacks drama [as opposed to an oral performance], it lends itself better to discussion of the analytical *process* through which it was created.

Neumann, *supra* note 21, at 763-64 n.114; *cf.* Parker, *supra* note 3, at 573 (noting that “[w]orking through the process of revising the organization of a legal discussion demonstrates to students not only that clear thinking promotes clear writing, but also that clear writing promotes clear thinking”).

27. For instance, first-year law students must learn a new way of working with ideas—that of “thinking like a lawyer.” During this process, students’ problematic writing in draft documents tends to come from their problematic thinking. *See* Rombauer, *supra* note 3, at 393; Commenting on draft documents, therefore, a legal writing teacher must address the student’s thinking; to address only the writing issues would just overwhelm the student and undermine her ability to make the draft better. Berger, *supra* note 5, at 62-63; Kearney & Beazley, *supra* note 20, at 893.

28. *See supra* note 22.

29. Thus, given the significant differences between much of the writing in English

Although each student has a unique method of thinking and composing, certain prescribed methodologies must be followed when working with legal analysis. This process must yield a precise written analysis in order to be useful.³¹

When commenting on students' work, teachers need to provide feedback as expert legal thinkers and writers.³² They must assist the student to understand the process of crafting legal analysis and using it to solve problems.³³ At the same time, teachers must be experts, just as supervising attorneys who are interested in the results of that process as they appear "within the four corners" of the document.³⁴ Given the complexities of this dual role, it is the teacher, and not other students, who has the expertise³⁵ to provide students with useful feedback on their written work.³⁶

composition classes and legal writing classes, legal writing teachers should tailor ideas adopted from English composition theory extremely carefully to take into account the nature of legal analysis and communication of that legal analysis in the law practice context.

30. Kearney & Beazley, *supra* note 22, at 893; *see* sources cited *supra* note 24.

31. *See supra* notes 9-19 and accompanying text.

32. Berger, *supra* note 5, at 91-92 (discussing, with examples, how a legal writing teacher providing comments on a "nearly final draft" should consider doing so from the point of view of a "critical expert . . . [giving] feedback based on expert criteria for analyzing content" and the point of view of an "average legal reader . . . [giving] feedback . . . based on reader response"); Parker, *supra* note 3, at 582-83.

When commenting on papers, teachers can draw upon their own professional understanding, attitudes, and instincts to inform students about the audiences for the document. Margin-comments that express reactions that the document likely would elicit from its intended readers can help students keep the focus on the goals for that document.

Williams, *supra* note 8, at 9 (observing that "[g]ood critical thinking/writing in general or good thinking/writing in a particular field does not simply happen as a result of a person's mind maturing, but is a consequence of experience gathered by working with others more experienced in some particular discourse community").

33. *See* Kearney & Beazley, *supra* note 22, at 890.

[T]he teacher should use Socratic questions and critique to enable the student to rethink the analysis, realize any errors, and revise the writing. This individualized, interventive approach to teaching legal writing is one of the best ways to teach students not only how to communicate legal analysis, but also *how to conduct that analysis*.

Id. (emphasis added).

34. Berger, *supra* note 5, at 90-92; *see* sources cited *supra* note 21. *See generally* discussion *supra* Section II, pp. 5-7, and accompanying notes 9-19.

35. This need for teacher expertise is precisely why most law schools hire legal writing faculty who hold a law degree, and, in many cases, have significant experience practicing law. *See* American Bar Association, SOURCEBOOK ON LEGAL WRITING PROGRAMS 57 (1999) ("In a first-year legal writing curriculum, each teacher optimally should have . . . experience as a practicing attorney, sufficient to develop a well-rounded view of the legal profession and the settings in which legal writing occur . . .").

36. In a first-year legal writing course with high analytical content, students will need a great deal of contact with their teachers, the experts—through classes, individual and group meetings, and individual written comments on their written work—before they will develop sufficient

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As legal educators, legal writing teachers must make comments specifically designed to help students identify the analytical skills they understand, as well as the skills with which they struggle.³⁷ In order for these comments to be helpful, teachers must read draft documents from the point of view of someone who has a complete knowledge and understanding of what the legal authority says, the range of

sophistication with legal analysis to be able to give effective and accurate feedback on their own or other students' written work. Used without sufficient checks and balances, therefore, especially during the early months of law school, self-editing and peer critique assignments may result in student-authors who end up with an erroneous view of the process of legal analysis or an erroneous view of the actual analysis that is the source of their own written draft. As students become more sophisticated over time, however, legal writing teachers should then begin to require students to self-edit their own work. Such assignments help students internalize important concepts and use them independently; obviously an important goal since teachers do not travel with their students in person throughout their careers. Teachers should also consider using peer critique assignments at this point since they require team work and, as such, mirror what goes on in law practice. See, e.g., Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 175 (1997) (discussing student self-critique of their own written work); Berger, *supra* note 5 (discussing various methods to help students reflect on their own work and to provide critique on peer written work at different stages of the drafting process); Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 1 (2003) (discussing an in-class peer review editing exercise); Jo Anne Durako, *Peer Editing: It's Worth the Effort*, 7 PERSP.: TEACHING LEGAL RES. & WRITING 73 (1999), reprinted in BEST OF PERSPECTIVES: TEACHING LEGAL RESEARCH & WRITING 51 (2001) (discussing peer editing assignments); Elizabeth L. Inglehart et al., *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 185 (2003) (discussing the theory and practice of collaborative group exercises); Steven J. Johansen, "What Were You Thinking?": *Using Annotated Portfolios to Improve Student Assessment*, 4 LEGAL WRITING: J. LEGAL WRITING INST. 123 (1998) (discussing annotated portfolios where students, using teacher-generated objectives, reflect in writing on the choices made in drafting a piece of writing); Kearney & Beazley, *supra* note 22, at 894-97 (discussing private memos where students write about their thinking and writing process); Parker, *supra* note 3, at 572-80 (discussing a range of writing assignments to help students learn, including ones that involve self-reflection, collaboration with peers, and peer critique).

