

The Scrivener: Modern Legal Writing



The Common Comma: Part II

by K.K. DuVivier

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This column shows how a comma, or the lack of one, can significantly change your meaning. It also addresses several comma issues raised by readers, but not fully resolved by my previous column on commas.¹

Restrictive and Nonrestrictive

Restrictive phrases or clauses are needed in a sentence because they restrict, or limit, the content of the words they modify. In contrast, nonrestrictive phrases or clauses are not necessary to the basic meaning of a sentence; they provide additional, nonessential information.

Although the restrictive and nonrestrictive labels are easy to confuse, the appropriate punctuation for each is critical. Commas would interrupt the flow of essential information in a restrictive phrase or clause and, therefore, should not be added. However, you need only look at the prefix of *nonrestrictive* to remember that the rule for a nonrestrictive phrase or clause is the inverse: when the information is *not* needed, commas *are* required.

Example (restrictive phrase): The word processor with the color monitor is easy to use.

Example (restrictive clause): The word processor that has a color monitor is easy to use.

Example (nonrestrictive phrase): The word processor, with the color monitor, is easy to use.

Example (nonrestrictive clause): The word processor, which has a color monitor, is easy to use.

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through *The Scrivener* column. Send your questions to: K.K. DuVivier, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401.

By choosing restrictive phrasing in the first two examples, the writer conveys one message: that there are several word processors and that the information about the monitor is necessary to identify which word processor is at issue. In contrast, by setting off the information with commas² in the nonrestrictive phrasing, the writer conveys a different message: that only a single word processor is at issue, and the monitor information is merely an added detail.

This word processor example shows how misuse of the restrictive or nonrestrictive phrasing can blur otherwise clear ideas. However, the following example shows how the problem can transform from a slight blur into miscommunication of the fundamental message of the sentence.

Example (restrictive): Attorneys who intentionally prolong litigation for personal gain misuse the legal system.

Example (nonrestrictive): Attorneys, who intentionally prolong litigation for personal gain, misuse the legal system.³

The first sentence is a less serious indictment. It restricts the attorneys who misuse the legal system to a limited group—those who intentionally prolong litigation for personal gain. The second sentence broadens the indictment significantly. Instead of restricting its condemnation to a limited group of attorneys, it says that *all attorneys* intentionally prolong litigation for personal gain. Thus, the placement of commas here is much more than a formality.

The Which-That Rule

Reader Gunnar Andersson, from Colorado Springs, wrote to ask for clarification of a rule about using “which” or “that”

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to introduce nonrestrictive or restrictive clauses. Note that the word processor illustrations above use the standard convention: "that" to introduce the restrictive clause and "which" to introduce the nonrestrictive clause.⁴

A mnemonic for this rule is that a writer should go on a "which" hunt—searching out all of the "whiches" that introduce restrictive clauses and changing them to "thats."⁵

The problem with a "which" hunt, however, is that our writing might better be improved by a "that" hunt. Lawyers tend to overuse "that." Sometimes "that" can be eliminated without need for a replacement (*example in the sentence after next*). Other times, substituting a "which" for a "that" could be a welcome respite, if it were permitted.

There is some indication that (*this "that" might be eliminated without replacement*) the Which-That Rule is evolving, at least in contexts other than legal writing. "Which" is still universally used to introduce nonrestrictive clauses, but some sources now say that both "which" and "that" correctly may be used to introduce restrictive clauses.⁶ Legal writing is a conservative medium, however, and recent texts advise "careful writers" to adhere to the traditional rule of using only "that" for restrictive clauses and "which" for nonrestrictive.⁷

Commas in a Series

In footnote 9 of the last column,⁸ I mentioned that many publishers, including *The Colorado Lawyer*, omit the "serial comma" before the conjunction in a series.⁹ I suggested that omission of this comma did not impact meaning by including footnote 9 under the category of "Comma Rules Readers Expect," rather than "Comma Rules Affecting Clarity and Meaning." I noted that publishers omit the serial comma based on the concept of "open punctuation" that requires "using only as much punctuation as is necessary to make the meaning clear."¹⁰

Don Wilson, Assistant City Attorney for the City and County of Denver, wrote to illustrate that the serial comma is not just expected punctuation; sometimes it is necessary to make the meaning clear. Using an excerpt from an article by Judge Kane,¹¹ Mr. Wilson showed how rigid adherence to the rule of eliminating the serial comma can cause imprecision.¹²

Amending the Constitution with a Comma?

Inserting a comma where it does not belong can be just as inaccurate as omitting one where it clearly does belong. Both may have serious legal consequences.

For example, Article II, § 14 of the Colorado Constitution inserts a comma after the word "other" and before the phrase "for agricultural, mining, milling, domestic, or sanitary purposes."¹³ Under standard rules of grammar, this comma would indicate that the "agricultural, mining, milling, etc." restriction applies to both of the preceding exceptions—effectively restricting the uses of a private way of necessity to the limited purposes listed.

The related statute on eminent domain uses virtually identical wording, but omits the comma.¹⁴ Without the comma, the restriction applies only to the preceding phrase: "for reservoirs, drains, flumes, or ditches on or across the lands of others. . . ."¹⁵

The Colorado Court of Appeals did not address the comma itself, but effectively supported the statute version by stating, "private ways of necessity are . . . separate and distinct from those for reservoirs, drains, flumes, or ditches, and . . . [were]

not, as were the latter, limited in use to easements for agricultural, mining, milling, domestic, or sanitary purposes."¹⁶

Professor Dale Oesterle, from CU Law School, alerted me to another example of comma misuse—in Article II, § 1 of the United States Constitution. The comma after "United States" creates the unworkable impression that candidates may not be eligible to run for the presidency unless they were born "at the time of the Adoption of this Constitution."¹⁷

Thus, the comma is no small matter, despite its size.

