

The Scrivener: Modern Legal Writing
Sorting Things Out—Which, That, Then, Than, When, Where
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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 or call her at (303) 871-6281.

The May 2005 column addressing "which" and "that" evoked a flurry of comments about additional issues.¹ This column responds to the reader questions that column spawned.

More on "Which" and "That": Eliminating Them Completely

Question:

"After reading your column in the current edition of *The Colorado Lawyer*, I wanted to share a thought with you. I was taught there are many instances where 'that' or 'which' are not necessary at all. For example, the question from your reader could have been: 'Here's a question I've wondered about for some time,' instead of 'Here's a question that I've wondered about for some time';² or 'The donations from large law firms must go to the 2005 Scholarship Fund,' instead of 'The donations that come from large law firms must go to the 2005 Scholarship Fund.'³

"I believe people would improve their writing by looking for 'that' and 'which' and considering whether they are needed at all. Many times, I can eliminate them. I'd be curious as to your views on this."

—Mark S. Cohen

Answer:

I agree completely and often give this advice as well as follow it in my own writing. We should go on "that" hunts, as well as on "which" hunts, and ferret out as many as we can.

Moving from "Which" and "That" to "Than" and "Then"

Question:

"Thank you for the article on 'which' or 'that.' I have been struggling with the distinction on a daily basis. Have you ever done an article on 'than' and 'then'?"

—Anonymous

Answer:

Although this distinction is sometimes troublesome, I can answer it here instead of dedicating an entire column to it. Most simply stated, use "then" for time and "than" for comparisons. To elaborate a bit, "then" is an adverb, usually meaning "at the same time" or "next in order or time."⁴ Confusion can arise when "then" is combined with a conjunction to denote a different time or instance, but it is the conjunction, not the use of "then," that elicits any comparison.

Examples:

- The witness completed her testimony, and *then* stepped down from the stand.
- I found the story compelling, *but then* I have suffered in a similar way.⁵

In contrast to "then," the word "than" most often serves as a conjunction in formal writing.⁶ Use it for comparative expressions such as "taller than," "greater than," "more than," and "rather than."⁷ The pronoun following "than" should be in the nominative or objective case, depending on its role in the resulting clause, even if several of the words in that clause are not explicitly stated.

Examples:

- I regard her more highly than he. (The nominative pronoun "he" suggests the comparison is between how I regard her and how "he" does.)
- I regard her more highly than him. (The objective pronoun suggests the comparison is between the objects of the sentence. Thus, if fully expressed, it would state, "I regard her more highly than I regard him.")⁸

On to the Question of Using "Different From" or "Different Than"

Question:

"Another distinction that confuses me is which preposition to use after the word 'different.' Should I write 'different from' or 'different than'?"

—Anonymous

Answer:

The previous answer notes that the word "than" usually serves as a conjunction, but it also can be used as a preposition in informal writing and speaking.⁹ Because "different than" is less accepted, however, it is better to be safe by using "different from," which is always correct.¹⁰ Avoid the risk of distracting those readers who see "then" as only a conjunction by editing out the less legitimate "different than" construction.

Examples:

- That attorney's approach is *different from* mine.

- Okay, but better to avoid: That attorney's approach is *different than* mine.

Deciding Between "When" or "Where"

Question:

"When I was young, there was a popular song titled 'Where or When?' The first words are 'I don't know where or when.' I'm not young anymore, and the question remains—where or when—especially among members of the Supreme Court Civil Rules Committee. (I'm a member.)"

"A sentence in a proposed Rule of Civil Procedure reads: 'In any civil case which is concluded and where all related orders have been submitted and ordered by the court' . . . Query: Is 'where' proper or should it be 'when'?"

—David Michael

Answer:

Few of my reference books address this distinction, but one that does states, "When indicates a point in time; where indicates a physical place."¹¹ Furthermore, the dictionary admonishes, "In careful English, WHERE is not used in place of WHEN [or] . . . to replace THAT."¹² Consequently, it is important to investigate your "wheres" to see if they truly represent a place. If not, substitute an appropriate alternative.¹³

Examples:

- *When* (not "where") e-filing is mandatory, the court may . . .
- In any civil case that¹⁴ is concluded and *in which* (not "where") all related orders have been submitted and ordered by the court . . .

Conclusion

Mark Twain once said, "The difference between the right word and the almost right word is the difference between lightning and the lightning bug."¹⁵ This axiom is especially true when you jolt readers with the wrong word in a substantive context. However, using the wrong word grammatically also can cloud the argument and undermine your case.

NOTES

1. DuVivier, "Going on a 'Which' Hunt," 34 *The Colorado Lawyer* 53 (May 2005) (*hereafter*, "Which Hunt").

2. *Id.*

3. *Id.* at 54.

4. Stein, ed., *The Random House Dictionary of the English Language*, unabridged ed. (New York, NY: Random House, 1971) (*hereafter*, "Random House") at 1471.

5. *See, e.g., id.*

6. Garner, *The Redbook, A Manual on Legal Style* (St. Paul, MN: West Group, 2002) (*hereafter*, "*The Redbook*") at § 10.15(a), 132.

7. Enquist and Oates, *Just Writing* (Gaithersburg, NY: Aspen Law & Business, 2001) (*hereafter*, "*Just Writing*") at 307.

8. Samples directly from *The Redbook*, *supra*, note 6 at § 10.15(a), 133.

9. *Id.* at § 10.15(b), 133.

10. Ray and Ramsfield, *Getting It Right and Getting It Written*, 3rd ed. (St. Paul, MN: West Group, 2000) at 112.

11. *Id.* at 406.

12. *Random House*, *supra*, note 4 at 1626.

13. *E.g.*, *Just Writing*, *supra*, note 7 at 308 (Advises using "a case in which," instead of the expression "a case where," because a case is not a place.)

14. The language of the rule in the question uses "which." However, "that" instead of "which" is appropriate because there are no commas and the clause "that is concluded" restricts the types of civil cases to which the rule applies. See "Which Hunt," *supra*, note 1 at 53.

15. Benardete, ed., *Mark Twain, Wit and Wisecracks* (White Plains, NY: Peter Pauper Press, Inc., 1998).