37. Giving comments on a student's draft law practice document is somewhat different than giving comments on a student's scholarly paper, prepared for a research seminar, and it is this difference that explains Professor Kissam's concern that a focus on the "ideal of legal expertise," by both teacher and student, tends to undermine the quality of the student-author's ideas expressed in writing. See Kissam, *supra* note 18, at 147-48. Obviously, both law practice writing and scholarly writing depend upon accurate and precise analysis based on legal authority; thus, in giving comments in either context, a teacher does the student, and ultimately the legal profession, a serious disservice if he does not correct fundamental errors in the student's legal analysis. In this sense, the teacher must hold the student to an "ideal of expertise," including being sure that the student has analyzed the relevant legal authority and understands what is within the "reasonable zone of right answers." Scholarly writing (and law practice writing that pushes the limits of the "reasonable zone of right answers"), however, includes the next step of commentary on or criticism of that "reasonable zone of right answers." Thus, a teacher who does not use the "ideal of expertise" carefully as he comments on a student's attempt at this kind of writing may undermine the student's ability to take the next step in generating and developing a creative view or critique of the law. See *id.*

reasonable analysis the authority supports, and the impact that analysis might have on the client's problem.³⁸ Teachers must then decide whether the students' analysis falls within the "reasonable zone of right answers" (even if it creatively pushes the limits of legal authority) and whether the reader will be able to grasp it easily and accurately.

Such comments, therefore, initially help students learn the fundamental skills of legal analysis, both in the sense of a theoretical understanding and in the practical sense of being able to use these skills to reach positive results.³⁹ They also help students confront the fact that murkiness "on the page" usually reflects murkiness in thinking. As the course progresses, these comments assist students to begin to self-identify analytical successes and problems in their own work and then attempt to fix problems with increasing independence.⁴⁰

In deciding how to comment from the point of view of educator, teachers must first gauge how much direction students need. To make this assessment, teachers should consider the following: the students' analytical successes and problems throughout their drafts; any knowledge that they have about any particular student's process or resulting analysis; where the drafts fall within the course's whole curricular sequence; the analytical requirements of the legal problem being worked on; and the kinds of problems students at varying stages of law school have with certain analytical skills.⁴¹

38. Kearney & Beazley, *supra* note 22, at 900.

39. See Parker, *supra* note 3, at 573 (noting that "[w]hen commenting on papers, a teacher can show students precisely where their writing is unclear, pose questions designed to illuminate thinking problems underlying the unclear communication, and provide models for expressing analysis more clearly"); Romantz, *supra* note 3, at 144 (noting that "[t]he ability of legal writing courses to offer detailed and repeated critique of student performance helps students learn the mechanics of legal thinking").

40. Kearney & Beazley, *supra* note 22, at 902-03.

41. In this role as educator where the teacher is focusing on the analysis, he will either be in the position of knowing who the particular student-author is or in the position of not knowing because the assignment is graded anonymously. If the teacher has knowledge of the individual student-author, the teacher may be able to tailor comments to what was "in the student's head" but which did not end up "on the page" or may be able to refer to specific skills that the student has been struggling with and has successfully or not so successfully used to produce the draft document. The teacher may have this knowledge about the individual student-author because the course is not graded anonymously; or it may arise from the fact that the teacher uses devices like a "private memo" that is a separate writing addressing the student-author's thought process behind the analysis as expressed on the page of the document that "opens a window for the teacher into the student's thinking process." Kearney & Beazley, *supra* note 22, at 894-95. In the case when legal writing teachers do not know the identity of the student-author or do not use devices such as a "private memo," they will need to figure out the student's actual problem from the words on the page. Since the teacher in this situation does not have the specific knowledge of what the student was thinking as she wrote the words on the page, the teacher must use a range of "clues" from the writing itself or from the curricular sequence to decide on the most appropriate response. *Id.*

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Teachers should not just “give” students analysis. This will lead students to just “fill in the blanks” as they revise without ever confronting their initial mistakes and how to correct them.⁴² Students who revise in this manner tend not to raise their level of analysis.⁴³ Moreover, they may lose a sense of control over their own writing because they end up feeling that they are just regurgitating the teacher’s thoughts.⁴⁴ On the other hand, if teachers simply provide general comments or ask general questions that fail to provide sufficient guidance as to how students can identify and fix problems,⁴⁵ students may end up feeling frustrated and defeated. This in turn significantly undermines the students’ ability to successfully revise their documents.⁴⁶

In addition to providing comments as educators, legal writing teachers should provide comments from the points of view of lawyers and judges⁴⁷—readers who lack the same familiarity with the analysis as the author.⁴⁸ In this role, teachers should read and respond as if they will be taking action based exclusively on the analysis. Sometimes this kind of feedback will simply describe problems that the law practitioner would encounter as she reads the document. Sometimes this kind of

42. See Kearney & Beazley, *supra* note 22, at 890, 901; Neumann, *supra* note 23, at 727, 757. One way to avoid providing the student with a set “answer” is for the teacher to ask questions. Kearney & Beazley, *supra* note 22, at 887. Another way is to combine questions with explanation to sufficiently support the student in rethinking the analysis. See the three examples of teacher feedback *infra* Section III.

43. See Kearney & Beazley, *supra* at note 22, at 901.

44. *Id.*; Neumann, *supra* note 23, at 727.

45. The time when students consistently must learn a series of difficult analytical skills is during the first year of law school; however, students will also encounter new complex analytical skills throughout their second and third years. See *supra* note 42.

46. Anne Enquist, *Critiquing Law Students’ Writing: What the Students Say Is Effective*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 145 (1996). Professor Enquist conducted a survey to discover what written comments law students found effective and ineffective. She concluded that students do not find effective “short, cryptic, coded, or labeling comments.” *Id.* at 188; see also Anne Enquist, *Critiquing and Evaluating Law Students’ Writing: Advice from Thirty-Five Experts*, 22 SEATTLE U. L. REV. 1119, 1149-50 (1999) (discussing several legal writing teachers’ survey responses concerning “ambiguous comments”); Kearney & Beazley, *supra* note 22, at 901 (noting that vague comments do not provide sufficient guidance for students to revise their writing); Neumann, *supra* note 21, at 768 (noting that “vague and unspecific comments” do not help students understand the theoretical foundation and how it relates to their performance”); Parker, *supra* note 3, at 586 (noting that “descriptive comments, such as ‘poor organization,’ or general exhortations, such as ‘work on organization’” are insufficient); Professor Enquist also concluded from her student survey that “[s]ome students are more frustrated than challenged by comments framed as questions when students are unable to use the question to determine the problem the instructor is pointing out and what solution would be acceptable.” Enquist, *supra*, at 189.

47. In addition to writing to another lawyer or judge, a lawyer may write to a range of other audiences in law practice, including clients, legislators, and others. Obviously, each time the audience changes, the attorney-author (or the student “attorney-author”) must reassess the purpose of the document and how best to achieve that purpose. Parker, *supra* note 3, at 581-82.