Conclusion

Do not let the commonness of the comma lull you into underestimating its potential impact. Choose your commas carefully. Also remember that tighter sentences create less need for commas. If you find yourself making several comma decisions in a single sentence, the sentence probably is too convoluted. Keep your readers focused on the sentence's precise message, not on its punctuation.

NOTES

1. DuVivier, "The Common Comma: Part I," 24 *The Colorado Lawyer* 2151 (Sept. 1995).

2. "Set off" means that the whole phrase or clause is separated from the rest of the sentence with commas. When the material is set off within the body of a sentence, the commas almost always come in pairs—one at the beginning and one at the end. Do not fall into the common trap of using just one half of the pair.

Example (incorrect): Rebecca Love Kourlis, a respected practitioner was appointed as a justice for the Colorado Supreme Court.

Example (correct): Rebecca Love Kourlis, a respected practitioner, was appointed as a justice for the Colorado Supreme Court.

3. Example from Oates, Enquist and Kunsch, *The Legal Writing Handbook* 785 (Boston, MA: Little, Brown & Co., 1993).

4. "[C]lauses introduced by *which*, *when*, and *where* are nonrestrictive. . . ." Strunk & White, *The Elements of Style* 4 (New York, N.Y.: MacMillan Publishing Co., Inc., 1979); see also Ray & Ramsfield, 2d ed., *Legal Writing: Getting It Right and Getting It Written* 309-10 (St. Paul, Minn: West Pub., 1993).

5. Editors are cautioned not be overzealous in such hunts, because "sometimes only the writer will understand the meaning well enough to know whether a clause should be introduced by *which* or *that*." New York Public Library, *Writer's Guide to Style and Usage* 139-40 (New York, N.Y.: Harper-Collins Publishers, Inc., 1994).

6. New York Public Library, *supra*, note 5 at 138-40; Faulk & Mehler, *The Elements of Legal Writing* 72 (New York, N.Y.: MacMillan Publishing Co., Inc., 1994).

7. Oates, Enquist & Kunsch, *supra*, note 3 at 786; see also Ray & Ramsfield, *supra*, note 4 at 309.

8. DuVivier, *supra*, note 1 at 2152.

9. I also noted this might be the minority view, at least among lawyers, who traditionally include the serial comma. *Id.*

10. Oates, Enquist & Kunsch, *supra*, note 3 at 777.

11. "Invariably there is malnutrition. Shrunken eyes, cavernous sockets, bodies prematurely aged, flimsy arms, sagging skin and faces without a trace of expression." Kane, 24 *The Colorado Lawyer* 2149 (Sept. 1995).

12. Wilson notes, "At first blush, I thought we had sagging faces. You and I know Judge Kane is no sloppy writer. Therefore, I attribute the imprecision to the open-punctuation phenomenon. . . ."

13. Article II, § 14 of the Colorado Constitution provides as follows: Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the land of others, for agricultural, mining, milling, domestic, or sanitary purposes. [*Underlining added.*]

14. CRS § 38-1-102(3):

Under the provisions of this section, private property may be taken for private use, for private ways of necessity, and for reservoir, drains, flumes, or ditches on or across the lands of others for agricultural, mining, milling, domestic, or sanitary purposes. [Underlining added.]

15. *Id.*

16. *Crystal Park Co. v. Morton*, 146 P. 566, 569 (Colo. App. 1915); see also *Bear Creek Development Corp. v. Dyer*, 790 P.2d 897 (Colo. App. 1990).

17. "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President. . . ." U.S. Const. Art. II, § 1. [Underlining added.]

Office of Legislative Legal Services Survey PROPOSED FORMAT CHANGE IN THE OFFICIAL COLORADO REVISED STATUTES

A committee of the Colorado General Assembly is considering a proposal to change the format of the official statutes prepared in accordance with section 2-5-105, C.R.S., and printed and distributed by Bradford Publishing. The statutes are currently printed in a hardbound set with red covers and are supplemented annually with pocket-part supplements and periodic replacement volumes.

The proposal contemplates the publishing of an annual, fully annotated, softbound set of statutes in lieu of the current hardbound sets.

While a softbound set may better meet the requirements of government officials and the general public, the committee believes that the needs of the practicing bar should be considered. **To provide the committee with guidance, your views are being solicited.** Would you please take a moment to answer the following:

If a 13 volume, fully annotated, softbound set was provided annually at a cost between \$110 and \$140 (about the same as or a little more than the current cost of approximately \$115 for the annual pocket-part supplements and replacement volumes), would you purchase such a set?

Yes No

If the format is changed to softbound, would you be more likely to purchase a CD-ROM version or other electronic version rather than the softbound?

Yes No

If the format is changed to softbound, would you be more likely to purchase an unofficial hardbound version than the softbound?

Yes No

Would you prefer that the state continue to provide the hardbound set?

Yes No

Even if the state continues to provide a hardbound set, would you be more likely to purchase a CD-ROM version in lieu of the hardbound set in the future?

Yes No

Comments: _____

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