

## **The Scrivener: Modern Legal Writing**

*"Beholder" Reflections—Part II*

by K.K. DuVivier

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### **DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?**

K.K. DuVivier will be happy to address them through the Scrivener column. Send your questions to: [kkdvvivier@law.du.edu](mailto:kkdvvivier@law.du.edu) or call her at (303) 871-6281.

This column is the second in a series analyzing feedback from readers about what they believe is good legal writing. In the January 2006 *Scrivener*,<sup>1</sup> I provided a survey containing writing samples for three parts of an objective legal analysis. The survey questions asked readers to indicate which samples they preferred and why, and to comment on specific devices used in the samples.

In the May 2006 *Scrivener*,<sup>2</sup> I reported on the reader response to questions pertaining to samples for the first part of a legal analysis: the introductory roadmap paragraph. This second column will address reader response to samples dealing with the explanation of legal authorities (the "rule" portion of an objective legal analysis). These samples are shown below.

### **Survey Sample 2:**

#### **Explanation of Authorities Related To the Executive and Management Personnel Exception**

##### ***Sample 2A***

Colorado courts have held that management personnel are "in charge" of the business. *Id.* Two characteristics of being "in charge" are the extent of the employee's responsibilities in the company and the executive powers of the employee. *Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1342 (Colo.App. 1984); *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 765 (Colo.App. 1988). For example, the *Porter* court held that the employee ("Higgins") was not in charge because he was responsible for negotiating and selling contracts and promoting company business. *Porter*, 680 P.2d at 1342. Similarly, the court in *Management* determined that the employee ("Miller") was not management personnel, as he was largely an "information gatherer" who collected job candidate information for the recruitment agency. *Mgmt. Recruiters*, 762 P.2d at 765. The *Porter* and *Management* courts established that an employee who is "in charge" not only manages the business, but also has significant responsibilities. *Porter*, 680 P.2d at 1342; *Mgmt. Recruiters*, 762 P.2d at 765.

In addition to the requirement of being "in charge," an employee must be unsupervised to satisfy the Management Exception. *Porter*, 680 P.2d at 1342. In *Porter*, Higgins was supervised, and this fact was significant in the holding that Higgins was not management personnel. *Id.* (Under the plain meaning rule, Travers can presume that "supervised" means what it expresses, namely that the employee worked

under direct management.) The court in *Atmel* emphasized that the employee ("Jenkins") had three management levels above him and, thus, was not management personnel. *Atmel Corp. v. Vitesse Semi Conductor Corp.*, 30 P.3d 789, 794 (Colo.App. 2000). Both *Porter* and *Atmel* concluded that an employee who is supervised by senior management is not executive or management personnel. *Porter*, 680 P.2d at 1342; *Atmel*, 30 P.3d at 794.

Moreover, when a Colorado court determined that an employee worked unsupervised, it held that the employee was executive personnel. *Harrison v. Albright*, 577 P.2d 302, 304 (Colo. App. 1977). For instance, the *Harrison* court noted that Albright was the "only" person at Pride who had the expertise to run the company. *Id.* The previous statement suggests that there was no executive to whom Albright reported. *Id.* Executive and management personnel work under little or no supervision.

## **Sample 2B**

Travers was probably a member of executive and management personnel while employed at Western. When determining whether an employee was executive or management personnel, the Colorado courts focus on whether the employee was "unsupervised" and "in charge."

An employee who is "unsupervised" and "in charge" of some area of the business is executive or management personnel. *Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1342 (Colo.App. 1984). In *Porter*, the employee's primary duties were to negotiate and sell contracts, make sales calls, keep updated contracts filed, and promote the employer's business. *Id.* The court held that he was neither executive nor management personnel because none of his duties involved acting in an unsupervised capacity. *Id.* He was not in charge of contracts or any other area of the business; rather his duties were of the ministerial type that are generally delegated to a supervised employee. *Id.*

The *Atmel* court further defined "unsupervised" when it held that an employee who was a technical liaison and who had three levels of management above him was not executive or management personnel. *Atmel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789, 794 (Colo.App. 2001). The court reasoned that the employee was supervised because he worked under multiple levels of management and acted as a link between other employees rather than as a manager over them. *Id.*

## **Reader Reflections**

Readers preferred Sample 2B over Sample 2A by more than a two-to-one margin. The most common reasons for this preference were that 2B was more precise, direct, and easy to follow. Readers also responded to specific questions about the following:

- 1) the use of a conclusion in the introductory sentence;
- 2) the use of parentheticals;
- 3) the use of quotes; and
- 4) the manner and order of describing cases (either combined or sequential).

