The Scrivener: Modern Legal Writing

"Beholder" Reflections—Part I

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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 or call her at (303) 871-6281.

In the January 2006 *Scrivener*,[1] I sought advice from my readers: Is the perception of what constitutes good legal writing in the eye of the beholder? By measuring reader reflections of the samples I posted in a survey online, I am attempting to answer this question.

Over the years, I have asked several judges what they prefer in persuasive briefs and have incorporated their responses in how I teach persuasive writing. However, responses from practitioners about their preferences for an objective legal analysis show much wider discrepancies.

Some law firms swear by a traditional office memorandum for reporting research results in an objective fashion. Others expect a more informal note to the files. Still others have told me their clients cannot afford to have associates writing memos, so there is no need to focus on the written form of an objective legal analysis. Overall, enough lawyers convinced me that they value objective legal analyses,[2] so I designed my electronic survey to discern reader opinions about which writing techniques they preferred in this context.

Each of the two samples I used in the survey met basic standards for quality legal writing in an objective context. I chose them, however, because they illustrate different techniques advocated by legal writing texts. The survey helped identify factors legal writers should consider to adjust for different audience reactions. Because of space constraints, this column will address only the introduction section in the survey. Later columns will address feedback on the other portions of an objective legal analysis.

Survey 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.

Reader Reflections

First, the survey asked readers to comment on which sample they preferred and why. Twice as many readers preferred Sample 1A to Sample 1B. These readers said that Sample 1A was more "direct" and "concise." In addition, the survey asked readers to comment on devices the writers used in the samples, including:

1) numbering the components in the discussion;

2) defining terms in parentheses with capital letters; and

3) citing to both *Porter* and *Network* in the introduction section of the memo.

Numbering the Components

The respondents universally liked the use of numbering in Sample 1A to let them know where the discussion was headed. One reader said it helped him "visualize the points" and gave "a frame of reference." Many readers said they strongly encourage use of this technique and think it is appropriate in almost every introductory paragraph because of the precision it conveys.

Defining Terms

Reader responses also were fairly consistent about the technique of defining terms: the majority liked it in general, but agreed that "Sample 1B goes too far." Those who favored the technique said a defining term is necessary only "if there might be any confusion." Creating formal definitions for terms also is helpful

when "the writing is a demand letter or some other writing in which precision is important, but the addressee's opinion about it is not."

However, most of the survey responders had negative opinions about how Sample 1B defined terms. Several of the commentators noted that the definitions in Sample 1B were unnecessary and overused. They were "distracting," and two readers went so far as to explicitly label the parenthetical definitions in Sample 1B as "annoying." One reader's reaction was even stronger, concluding that "[d]efining terms with capital letters is pretentious."

Overall, the responses suggest legal writers should use parenthetical definitions sparingly and only in appropriate situations. Defining terms may be helpful to make an exchange with another lawyer precise, but "[i]f the audience is a lay person, like an addressee of a letter, then there should not be this way of defining because it creates too much of a distance with the audience." Also, the writer can "reduce the clutter and distraction factor" of these definitions by "dispensing with the quotation marks."[3]

Citing to Porter *and* Network

The second-to-last sentence of Sample 1B contains what many legal readers recognize as a string cite—a citation to more than one authority in a single citation sentence. A few readers did not object to this string citation, but several were confused by the use of two cases here, and approximately two-thirds were put off by any citations to cases in the introductory paragraph. The majority said that they "usually don't cite to precedent in the conclusion and recommendations section," noting that such cites are "unnecessary and distracting" at this point of the analysis. Instead, these readers recommended saving the citations for the body of the analysis.

Even if a citation might be appropriate in the Introduction, the readers stated that they would use only one case instead of a string cite: "[I]f the point is settled law, then I use the most persuasive (highest court/most recent decision)." Furthermore, citing to more than one authority in this context created confusion: "I assumed the author cited two cases because one addressed one of the two issues and the other addressed the other issue. If that's correct, it would have been helpful to include parentheticals to that effect, such as '(Management Exception)' and '(Trade Secret Exception).'"

Conclusion

In the July *Scrivener*, I will address reader responses to the rule portion of an objective legal analysis. If you are interested in having your opinion counted, you may still weigh in by completing the survey at http://www.surveymonkey.com/s.asp?u=104991488234.

Finally, please help me applaud those readers who already expended the mental energy to complete the survey. Although the sample was not large, there were enough responses to discern some trends. In addition, the quality of the sampling was excellent: the average time of practice experience for those responding was twenty years. Without friends like these who are generous enough to dedicate their time, those of us who care about whether our writing is effective would not have the information we need to improve. We owe these people a big thank-you.

Notes

1. K.K. DuVivier, "Eye of the Beholder," 35 *The Colorado Lawyer* 91 (Jan. 2006).

2. I count on my readers to give me advice on the latest writing trends in legal practice. Our students write objective legal memoranda, client letters, and persuasive briefs, so please let me know if you recommend other alternatives.

3. The traditional format for defining terms also requires "hereinafter" in the parenthesis. *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n *et al.* eds., 18th ed. 2005) at 66–67.