48. Kearney & Beazley, *supra* note 22, at 900.

feedback will be written in the first person in order to convey more intimately and vividly the reader's personal reaction.⁴⁹ In either form, this type of comment compels the student to confront the impact of the ideas written, desirable or adverse, on the reader's ability to grasp the document's ideas and then to proceed to take future action. In this matter, the student comes to realize that thinking about and expressing ideas precisely in law practice makes a great difference.⁵⁰

The precise balance between these dual roles of educator and law practitioner depends on the number of drafts the student submits. A curriculum that calls for several drafts of an assignment will allow the teacher more freedom to give written comments.⁵¹ During very early drafts, for instance, the teacher will be able to focus more on the student's individual process of generating ideas and less on how those ideas might affect the ultimate audience.⁵² Knowing that she will have other chances to help the student on subsequent drafts, the teacher can comment in a fashion that focuses on the student's analysis in a more open-ended manner. This allows the student room to make some mistakes without risking that she will have no further chance to correct these misapprehensions. Even at this point, however, the teacher must alert the student to the kinds of analytical mistakes that might undermine the usefulness of the document, such as a serious misunderstanding of the analytical process or the adverse results of misapplying that process.⁵³ To help the student focus

49. See, for example, *infra*, Section III and the teacher feedback in the second example. In the third paragraph, the teacher describes the supervisor's reaction in a manner that vividly articulates why the supervisor would end up with an important analytical question that was not answered by the student's ideas as expressed on the page of the document.

50. James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols*, 1 LEGAL WRITING: J. LEGAL WRITING INST. 35 (1991). Professor Stratman observes that readers in the law practice environment "do not read-to-criticize, the way the writing teacher might; instead, they read to complete a task, to do what needs to be done." *Id.* at 40. To help students internalize why this kind of reader needs certain things from the author of a legal document, he suggests students should collect and analyze reader protocols, a process by which the reader responds orally as he proceeds through a piece of writing. While reader protocols are a detailed, in-depth form of reader-based comments, this type of comment can also be very effectively provided as part of a legal writing teacher's written feedback on student draft assignments. See the three examples of teacher feedback *infra* Section III.

51. For instance, Professor Berger writes about a curriculum where students proceed through a series of drafts, each with teacher feedback. "Thus, the writing teacher should read and write differently depending on whether the student is engaged in (1) generating thought . . . ; (2) having second thoughts . . . ; or (3) moving toward rhetorical effectiveness . . ." Berger, *supra* note 5, at 79; see also Kearney & Beazley, *supra* note 22, at 892-93 ("series of drafts").

52. See Berger, *supra* note 5, at 86-91 (discussing how the legal writing teacher should be 1) a "writing coach" in giving feedback on very early drafts where students are still generating initial ideas, and then 2) a "more experienced fellow writer" in giving feedback on "second thoughts" drafts).

53. The focus of this article, and therefore the three examples of student drafts in Section III, *infra*, are from a drafting stage later than the stage when the student is initially generating ideas. See *supra* note 5. However, even assuming these drafts were from this earliest stage, the teacher would

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on the analytical process that will generate an appropriate analysis, the teacher might choose to refrain from making comments from a law practitioner's point of view at this early stage, and leave that to a subsequent draft.⁵⁴

Much more common in first-year legal writing courses, however, are curricula that allow one rough draft and a final product for some or all major assignments.⁵⁵ In this situation the student submits a piece of writing that, even though not a "final" product, is the kind of draft document that represents the student's best work at that particular point in the curriculum, given the student's skill level. When giving feedback in this situation, legal writing teachers should assume the roles of educator and law practitioner. When teachers make comments from both of these perspectives, they ensure that students have sufficient support to see where they have successfully produced and communicated legal analysis to their audience.⁵⁶

still need to give the student sufficient feedback to identify the important analytical problems in the draft and remind the student of the correct process to come up with an analysis that was within the "reasonable zone of right answers." Teachers who fail to provide this kind of feedback do not prepare their students adequately for the practice of law.

54. See Berger, *supra* note 5, at 86-93 (discussing why a teacher should respond as a "writing coach" during the early stage "generating thought" draft and as an "average legal reader" during later stages, such as the "nearly final" draft").

55. A curricular sequence that requires, for all major assignments, a series of drafts with the teacher's analytical feedback on each would be extremely desirable. However, it is unlikely to become the norm soon, given the high student to faculty ratio in the majority of legal writing courses, and the resulting work load for legal writing teachers. For instance, the 2004 ALWD/LWI Survey Highlights describes the teaching load of a legal writing faculty member as follows: "In the 2003-04 academic year, the 'average' LRW faculty member taught 45 entry-level students . . . [and] . . . read 1,554 pages of student work . . . [per semester]." ALWD/LWI SURVEY, *supra* note 3, at v; see also Jo Anne Durako, *A Snapshot of Legal Writing Programs at the Millennium*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 95, 107-09 (2000) (discussing the results of the 1999 ALWD/LWI Survey as to the workload of legal writing teachers, and comparing this workload to that of doctrinal teachers). The word "average" in this quote from the 2004 ALWD/LWI Survey tells the story: the maximum student to faculty ratio counted in this "average" was 92 students to one faculty member for the fall semester and 90 students to one faculty member for the spring. ALWD/LWI SURVEY, *supra* note 3, Question 82a.

56. Of course, legal writing teachers have a range of other, potentially more economical teaching methodologies in and out of the classroom, both oral and written, to help students as a group and individually as they begin the process of generating appropriate ideas for their analysis of a legal problem. See, e.g., E. Joan Blum, *Writing Labs: Commenting on Student Work-In-Progress*, 14 THE SECOND DRAFT: BULL. LEGAL WRITING INST. (Macon, GA), No.1, Nov. 1999, at 11-12, available at <http://www.lwionline.org/publications/seconddraft/nov99.pdf> (discussing small group writing labs where teachers give students immediate oral and written feedback on limited portions of a draft memo); Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 37 (2001) (discussing in-class exercises that teachers can use to help students learn legal analytical skills); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 190-201 (1993) (discussing strategies and techniques that teachers can use during class to help students read legal texts in a sophisticated

Giving feedback in this dual role still requires that legal writing teachers help the students develop their own process of thinking and writing. This provides students with opportunities to discover unique, individual voices that differ from those of their teachers. It still requires that teachers recognize when their students present unanticipated, novel analysis that falls within the “reasonable zone of right answers.” In such cases, teachers need to exercise a high degree of sensitivity to ensure that their students retain a sense of control over their work, which, in the final analysis, is the students’ and not the teachers’ product.⁵⁷ But when giving feedback on just one draft before a final memo, teachers must balance sensitively these important concerns with the overarching goal of ensuring that their students’ analytical process achieves a result within the “reasonable zone” of accuracy and precision.⁵⁸

Thus, the rhetorical context within which the legal writing teacher operates places the student in a very tricky situation, one that requires a high degree of sophistication. In making comments on a draft document, teachers must never lose sight of the ultimate goal of ensuring a correct analytical process that yields high quality results that are useful in law practice, even as they support their students in retaining a sense of their own voice and control as writers.

