

The Scrivener: Modern Legal Writing



Play It Again, Sam: Repetition—Part II

by K.K. DuVivier

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Repetition plays a key role in legal writing. The September “Scrivener”¹ addressed using repetition to ensure accuracy, to build emphasis, and to connect ideas. This article focuses on using repetition to make readers comfortable with the writer’s use of authorities and to alert them to key wording. In addition, the article explores balancing the use of repetition to avoid making readers bored or irritated.

Repetition of Exact Phrasing To Assure Readers

Repeating the exact wording from an authority assures readers of the accuracy of the legal test they are being asked to apply. Legal analysis focuses on words, and frequently in statutory analysis, on a single word. Because each word has its own connotations, there is potential for a different interpretation every time the writer paraphrases. By quoting the exact wording of a statute and by citing to the exact page of a case, writers can assure their readers that they are getting an accurate picture of the controlling authority without any threat that the words may have been altered or distorted.

Repetition to Focus on Key Words

Creative writers often express the same concept in different words. These writers want to focus on a visual image. If these writers repeat a word, readers can get snagged on the word instead of focusing on the image. The purpose of elegant variation in creative writing is to shift emphasis away from a particular word and to move it to the visual image.

In legal writing, we repeat the exact word for the same reason that creative writers do not do so. Our objective is not to create a mood or image. Instead, we want our readers to notice specific words because those words are the focus of our analysis in a precedent-based system, and the exact wording of the pre-

cedent controls. One of my friends in the legal writing community characterizes this exact wording of key terms as the “phrase that pays.”² The phrase that pays is the portion of a statute or the key phrase from a case that is pivotal to our analysis. By alerting readers to this exact wording, we guide them through the analysis.

We start guiding our readers through a step-by-step legal analysis, first with the statement of a legal rule and then with the application of that rule.³ When stating the rule, put the phrase that pays in quotation marks. Placing these key terms in quotes serves two purposes. First, as discussed above, it assures our readers of the accuracy of the tests chosen. Second, using quotation marks helps alert the readers to the significance of these terms. Don’t be tempted to use long block quotes. Readers have to sift through these long blocks in an attempt to uncover our point. Instead, do the work for the readers by distilling a block quote to only a few words or a short phrase.

In the application portion of an analysis, repeat the phrase that pays verbatim. This makes the connection between the legal precedent and the party’s situation explicit. If we vary the words, the readers may miss the point. However, do not repeat the quotation marks when using the phrase that pays in the application. If these words are quoted in the rule portion, their origin will be obvious, and the too frequent use of quotation marks numbs readers. An example of appropriate repetition of key wording follows.

The Baseball Act imputes knowledge to spectators of the “obvious and necessary” risks of observing baseball games. § 13-21-120(4)(a). Although Colorado has not addressed the risk posed by a foul ball, the California Supreme Court did in *Smith v. Jones*, 457 P.2d 98 (Calif. 1940).⁴ In *Smith*, a spectator assumed the risk of an errant foul ball that flew into the stands. *Id.* The *Smith* court reasoned that hitting the ball was “necessary to score” and once the ball was hit, it was “obvious” that the players could not always keep the ball from flying into the stands. *Id.* at 100. Thus, if Colorado follows the

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Smith reasoning, plaintiff here assumed the risk of the foul ball that hit her because that risk was both “obvious and necessary.”

How Much Repetition is Too Much?

Sometimes, we become frustrated because we have stated a point, but our audience has not gotten our message. We need to repeat so our audience will not miss an important message. On the other hand, too much repetition may irritate them or suggest they are dense. What is the balance? The answer isn't always clear, but here are a couple of guidelines.

1. Legal writers have an audience of very busy people. Generally, these readers want to understand the argument the first time through because they may not have the luxury of going back to read it again. Consequently, these readers will appreciate repetition that makes connections explicit. The deliberate repetition of key words and phrases will not irritate them because they will rarely notice it.

2. With respect to other portions of the brief, elegant variation has its place. In describing the facts, the emphasis generally is on the situation and not on specific words. Here, avoid using unnecessary repetition of words that will turn off readers.

Conclusion

The objective of legal writing is communication. By giving readers the exact wording of an authority, we can assure them that our argument is firmly based on that authority. Furthermore, in developing the analysis, we can help readers see the connections between the authorities and the party's facts by repeating the key terms when applying them. However, scrutinize and eliminate any repetition that does not forward a theme or illustrate a connection with the precedent. Variation provides relief and counterbalances the situations when repetition is both deliberate and needed. Play it again, Sam—but only if you have a good reason.

NOTES

1. DuVivier, “Play It Again, Sam: Repetition—Part I,” 30 *The Colorado Lawyer* 65 (Sept. 2001).
2. *E.g.*, Beazley, “How to Read a Writing Sample,” *Illinois Bar Journal* 615 (Nov. 1999).
3. One acronym for a structuring a precedent-based legal analysis is IRAC, which stands for Issue, Rule, Application, and Conclusion. See DuVivier, “Getting Organized: Part II,” 20 *The Colorado Lawyer* 1809 (Sept. 1991).
4. This case is fictional, so don't try looking it up. ■

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