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The Scrivener: Modern Legal Writing
Going on a "Which" Hunt
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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.

This column addresses the following question from a reader about the use of "which" and "that":

KK: Here's a question that/which I've wondered about for some time. What is the proper use of the words "that" and "which"? I understand their use in the context of "Which car is yours?" and "It's that red one." However, which word is proper in my first sentence and how do I know when to use one or the other?

"Which" and "That" as Adjectives

The words "which" and "that" are tricky because they can serve several functions. As the question above indicates, few of us have trouble when we use them as adjectives. "Which" indicates uncertainty and is often in a question.1 In contrast, we should use "that" when we are pointing out a specific person or item.2

Examples:

Which car is yours?

"Which" is used as an adjective in a question.

I am uncertain about which car is yours.

"Which" is used as an adjective in a declarative sentence.

That car is mine.

"That" is used as an adjective in a declarative sentence.

"Which" and "That" as Pronouns

"Which" and "that" also can serve as pronouns, replacing a noun in the original or in a previous sentence that is their "antecedent" (roughly translated as noun "going before").3 We may use "that" as the pronoun when the antecedent is an animal, thing, or person. Although we may use "which" for animals or things, it is not appropriate for people. Instead, "who" is used to refer only to people.4 Again, these distinctions are

rarely what troubles writers the most. Instead, the biggest concern is whether to use "which" or "that" in a pronoun clause.

To decide whether "that" or "which" is appropriate, we must first determine whether the pronoun clause introduced is "restrictive" or "nonrestrictive." Use "that" as the pronoun for introducing a restrictive clause. The clause is restrictive because it restricts or "narrows the range of items covered by" the antecedent.5 In contrast, "which" is the pronoun for introducing nonrestrictive clauses because it does not define the antecedent and, in fact, is not necessary to understand the full meaning of the sentence.

Examples:

The lawn mower that is broken is in the garage.

Use "that" for the restrictive pronoun because it tells which mower of perhaps several mowers is in the garage.

The lawn mower, which is broken, is in the garage.

In this sentence, the use of "which" as a nonrestrictive pronoun indicates that only one mower is in question. The clause adds a nonessential fact about the mower: it is broken.6

Punctuating "Which" or "That" Clauses

Few of us are meticulous about the distinction between "that" and "which" when speaking because we can clarify our meaning with inflection or further explanation.7 However, as lawyers, we have an obligation to avoid creating ambiguity that may hurt our clients, especially when we are drafting legal documents.8 Punctuation can help guide us to the correct use of the words.

Restrictive "that" clauses are an essential part of the sentence and should not be set off by commas. On the other hand, nonrestrictive "which" clauses are ones that we could "lift[] from the sentence without changing the essential meaning."9 Consequently, commas are appropriate at the beginning and end of a "which" clause and "work like parentheses" to indicate that the enclosed information is expendable.10

Most grammar-checking software can help identify "which" or "that" constructions, but it provides only a crude guide. Such software is programmed to prompt writers to substitute a "which" when they place a comma before a "that." The software does not, however, catch all uses of the word "which," nor can it substitute for the writer's discretion. The following illustrates how only the writer can truly know which word is appropriate in a particular context.

Examples:

The donations that come from large firms must go to the 2005 Scholarship Fund.

According to standard grammatical conventions, this sentence says that out of the pool of all donations, only the restricted subcategory of donations from large firms must go into the 2005 Scholarship Fund. Other donations, perhaps from individuals and smaller firms, may go into other funds or be used in other ways.

The donations, which come from large firms, must go to the 2005 Scholarship Fund.

In contrast to the first example, this sentence clearly indicates that all donations are to go to the 2005 Scholarship Fund. It is just an aside that these donations happen to have come from large firms.

Proposed Solutions

So what is the answer to my reader's question? Although the lack of commas in the first sentence might indicate "that" is the appropriate choice, I would guess that the writer of the question instead meant to insert the clause as an aside. Consequently, "which" would probably be the better choice. Here are two possible interpretations of the sentence.

• *Here's a question, which I've wondered about.* (The sentence could be complete without the "which" clause: *Here's a question*. The fact that the writer has wondered about it is an aside.)

• *Here's a question that I've wondered about.* (The "that" clause restricts the question only to the one the writer has wondered about. In other words, among all of the questions the writer may have, the "wondered about" category is a subset. Using "that" seems to fit better if the clause defined a particular type of question: *Here's a question that addresses relative pronouns.*)

Conclusion

Whenever we review our work, it is important as attorneys to go "*which* hunting."11 As authors, only we can determine what we are trying to convey, so our intended meaning should guide us in deciding whether a "which" or "that" is the appropriate choice. However, if we are conscientious about these words, we can avoid creating ambiguities, and our readers should be able to distinguish quickly between necessary and unnecessary information.12

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NOTES

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1. *See* Stein, ed., *The Random House Dictionary of the English Language*, unabridged ed. (New York, NY: Random House, 1971) (*hereafter*, "*Random House*") at 1626.

2. *See id.* at 1469.

3. *Id.* at 62.

4. *See* Enquist and Oates, *Just Writing* 308 (Gaithersburg, NY: Aspen Law & Business, 2001) (*hereafter*, "*Just Writing*"); Garner, *The Redbook, A Manual of Legal Style* § 10.20, 135-36 (St. Paul, MN: West Group, 2002); Sebranek, Kemper, and Meyer, *Writers INC* (Wilmington, MA: Write Source, 2001) (*hereafter*, "*Writers INC*") at 500.

5. Ray and Ramsfield, *Getting It Right and Getting It Written*, 3rd ed. (St. Paul, MN: West Group, 2000) (*hereafter*, "*Getting It Right*") at 369.

6. Examples are taken verbatim from Strunk and White, *The Elements of Style*, 4th ed. (Needham Heights, MA: Allyn & Bacon, 2000) (*hereafter*, "*Elements*") at 59. Parenthetical commentary is modified from the original.

7. *Random House, supra*, note 1 ("The traditional rule is that THAT is used to introduce restrictive relative clauses and WHICH to introduce nonrestrictive relative clauses. . . . In practice, however, this distinction is made more often in careful writing than in ordinary speech. . . ."). *See also Just Writing, supra*, note 4 at 308.

8. *Getting It Right, supra*, note 5 at 369.

9. *Id.*

10. *Id.*

11. *Elements, supra*, note 6 at 59.

12. *Writers INC, supra*, note 4 at § 459.2.