III. THEORY TRANSLATED INTO PRACTICE: EXAMPLES OF A TEACHER’S WRITTEN FEEDBACK ON A STUDENT DRAFT DOCUMENT

A legal writing teacher’s written comments⁵⁹ are the equivalent of a textbook that uses the student’s own written words as the examples.⁶⁰ This “textbook” provides the student with a sophisticated guide for the revision process that is tailored to original thinking.⁶¹ This type of feedback complements other teaching methods in

manner).

57. Nancy Soonpaa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 81, 104 (1997); see also Neumann, *supra* note 21, at 761 (discussing how a teacher must be open to encountering new ideas during the dialogue process inherent in critiquing student work, both oral performance and written).

58. See discussion *supra* Section II.A and accompanying notes 8-21.

59. Written comments are in a tangible, permanent form, and this is important so that students can continually refer back to them during the revision process. However, voice comments inserted in the text of the student’s document or audio-taped comments can provide the same support, even though they are in a different form. See generally Elisabeth Keller, *Audiotaped Critiques of Written Work*, 14 THE SECOND DRAFT: BULL. LEGAL WRITING INST. (Macon, GA), No.1, Nov. 1999, at 13-14, available at <http://www.lwionline.org/publications/seconddraft/nov99.pdf>. Professor Keller encourages students to listen to her audio-taped comments and then to summarize them in writing; she believes that this transcription process helps students internalize her comments and therefore further aids students’ ability to revise their work. *Id.* at 14.

60. See Kearney & Beazley, *supra* note 22, at 889-902; Parker, *supra* note 3, at 573.

61. See generally Kearney & Beazley, *supra* note 22, at 889-902.

a legal writing course, which, of necessity, are less personal and more generic.⁶²

The discussion below gives some concrete examples of this dialogue between teachers and students during the early months of the first year of law school. This is the classic time when students struggle to learn and understand the skills of legal analysis and why those skills are so important in law practice.⁶³ Thus, this is when legal writing teachers will spend most of their class time and written feedback efforts to support students as they hone their analytical skills.

*A. Background for Examples of Student Memorandum Drafts
and Teacher Feedback*

To give background for the examples below, let's assume that during the first semester of law school students are analyzing a group of cases that address a bystander's cause of action for negligent infliction of emotional distress in a particular state.⁶⁴ Their task is to write an objective memorandum to a hypothetical work supervisor, analyzing the law and applying it to their client's case in order to assess whether the client will be able to successfully state a cause of action. The examples below focus on two paragraphs that analyze the law relevant to one particular requirement of this cause of action; they do not address the paragraphs of discussion that would follow, namely, a paragraph or two that address whether the law indicates that the client's facts would satisfy this requirement or not.⁶⁵

Let's further assume the following about the underlying analysis. The mandatory authority from the particular jurisdiction includes three cases that address the requirement under consideration—the requirement that the bystander's emotional

62. For instance, classroom discussion tends to be much more generic, given the number of students, and thus is less likely to ensure that most students confront whether they understand important concepts or not. Parker, *supra* note 3, at 569, 571; Enquist, *supra* note 46 at 1129 (describing what Mary Beth Beazley wrote in answer to the author's survey: "Classroom work in legal writing is fine for presenting the many universal truths about legal writing, but unfortunately most students don't recognize their strengths and weaknesses in a classroom discussion").

63. See *supra* note 63.

64. This example is loosely based on ideas from several jurisdictions' approach to this cause of action.

65. This paragraph is not organized using IRAC—Issue, Rule, Application, and Conclusion—(or variations on IRAC). Thus, the two sample paragraphs in the text above are directed to informing the reader, the law supervisor, of the analysis of the law on this particular requirement, including the relevant general principles of law in the first paragraph and descriptions of cases that illustrate those general principles in the second. These paragraphs do not address the client's facts, because the client's fact would be discussed in the next paragraph, not provided in the example above, where the author would apply the "law" to the client's facts and come to a conclusion predicting whether the client's situation would satisfy this requirement or not. For essays on the utility or not of teaching first-year students IRAC or its variations, see generally 10 THE SECOND DRAFT: BULL. LEGAL WRITING INST. (Macon, GA), No.1, Nov. 1995, at 1-20, available at <http://www.lwionline.org/publications/seconddraft/nov95.pdf>.

distress must result in a significant physical injury. To arrive at an accurate, precise, and useful discussion of what these cases say about this requirement, the students need to deal with the following four analytical issues.

First, students must figure out that the courts view this legal issue as a requirement to state the cause of action. Since none of the cases explicitly state that this is so, students need to derive this aspect of the analysis from the holdings in all three cases, which, viewed together, indicate clearly that the courts view a “significant physical injury” as a requirement. In two cases, the court found that the bystander’s emotional distress did result in a sufficient physical injury and then analyzed whether the other requirements to state a cause of action were satisfied; in the third decision, the court decided that the bystander’s emotional distress did not result in a sufficient physical injury while holding, without further analysis of the other requirements, that the plaintiff-bystander did not state this cause of action.

Next, students need to figure out how the courts describe this requirement. Here, all three cases explicitly and consistently describe this requirement as “the bystander’s emotional distress resulting in a significant physical injury.”

Third, none of the cases explicitly state what kinds of physical injuries are sufficiently “significant,” so students must synthesize the three cases to come up with what a reasonable lawyer could infer about the general category of physical injuries that are “significant.”⁶⁶ And fourth, the cases all explicitly address why the courts impose this requirement, but each case uses different language in expressing that reasoning. One states the emotional distress must be “serious”; a second states it must be “severe and genuine”; and the third states that it must not be “negligible and fraudulent.” Thus, students must compare and contrast these phrases and synthesize them to come up with one concise, accurate explanation of what the three courts mean, even though each court uses somewhat different language to express similar ideas.⁶⁷

Finally, let’s assume that each student turns in one draft of this objective memorandum, which is the best work that the student is capable of at that time.⁶⁸ The teacher then gives written comments and the student works with these comments to revise the document into a “final” memorandum.⁶⁹

The series of samples below illustrate some different analytical problems that the legal writing teacher could confront in a student draft on this problem and how the teacher should address these problems with written comments, responding as the

66. See sources cited *supra* note 14.

67. See also *infra* note 95 and accompanying text.

68. See *supra* note 5.

69. Of course, legal writing teachers may additionally help students with their revision process by using various other teaching methodologies, like discussions and exercises that go on in the classroom, office hours with individual or small groups of students, and individual conferences. See, e.g., Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255 (2004).