### **Conclusion in the Introductory Sentence**

Readers were split almost evenly about the use of conclusions for the introductory sentence. Several readers liked it:

- "The first sentence should give an indication of what is to come. Usually I would prefer an introductory sentence rather than just diving into the case analysis."
- "I like the conclusion up front so I don't have to guess where the paragraph is going."
- "Yes, yes, yes—give me the conclusion or test in the first line. I don't have time to read to the end to figure out what you're trying to say."

Other readers felt differently about putting the client's conclusion up front:

- "I prefer the discussion to focus upon issues, rather than conclusions."
- "I do not like starting with a conclusion. I'd rather see the facts compared with the authorities leaving me free to reach a conclusion."

## ***Parentheticals***

The majority of readers did not like how the author of Sample 2A used parentheticals. The sample used them two ways. First, none of the readers liked the use of parentheticals for names of parties from the precedents. One reader objected to including information readers did not need in the explanation of precedents, such as the names of individual parties. So, providing these names in short-form parentheticals was even more objectionable: "Hate it. Seems completely misplaced or unnecessary."

There was more disagreement about the second use of parentheticals in the second paragraph of 2A that addressed the plain meaning rule. The majority still found it distracting:

- "Use of parentheticals is rarely helpful, especially full sentences."
- "No. This appears to be an important point that's just tossed in."
- "I'm OK with parentheticals when they are necessary, but in Sample A, I probably would have included that in the text sans parenthetical."

## ***Quotes***

All of the readers liked the use of quotation marks around key terms:

- "I like the use of quotes in 'unsupervised' and 'in charge' because it indicates that those terms are important in analyzing the facts."
- "Quotes give greater credibility to the statement."
- "I think the use of quotes in work product like a memo to a supervising attorney is appropriate, so that the attorney has the benefit of seeing the exact wording used in a statute or opinion."

However, one reader said: "Would prefer to see quotes only the first time the word is used to alert the reader that it is a defining term. Otherwise, no need for them, especially when naming parties in the cases cited."

## ***Combined or Sequential Descriptions of Cases***

The feedback on this section showed a preference for sequential descriptions. Many liked the sequential treatment of precedents:

"I prefer the descriptions in separate paragraphs with a first sentence describing why the case is being mentioned."

- "Sequential descriptions are better."

- "I prefer cases discussed in sequence rather than combined."
- "Sequential discussion of cases is much easier to follow."
- "I prefer sequential descriptions of cases, rather than combining or blending."

Only one reader was strongly opposed to it: "Combined, PLEASE!! Unless the development of the law is a critical issue, I don't need a full case summary—the whole point of me asking someone to do a legal memo is for that someone else to distill the case law down to the critical issues for me—don't make me do the work of following through each case to see how they are consistent or different. Tell me what the critical items are for issue A, citing or quoting as appropriate; then move on to issue B and do the same thing. PLEASE!!!"

Another reader noted, "I don't like sequential discussion of cases unless the writer intends to show the development and evolution of a body of law over time. I would much prefer a discussion that provides integrated analysis from the applicable cases."

Only one of the readers had a problem with combining the cases to create a synthesized test: "The combined descriptions of cases is confusing—hard to keep them apart." All the others were okay with it:

- "I don't have a problem with combining the discussion of two cases that stand for the same proposition."
- "Combined or sequential descriptions of cases is totally dependent upon the context—I don't have a general preference one way or the other."
- "I would generally separate them but it depends upon which works better under the circumstances."
- "Combined descriptions are okay when discussing how multiple cases address a single issue/term, but Sample A has way too much description of the facts of the cases for the purposes for which they are cited. If you're going to discuss more than just the holding of the case, I would separate out the descriptions."

## Conclusion

The September 2006 *Scrivener* will be the last installment of the feedback in this survey: reader responses to the application portion of an objective legal analysis. The survey has been left open, and reader feedback is still desired—particularly on the last three questions—8, 9, and 10. You can find the survey online at <http://www.surveymonkey.com/s.asp?u=104991488234>. Again, thanks to all of you who care about whether our writing is effective and are willing to donate your time to provide this valuable information we need to improve.

## NOTES

1. K.K. DuVivier, "Eye of the Beholder," 35 *The Colorado Lawyer* 91 (Jan. 2006).
2. K.K. DuVivier, "'Beholder' Reflections—Part I," 35 *The Colorado Lawyer* 95 (May 2006).