The Scrivener: Modern Legal Writing
"Beholder" Reflections—Part III
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DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?
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This is the final column in a series addressing reader expectations for objective legal writing. In the January 2006 Scrivener,[1] I posted three samples of objective legal writing and asked readers to give me feedback through an online survey about which they preferred and why. The May and July columns[2] provided analysis of reader responses to introductory and rule explanation paragraphs. This column reports on reader reactions as to what many lawyers would argue is the most important part of a legal analysis: application of the legal rule to a client's facts.

Survey 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.

Reader Reflections

Although the rule application portion may be the most important component of a legal analysis, the survey suggests many individuals disagree about the best way for lawyers to construct it. Most readers preferred one of the introductory and rule explanation paragraphs over the other by a margin of two-to-one;[3] however, there was no clear "winner" for the rule application paragraph.

Readers expressed a slight preference for Sample 3B, but some admitted they chose 3B because they preferred the outcome in that sample rather than how the writer presented the rule application. (Section 3A concluded that the non-competition covenant may be valid because the potential plaintiff fits within the executive and management personnel exception in the Colorado statute; Section 3B found that she was supervised and therefore could not fall under the exception.)

Significantly, about half of those responding to the survey stated they did not have a strong preference, and in fact, did not like either sample very much. The remainder of this column explores some of the reasons for this result and addresses specific comments the readers had concerning the following:

1) introductory sentences;

2) references to precedent cases and facts from those cases;

3) use of citations when applying cases to client facts; and

4) conclusion sentences.

Introductory Sentences

Several readers found the structure of Sample 3A confusing, not so much because it started with a conclusion, but because they disliked the flow of the sentences following the conclusion. For example, one reader noted, "[It is] distracting to go straight from the conclusion in our case (first sentence) to the facts of one of the cited cases (second sentence). A transition (e.g., ‘Like the employee in Porter,’) would have been helpful." Similarly, another reader found the ricocheting between ideas too jarring: "Jumping back and forth from Travers to *Porter* and *Atmel* in A makes me mentally shift focus to remind myself who we are talking about where."

Many of the readers disliked the opening sentence of Sample 3B, as well. The primary complaint was that it was too long and contained confusing references to the precedent parties without enough context. Some readers also objected to the interruption of the parenthesis in the opening clause.

References to Precedent Cases and Facts from Those Cases

Although some readers noted that the samples were "OK," few thought they achieved the correct balance in using precedent cases in the rule application. Though "you need some facts unless you merely want a string cite," some readers stated that 3A repeated too many of the facts: "[T]he most important part of this section is to write the facts in such a way that I can tell for myself what the answer is, without the author having to beat me over the head with reminders of what the earlier people did or didn’t do."

In comparison, several readers preferred 3B, but felt it contained both too much and too little detail: "3B uses far too many names, without making clear when the memo is referring to a client employee and when it is referring to someone involved in a precedential case."

Perhaps what is most significant is that readers noted that the comparison of the client facts to the precedent facts is not as important as the comparison of the reasoning: "Both samples apply the law to the facts, but neither does a great job of explaining how the court's *reasoning* in those cases will drive the outcome in our case."

Use of Citations When Applying Cases to Client Facts

A few of the readers were put off by the use of case cites in the rule application portion of the analysis, considering them "unnecessary at this point in the memo." However, a slight majority of those who commented on this technique thought that "quick citation" in the rule application section can be helpful to indicate "where the position is supported in the [precedent] opinion." However, as with the previous comments, the readers noted that "[c]itations alone aren't sufficient. 3B would be better if it indicated why the cases are cited."

Conclusion Sentences

Many of the readers liked conclusions both at the beginning and end of the rule application section and felt the conclusions used in the samples were "good and powerful in both examples." Some felt the opening sentence in Sample 3A was better than in 3B, "but both should proceed to the conclusion (e.g., 'Travers was unsupervised and in charge at Western, therefore she qualifies as management personnel against whom a non-competition covenant may be enforceable.' 3B's would be better if it deleted the first clause."

The majority of responses favored the final conclusion in Sample 3A—some because it was less absolute, and some "because it grounds the conclusion in the controlling statute." In contrast, some readers felt that Sample 3B provided more basis for the conclusion, but that it did not take "the analysis to the ultimate conclusion: 'Travers is not management or executive personnel under the provisions of the Statute, and therefore the non-competition covenant may not be enforced against her.'"

Conclusion

Overall, the survey can serve as an eye-opener for legal writers. Although objective legal analysis is something that lawyers communicate every day, legal audiences have some widely differing opinions about the correct form for expressing it. Despite this lack of consensus, the good news is that many of the techniques illustrated are effective if writers use them properly. Writing is an art, not a science, and the artist must find the right balance to achieve success.

Thank you, again, to the readers who participated in the survey. I appreciate your valuable feedback on and encouragement of my efforts to give this "rare bit of useful instruction."

NOTES

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

2. DuVivier, "'Beholder' Reflections—Part I," 35 *The Colorado Lawyer* 95 (May 2006); DuVivier, "'Beholder' Reflections—Part II," 35 *The Colorado Lawyer* 93 (July 2006).

3. *See id.*