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expert legal thinker (and writer) as both educator and law practitioner. The problems in these samples illustrate how difficult legal analysis is to the novice. It is easy to forget just how many analytical steps it takes for a student in the first year of law school to write several short paragraphs in a memorandum and consequently, why a legal writing teacher needs to comment on how well the student used the process of “thinking like a lawyer” to develop accurate and precise legal analysis. The problems in the samples below also illustrate why the teacher’s comments should focus on how the reader in law practice would respond to the words on the page; first-year students have little experience with the actual environment of law practice, and do not have much sense of how their analytical successes and failures affect the ultimate audience of their document.⁷⁰ Given the students’ struggle with analysis in these samples below, the legal writing teacher’s comments appropriately do not focus on organization and presentation.⁷¹

The first subsection below sets out a paragraph that is within the range of what a practicing attorney would write. The subsequent subsections give three student attempts at the same paragraph, the teacher’s feedback to help the student revise the paragraph, and commentary on how the teacher framed the feedback from the dual points of view of educator and law practitioner to best help the student revise the document.

B. *Paragraphs as Written in Law Practice*⁷²

The following example is within the reasonable range of what an experienced attorney would write in law practice, assuming that a fleshed-out analysis was necessary.

70. See discussion *supra* Section II.A and accompanying notes 6-19.

71. While there may be times when a teacher should give comments on analysis and organization (or presentation) together, there are few instances when commenting on organization alone would be helpful if the student did not understand the basic analytical foundation. See Kearney & Beazley, *supra* note 22, at 892 n.27 (stating that “we believe that students must understand their analysis before they address mechanical concerns”); see also *supra* note 27. Thus, 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.

72. In legal practice, an experienced attorney might have incorporated the case descriptions into the first paragraph using parentheticals. However, given that the author wanted to show the contrast between cases that satisfied the requirement and the cases that did not, it is a reasonable choice to place the case descriptions, illustrating the general principles of analysis, into a short second paragraph. Certainly, this would be the preferable form for first-year students early in the academic year because it helps them sort out the difference between general principles of legal analysis and descriptions of how an individual case used those general principles to reach the result on the specific facts before the court.

The courts next require that the bystander's emotional distress result in a significant physical injury. See Case X; Case Y; Case Z. A physical injury satisfies this requirement when it impairs the bystander's health in a serious and permanent manner. See Case X; Case Y. This type of physical injury, the courts reason, helps to verify that the emotional distress is severe and genuine and thus belongs within the scope of a defendant's liability. See Case Y; Case Z.

In Case X, the court found that the bystander's emotional distress resulted in a significant physical injury. Case X. Here, upon encountering the injured direct victim, the bystander immediately began shaking violently and vomiting and within half an hour suffered a heart attack, from which the bystander never completely recovered. Id. The court reasoned that the heart attack, with its resulting effect on the bystander's quality of life, verified that the bystander's emotional distress was severe and genuine. Id.; see also Case Z (finding a significant physical injury when the bystander's emotional distress resulted in a cerebral hemorrhage which had the effect of lasting brain damage). In contrast, the court in Case Y refused to find that the bystander's emotional distress resulted in a significant physical injury. Case Y. Here, the bystander saw the injured direct victim at the scene of the accident and suffered a series of tension headaches beginning at the accident scene and ending several weeks afterwards. Id. The court reasoned that this type of physical injury did not provide sufficient evidence that the bystander's emotional distress was not negligible or even fraudulent. Id.

Our client . . . will probably satisfy the requirement that her emotional distress result in a significant physical injury⁷³

The sample above does a good job of analyzing the relevant law and communicating the analysis effectively to the supervisor. It begins in the first paragraph by communicating the analysis in general principles that explain what the "law" is on this particular issue. The first sentence accurately identifies the focus of the paragraph, the "next requirement," and what that requirement is, using the explicit language of the three cases. The second sentence goes on to synthesize what the three cases imply using language that explains how all three cases come to the results that they do on the facts before each court. The third sentence explains why the courts use this requirement, using language that synthesizes into a single, accurate summary the different phrasing each case uses.

The second paragraph goes on to describe the three relevant cases to illustrate the factual reach of the prior discussion of general principles. This paragraph includes both the cases that reach a positive result and the case that reaches the negative result too.⁷⁴ The third paragraph, although omitted here, would go on to set out how the

73. *See supra* note 65.

74. *See supra* note 72.

“law,” as spelled out in the first two paragraphs, applies to the client’s facts and supports the prediction or predictions concerning what the future court will decide.

C. First Example of Student Draft and Teacher’s Feedback

1. Student Draft

“The courts next look at whether the bystander’s emotional distress results in a physical injury that is significant. Case X; Case Y; Case Z. . . .”

In this first example, the student’s initial sentence of the paragraph adequately describes the legal issue that is the focus of the analysis at this point in the memorandum. In fact, the student’s phrase—“the bystander’s emotional distress results in a physical injury that is significant”—is precise because it is the phrase that all three courts use explicitly and consistently.⁷⁵ The problem remains that the student’s use of the phrase “looks at” is imprecise because the courts do not view whether the bystander’s emotional distress results in a significant physical injury as optional but in fact require it for the plaintiff to state a cause of action. Thus, though the student’s words “on the page” are not technically inaccurate, they do not sufficiently inform the person reading the document, the supervisor, since the supervisor will probably not have an in-depth familiarity with the legal authority and will be looking to the ideas expressed within the four corners of the document to gain an accurate and thorough understanding of the basic analysis.

This problem of imprecision, especially during the first months of law school, rarely results from a situation where the student has well thought-out analysis “in her head” that simply doesn’t get expressed well enough “on the page.” Instead, this kind of imprecision tends to arise from the student’s fundamental misunderstanding of the process of “thinking like a lawyer” or the student’s inability to use that process well enough to come up with a sufficiently accurate and precise analysis.⁷⁶

To help students revise their work, teachers must do more than merely provide comments like “your first sentence is insufficiently precise” or “your first sentence’s use of ‘looks at’ is too vague to convey your analysis well enough.” Comments like these—ones that simply label the problem, and do not go further—do not adequately identify the analytical issues behind the imprecision and why those issues prevent the supervisor from understanding the analysis.⁷⁷

For this reason, teachers must respond in greater depth, using a combination of comments from the points of view of legal thinkers (and writers) as well as law

75. See *supra* Section III.A, p.17.

76. See *supra* note 27.

77. See sources cited *supra* note 46. However, a teacher can effectively use labeling comments when he encounters the same analytical problem more than once in a draft; in this situation, a labeling comment simply refers the student back to a prior comment where the teacher has already explained the analytical process to the student in-depth.

practitioners. As educators, teachers must give their students the kind of feedback that helps them rethink their analysis so that they will be able to produce more precise ideas on the page. In the situation under discussion, the teacher chooses to achieve this by contrasting the student's analytical success in this first sentence with the analytical problem. Using this contrast, the teacher can ensure that the student is clear about where he she has been successful, and use this success as a foundation to help the student revise the problematic analysis.⁷⁸ Thus, in the comment below, the teacher compliments⁷⁹ the student on employing the correct phrase to describe this requirement—"the bystander's emotional distress results in a significant physical injury," and reiterates why the cases support that result. This leads naturally to the part of the analysis with which the student had problems—that the emotional distress "must" result in the significant physical injury because the court views this as a requirement—and the help the teacher needs to give the student to rethink that part of the analysis.

