

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

*Eye of the Beholder*

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: [kkduvivier@law.du.edu](mailto:kkduvivier@law.du.edu) or call her at (303) 871-6281.

For more than fifteen years now, I have been in the business of teaching legal writing. In fact, as the director of a legal writing program, I also have been in the business of teaching others to teach legal writing. The responsibility weighs heavily on my shoulders: I know that a lawyer's stock and trade are words and that what we teach is fundamental for our students' success.

Over the years, I have heard complaints that no one can teach others to write well because the perception of what constitutes good writing is in the eye of the beholder. To a certain degree, this is true. Some readers like Hemingway or Twain, while others prefer Dickens or Nabokov.

Fortunately, some universals about legal audiences help make the task of defining good legal writing easier than defining good fiction writing. Legal writing must be utilitarian, so the emphasis should be on the message rather than on the writing itself. Consequently, to avoid distracting or turning off readers, my students must concentrate as much on what they should *not* write as on what they actually do write.

On the mechanical level, I teach my students to avoid typos and obvious grammatical errors that will spark audience skepticism about how rigorous they have been in their analysis and proofing. I also teach my students to avoid splitting infinitives, ending sentences with prepositions, and starting sentences with conjunctions, because these forms are distracting to some readers even if they are grammatically correct.

Similarly, some readers have been conditioned to respond negatively to certain style choices. It is technically not incorrect to use the passive voice, the pronoun "he" for a generic individual, or legalese and Latin phrases, yet these choices may cause readers to focus more on style than content. Numerous style books alert writers that these choices raise concerns for readers even if there is no universal consensus that writers should avoid them.

In contrast, legal writing textbooks present wide discrepancies as to how to address broader questions about section and paragraph organization. To address these inconsistencies, I created a survey to determine whether any of these textbook choices are especially distracting for legal audiences. Please help by going to <http://www.surveymonkey.com/s.asp?u=104991488234> and voting for the samples you prefer.

Completing a survey takes time, but I urge you to participate by providing the valuable information I am seeking. I have been writing this column for years as a service to the legal community, and now I am asking you, my readers, to return the favor by participating. The benefits to you will be twofold. First, I will report the results in a future column so you may apply them to your own writing. Second, I will use what we learn to teach future generations of lawyers to craft their work in a form that is beautiful to you as the beholder.

Below is a copy of the computer survey. If you prefer to give me your responses directly, you may fax them to K.K. DuVivier at (303) 871-6711.

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## Writing Preference Survey

**Directions:** Please read each of the three sample items below, and then answer the questions that follow.

### Sample 1: Introduction to a Discussion Section of an Objective Memo

#### Sample 1A

Non-competition covenants in Colorado are governed by CRS § 8-2-113, which provides such covenants are generally void, unless they fall within one of the exceptions listed in the statute. As you directed, this memo discusses the following exceptions: (1) whether Travers qualifies as executive or management personnel; (2) whether Travers falls within professional staff; and (3) whether her employer's customer lists are trade secrets. CRS § 8-2-113(2). Western will likely establish that Travers qualifies as executive and management personnel and that the customer list is a trade secret, but not that Travers is part of the professional staff.

#### Sample 1B

The Agreement is not enforceable under the provisions of the Colorado covenant not to compete statute ("Statute"). CRS § 8-2-113(2) (2003). The Statute states that a covenant not to compete that restricts the right of a person from working for any employer will be void unless the contract is either between the employer and a member of the employer's executive and management personnel, or is for the protection of trade secrets. CRS § 8-2-113(2). There are two additional exceptions to the Statute. *Id.* However, the senior partner has directed that only the management and executive personnel exception ("Management Exception") and the exception for the protection of trade secrets ("Trade Secrets Exception") apply. *Id.* The senior partner also has determined that Travers is not staff to executive or management personnel. *Id.*

The Agreement has the required elements of a covenant not to compete. Western must prove that the covenant is enforceable under the Statute. Thus, Western must establish that Travers worked as management personnel or demonstrate that Western's client information is a trade secret under the Colorado Uniform Trade Secrets Act ("UTSA"). CRS § 7-74-102 (2004). Whether an employee satisfies the Management Exception and whether an employment contract is subject to the Trade Secrets Exception are questions of fact for the trial court. *Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1342 (Colo.App. 1984); *Network Telecomm. v. Boor-Crepeau*, 790 P.2d 901, 902 (Colo.App. 1990). Travers is not management personnel, and the Agreement is not subject to the Trade Secrets Exception under the Statute.

**Questions:** Do you prefer one sample over the other? Is there anything about either sample that you find particularly distracting? How do you feel about the approach used in the samples? Specifically, please

comment on the following devices used: (1) numbering the components of the discussion; (2) defining terms in parentheses with capital letters; (3) citing to a precedent when stating a conclusion about the client's situation; and (4) citing to both *Porter* and *Network* after a general statement about the statutory exceptions.

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## 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 Semiconductor Corp.*, 30 P.3d 789, 794 (Colo.App. 2001). 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.*

**Questions:** Do you prefer one sample over the other? Is there anything about either sample that you find particularly distracting? How do you feel about the approach used in the samples? Specifically, please comment on the following devices: (1) use, in the very first sentence, of either a conclusion about the client's situation or a statement about a test from a case; (2) use of parentheticals; (3) use of quotes; and (4) combined or sequential descriptions of cases.

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### Sample 3: Application of Legal Tests to Client Facts

#### Sample 3A

Travers was unsupervised and in charge at Western. The *Porter* employee acted in a supervised manner by performing ministerial filing and promotional tasks, and the *Atmel* employee was supervised by three levels of management. In contrast, Travers was frequently unsupervised when Western's CEO was out of the office. Furthermore, neither the *Porter* nor the *Atmel* employee supervised or managed other personnel, whereas Travers supervised all of the raft guides. She also was in charge when monitoring corporate clients' raft trips from the head raft and during the CEO's absence.

Travers was in charge, suggesting that she fits within the executive and management personnel exception of § 113(2)(d). Accordingly, the non-competition covenant may be valid.

#### Sample 3B

In contrast with Albright (and like Higgins and Jenkins), Travers's guiding and marketing responsibilities were supervised, and her work product was monitored. *Harrison*, 577 P.2d at 304; *Porter*, 680 P.2d at 1342; *Atmel*, 30 P.3d at 794. Travers had creative latitude with regard to designing the Western website, DVD, brochure, and guide trips. However, Atkins made the final decisions to accept or reject new promotional designs. Further, Travers was not permitted to conduct employee interviews or evaluations independently. Although Atkins was the only management position above Travers (unlike Jenkins who had three levels above him), Travers could not proceed with marketing and guide plans without Atkins's direct approval. *Atmel*, 30 P.3d at 794. For these reasons, Travers was supervised.

In conclusion, Travers was not in charge of the business decisions at Western, and her responsibilities were supervised by Atkins. Therefore, Travers is not management or executive personnel under the provisions of the Statute.

**Questions:** Do you prefer one sample over the other? Is there anything about either sample that you find particularly distracting? Without considering the substantive conclusions, how do you feel about the approaches taken in these samples? Specifically, please comment on the following: (1) the introductory sentences; (2) the references to the precedent cases and facts from those cases; (3) the use of citations when applying cases to client facts; and (4) the conclusion sentences.