This contrast is especially effective in this situation because the analytical process to arrive at the phrase "the bystander's emotional distress results in a significant injury" is much easier and more basic than the process necessary to figure out that the courts require this. All three of the cases explicitly and consistently set out the overall phrase; thus the student only has to understand how to synthesize into a general principle language expressed consistently in three cases. While even this very basic skill can be troublesome to first-year students, it is not as difficult as figuring out the fact that the bystander's emotional distress "must" result in a "significant physical injury" in a situation where none of the cases explicitly makes that point.⁸⁰

Thus, the teacher's responsibility as educator is to remind the student of the appropriate process in analyzing this group of cases while pointing the student in the right direction for getting to the accurate analysis needed in this first sentence. But as part of focusing the student on the correct process, the teacher will help the student enormously if the teacher also responds in the role of the lawyer in practice to communicate to the student why a correct analytical process and the result of that process are imperative.⁸¹ If the student understands that her reader would either have a question about what "looks at" means or misunderstand the analysis and potentially cause harm to the client, the student will have greater motivation to learn the correct procedure. Therefore, this legal writing teacher is in a very different position in giving feedback from that of the teacher in the example above, where a student is writing about "lying" in an English Composition class. There, the student was free to come up with her own conclusions about "lying"; and the challenge for the teacher was to help the student think more in-depth, more creatively, more logically, while

78. See *supra* text accompanying notes 37-41.

79. Enquist, *supra* note 46, at 166, 1132.

80. See *supra* Section III.A, p.17.

81. See *supra* Section II.B.

expressing the resulting ideas more clearly. Writing about “lying,” the student could not come up with a “wrong” answer. Here, it is the responsibility of the teacher to help the student see that her answer is, in part, wrong, and to point the student in the correct direction.⁸²

2. Teacher’s Feedback⁸³

“ . . . Good work. In the first sentence of this paragraph, you give your reader, your work supervisor, what she needs at this point—you set out the topic of the next part of your analysis: “the bystander’s emotional distress results in a significant physical injury.” Good—this phrase, in just these same words, is the one that courts consistently use in all three of the relevant cases when they describing this idea.⁸⁴ You know from our discussions and exercises in class that when courts explicitly and consistently describe an important idea like this with the same words, over and over throughout a series of cases, you should almost always use that phrase in your memorandum. This is because the precise words may have an impact on the analysis that follows. The word “significant,” for instance, controls the focus of your next sentence where you explain the kinds of physical injuries that the courts find to satisfy this term. Additionally, if your supervisor files a complaint on behalf of your client, for instance, she will want to use the words that the court recognizes from the relevant precedent cases.

In contrast, you need to rethink your use of “looks at” in this same sentence; here, you have not articulated a precise enough idea for your supervisor. Is whether the “bystander’s emotional distress results in a significant injury” just a factor that the courts see as *optional*, which is what is indicated by your phrase of “looks at”? Or do the courts view this factor as one that *must* be looked at

82. See *supra* text accompanying notes 22-31.

83. Because of the nature of these roles that the legal writing teacher must play and thus the resulting sophistication of this kind of analytical feedback, at pivotal points in the draft the teacher may need to make individual comments that are quite lengthy. How long individual comments turn out to be will depend upon the teacher’s assessment of the following considerations: the importance of the analytical skill in relationship to the overall curricular sequence; how difficult the teacher believes this skill is for the average student as well as the skill level of the particular student who is writing the memo (either from actual knowledge of the particular student-author or from the ideas as they are expressed on the page, see *supra* note 41); and whether the teacher has already commented beforehand on similar problems on the particular memo. The teacher, giving feedback in the three examples discussed in Section III, would not give comments this long on every sentence in the entire draft. However, in these three situations the length is necessary because the student’s analytical mistakes in each case are so critical, and the teacher knows the student will not be able to revise the draft into any sort of useful document without confronting these problems. See Debbie Mostaghel, *Commenting on Student Papers*, 14 THE SECOND DRAFT: BULL. LEGAL WRITING INST. (Macon, GA), No.1, Nov. 1999, at 5, available at <http://www.lwionline.org/publications/seconddraft/nov99.pdf>.

84. See sources cited *supra* note 79 and accompanying text.

because it is “required”? This difference is critical in terms of your analysis. Imagine the consequences if your supervisor came away from reading your sentence here believing that it doesn’t matter whether she includes this “issue” in a complaint that sets out your client’s cause of action? If it is a requirement, then wouldn’t your supervisor *have* to include it in a complaint on your client’s behalf?

To rethink and then revise this aspect of this first sentence, therefore, you need to go back and think about the process that led you to use “looks at.”

To begin with, do any or all of the cases explicitly use the word “required,” “requirement,” or “must”? If so, that tells you forthrightly how the courts view this issue—that it is definitely a “requirement” that *must* be fulfilled if the plaintiff-bystander is to state this cause of action. This would be similar to how you figured out that you should use “bystander’s emotional distress results in a significant physical injury”—see above.

But these three courts didn’t do that, did they? So, how then do you figure out whether the courts just “look at” this issue, or “require” that the plaintiff-bystander satisfy it in order to state this cause of action? Even though the courts don’t explicitly use the word “require” or “must,” can’t you figure this out by comparing the ultimate decisions of all the cases relevant to this issue? Go back and read the three relevant cases, specifically focusing on Case Z and what happens to the plaintiff-bystander’s cause of action, given how the court resolved this particular issue. Be sure you understand the process of arriving at this decision and, again, why arriving at the correct decision while articulating it so precisely is critical to your reader, your work supervisor.⁸⁵

D. *Second Example of Student Draft and Teacher’s Feedback*

1. Student Draft

“The courts next require that the bystander’s emotional distress result in a physical injury that is significant. See Case X; Case Y; Case Z. This type of physical injury validates that the bystander’s emotional distress is sufficiently severe and genuine. See Case Y; Case Z.”

In Case X, the court found that the bystander’s emotional distress resulted in a significant physical injury. Case X. Here, upon encountering the injured direct victim, the bystander immediately began shaking violently and vomiting and within half an hour suffered a heart attack, from which the bystander never completely recovered. Id. The court reasoned that the heart attack, with its

85. *See supra* text accompanying notes 42-46.

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resulting effect on the bystander's quality of life, verified that the bystander's emotional distress was severe and genuine. *Id.*; see also *Case Z* (finding a significant physical injury when the bystander's emotional distress resulted in a cerebral hemorrhage which had the effect of lasting brain damage). In contrast, the court in *Case Y* refused to find that the bystander's emotional distress resulted in a significant physical injury. *Case Y*. Here, the bystander saw the injured direct victim at the scene of the accident and suffered a series of tension headaches beginning at the accident scene and ending several weeks afterwards. *Id.* The court reasoned that this type of physical injury did not provide sufficient evidence that the bystander's emotional distress was not negligible or even fraudulent. *Id.*"

This student sample shows very good work in what the student has explained on the page. However, the student skipped an important step in the analysis, a step the supervisor needs in order to fully understand this requirement and ultimately what this "law" indicates for the client's facts, which will come in the paragraphs that follow. This student has described the requirement well, and, unlike the first student, has made clear that it is a requirement. The student also included the courts' reasoning. But the student has failed to articulate what all of the cases together imply about the category of physical injuries that would be "significant."

Students in general, and first-year students in particular, often have trouble with moving from explicit analysis in the cases, to implicit analysis—what a group of cases implies but does not directly articulate.⁸⁶ This skill is quite difficult for the same reason that the first student had trouble seeing that the three cases together made clear that the courts saw this legal issue as a requirement. But it is also a critical skill that any good lawyer must know how and when to use in an accurately.⁸⁷

Thus, as with the first student, the teacher's feedback here shows the student where her analytical process failed, how to remedy the problem, and why remedying the problem would be critical for the reader, the supervisor in law practice. These comments should go a long way toward helping the student-author discover how to fix the problem and while motivating the student to do so.

2. Teacher's Feedback⁸⁸

"Good job with your first sentence of this paragraph where . . . and your second sentence where you set out the courts' reasoning concerning this requirement. These are both critical pieces of your analysis of this requirement, and ones that your supervisor—the reader of your document—needs.

86. See Williams, *supra* note 8, at 18-20, 24 (discussing that novice legal thinkers often have difficulty moving from concrete ideas to more sophisticated legal thinking).

87. See *supra* note 14.

88. See *supra* note 84.

However, note that you've also skipped an important step in your analysis. Right after you bring up the word "significant," don't you need to inform your supervisor about the *category* of physical injuries that the courts view as "significant"?

Think about this from your supervisor's point of view. Your supervisor will be reading along and encounter this phrase; she will immediately wonder, "well, what physical injuries, in general, are 'significant'?" As a trained lawyer, your supervisor knows that she will probably need the answer to this question to be able to predict whether your client's physical injuries will satisfy this requirement. In fact, you had some problem predicting this for your client in later paragraphs for the same reason—see my comment below.⁸⁹

As the author of this legal memorandum, one of your major responsibilities is to make sure that there are no "holes" in your analysis. I hear you thinking to yourself: "but why can't my reader, the work supervisor, read the case descriptions in my second paragraph and figure out, from these descriptions, an answer to what kinds of physical injuries are 'significant'? My supervisor is a lawyer, and better trained than I am!"? But is that your *supervisor's* job—or *yours*? Why did your supervisor assign *you* the task of analyzing these cases and writing this memorandum? In essence, if you don't do the full job of analysis here, it's like telling your supervisor to do the analysis herself. This might not go over so well in a busy law practice where everyone depends on others to do their assigned piece of the work.

So how do you, as the lawyer here, figure out what physical injuries are "significant"? You know that the courts don't ever tell you explicitly by articulating an explanation in any of the cases. So, you need to follow the process we learned in class to figure out ideas that are implicitly supported by a group of cases.⁹⁰

In particular, think about how to explain *in general terms* why the physical injuries in Case X and Case Y are ones that are "significant," and those in Case Z are not. It is this explanation, expressed in general principles, that belongs in your second sentence of your first paragraph. For instance, before Case Z, couldn't a reasonable lawyer have made an argument that tension headaches, which occurred over a period of time, were "significant" physical injuries? They, like the injuries in Case X and Case Y, certainly would have affected the plaintiff's life to *some* degree. But the court in Case Z decided that tension headaches were not "significant"; so your explanation can't be something like "would have affected P's life to some degree" because it doesn't explain why

89. This sentence does not refer to an actual comment discussed in this article.

90. Teachers help students revise if their comments refer to relevant portions of the textbook, handouts, or class discussion. Enquist, *supra* note 46, at 1141.

tension headaches are insufficient. Inferring analysis from a group of cases isn't an easy thing to do, but it's critical to your being able to provide your supervisor with a sufficient analysis of this requirement."⁹¹

E. *Third Example of Student Draft and Teacher's Feedback*

1. Student Draft

"In addition, the courts require that the bystander's emotional distress result in a significant physical injury. See Case X; Case Y; Case Z. A physical injury satisfies this requirement when it is one that adversely affects the bystander's health in a serious and lasting manner. See Case X; Case Y. This type of physical injury, the courts reason, helps to verify that the emotional distress is severe and genuine and not negligible. Id. Emotional distress that is not serious and not fraudulent is not sufficient. Case Y; Case Z. Only emotional distress that is serious and genuine belongs within the scope of defendant's liability. See Case Y; Case Z.

In Case X, the court found that the bystander's emotional distress"

The student in this third example has done a good job in the first two sentences, and has not made the analytical errors the first two students made in their respective drafts. However, when this third student discusses the courts' underlying reasoning in the final several sentences, the student struggles to articulate ideas precisely and concisely.

In commenting upon this problem, the teacher could just label this passage as "repetitious" or "insufficiently concise." Looked at from a *writing* point of view, this would make sense. In fact, the final three sentences of the paragraph say the same thing over and over, in different words. Such repetitiousness is definitely a problem for a supervisor in law practice because it muddles what should be clear, and therefore makes it difficult to grasp the analysis quickly and accurately. This wastes the supervisor's time—time that is at a premium in a busy law practice. However, the foundational question is *why* did the student, early in the first year of law school, communicate the ideas in this passage in such a repetitious manner? Without answering this question, the legal writing teacher cannot give feedback that will sufficiently help the student revise the passage.

The teacher who is giving feedback here does not necessarily know why the student chose the words on the page but can reasonably figure it out by thinking about the analysis of this particular problem and what it requires a first-year student to

91. Given the student's analytical issues, the teacher's feedback appropriately does not address organization or presentation in any depth. See *supra* note 71 and accompanying text.

work with, given where this assignment falls within the curriculum of the course.⁹² Since these draft memoranda of our three students above occur during the first semester of law school, this third student, like the first two students, more likely than not struggles with the analysis: reading and grasping the import of the relevant cases, synthesizing similar ideas together, and understanding that the reader needs to grasp easily the key aspects of the courts' reasoning behind this requirement.⁹³ In particular, this teacher knows that in the relevant cases the student has worked with, the courts vary as to how they describe two key ideas—that the bystander-plaintiff's emotional distress is "severe" and "genuine."⁹⁴

A sophisticated teacher will take this "clue" from the underlying analysis and conclude that the third student, struggling to grasp what the cases say, is very likely just lifting a series of verbatim phrases from several cases and stringing them together rather than engaging in the more difficult task of synthesizing similar ideas that are phrased differently. The teacher knows that it takes skill and confidence to synthesize ideas appropriately in this case, either by picking the best phrasing used by one of the courts that captures all important ideas, or rephrasing the similar ideas expressed differently by each court.⁹⁵ The student may have been unsure about what analytical process to use, or the student may have had a general sense but wasn't secure enough to use that sense confidently and appropriately.

Thus, in the feedback below, the teacher begins by identifying reasons why the reader in law practice would have problems with repetitious sentences describing the courts' reasoning, but quickly goes on to identify the appropriate analytical process to correct the mistake: synthesizing ideas from the cases into a more precise expression of the courts' reasoning. In contrast, if the student is still struggling with the process of synthesis and the teacher gives feedback only from the writing point of view, the student will know only why the passage is "bad" for the reader; however, the student

92. See *supra* note 41.

93. See Williams, *supra* note 8, at 24 (discussing how the novice legal thinker/writer will use the concrete, explicit language of cases at times when she needs instead to paraphrase the language in order to communicate a more sophisticated idea).

94. See *supra* note 67 and accompanying text. In this problem, the courts use different words for the same idea, and, compounding this, they express the same idea in the positive and the negative. For instance, one court states the emotional distress must be "serious"; a second states it must be "severe and genuine"; and the third states that it must not be "negligible and fraudulent." Synthesizing these ideas requires several steps. First, the student must see that "serious", "severe", and "not negligible" all are expressing very similar ideas. Second, the student must choose one of these words, or come up with one the courts have not used that captures the essence of them all. Third, the student must do the same with "genuine" and "fraudulent." Finally, the student must check that all cases explicitly and implicitly support the connection between the two—"and." See Wellford, *supra* note 14, at 103. By the time someone graduates from law school, these steps are intuitive; but during the first year of law school students will struggle with this relatively difficult analytical skill.

95. Williams, *supra* note 8, at 18-19, 24; see *supra* note 90.

will not necessarily know how to fix it since that would require a much better grasp of the analytical process than the student has at this point in time.⁹⁶

2. Teacher's Feedback⁹⁷

“ Note that your reader—your work supervisor—would have a difficult time reading through and grasping the underlying reasoning behind this requirement as you've articulated it in the final three sentences of your paragraph, because you have expressed similar ideas over and over using different words. As you know, your supervisor is likely to be extremely busy and will not have the time to work through an analysis that is expressed in this manner.

But the more important question is, *why* are your ideas about the courts' reasoning written in such a repetitious fashion? Figuring that out is the first step to revising these three sentences into a more focused articulation of the courts' reasoning behind this requirement.

First, it appears from these sentences that you do understand why the courts use this requirement. It isn't easy to grasp this because of the repetitiousness of the three sentences, but taken all together, they communicate that a “significant physical injury” “verifies” that the bystander reacts with the *kind* of emotional distress that courts allow within the scope of defendant's liability. This makes sense. As we discussed in class, courts in this jurisdiction use all the requirements of this cause of action to objectively determine the level of the bystander's distress because the court can't “see inside of the person” to figure out what they were, in fact, feeling. Good job figuring out the underlying reasoning.

But second, you need to think through and express more concisely and precisely what “kind” of emotional distress “belongs within the scope of the defendant's liability.” Go back and read each of the three cases and copy down how each describes this “emotional distress.” Then, work with the phrases you've copied down, and synthesize them into a concise, focused explanation. (Remember the exercises we did in class on this skill?)⁹⁸

Begin by asking yourself the following questions. Are the phrases you've copied down expressing different ideas? Or are they expressing similar ideas that each of the three courts have just expressed in different words? Is “not fraudulent emotional distress” different from “genuine emotional distress”? Are

96. See *supra* text accompanying notes 37-40.

97. See *supra* note 84.

98. See *supra* note 91.

the phrases “emotional distress that is not negligible,” “severe emotional distress,” and “serious emotional distress” similar or different?

If they are similar ideas expressed in different ways by different courts, you need to think about what you do in this situation. Would a lawyer in practice lift the verbatim phrases from the cases and use them all in expressing the courts’ reasoning on this requirement? (Here you have three cases; what if you had twenty with ten different variations?) Or would the lawyer decide how best to express that idea by synthesizing similar ideas together?

Clearly, it’s the latter, as our exercise in class demonstrated. So, in revising the final three sentences of this paragraph, you need to pick the best phrasing and use it consistently in your memo, or paraphrase the idea yourself and use that consistently.⁹⁹

This can be a scary process when you first work with legal analysis, because you don’t want to make a mistake—and, of course, you can be wrong in legal analysis. But the bottom line is that your job as the author of this document requires you to come up with a precise analysis that you express concisely to your supervisor. It might help you to remember that this is obviously a more difficult analytical skill to master than the situation where all the relevant courts have expressed a significant idea in precisely the *same* language—like they did when they described this requirement. All three cases used “bystander’s emotional distress must result in a significant physical injury,” and, consequently, I bet you felt much more confident about using those words in your document—see the first sentence of your paragraph where you did a good job in this regard.”

IV. CONCLUSION

Legal writing teachers should play a dual role in providing written feedback on their students’ draft documents. They should give comments from the point of view of an expert legal educator to ensure that their students learn the fundamental skills of legal analysis, both in the sense of a theoretical understanding and also in the practical sense of being able to use these skills to reach good results. Legal writing teachers should also take the point of view of an expert lawyer, to convey to students a sense of how ideas expressed in writing will affect their reader in law practice. Students who receive feedback from both of these points of view will internalize, in a sophisticated manner, both the analytical process and its place in law practice. As a consequence, they are much more likely to succeed as legal thinkers and writers in the legal community.

99. See *supra* text and accompanying notes 42-46.