March, 2004

That's the Way It Is: "That" and "Which" in Legal Writing

Gerald Lebovits
"DON'T COME BACK WITHOUT A REASONABLE OFFER"

Inside

Electronic Documents
Matrimonial Agreements
Psycho-Social Reports
Deception vs. Inaccuracy
That’s the Way It Is: “That” and “Which” in Legal Writing

BY GERALD LEBOVITS

Legal writing which depends on precision is all about eliminating ambiguity. Lawyers should strive to write clearly.

This column is dedicated to explaining why the preceding sentence should read: Legal writing, which depends on precision, is all about eliminating ambiguity. Lawyers should strive to write clearly.

That

Use “that” as a structural device to aid understanding; otherwise delete. Consider this ambiguous sentence: “The lawyer said on Monday he will write the brief.” Is it “The lawyer said that on Monday he will write the brief?” Or “The lawyer said on Monday that he will write the brief?”

Structural “that”:

- “The People alleged defendant committed murder.” Becomes: “The People alleged that defendant committed murder.” (The People cannot allege a defendant.)
- “The court held the 500-pound man was in contempt.” Becomes: “The court held that the 500-pound man was in contempt.” (The judge did not hold a 500-pound man.)
- The Gotham Writers’ Workshop Mission (Copyright Gotham Writers’ Workshop, Inc., 2000): “We believe anyone can write.” Becomes: “We believe that anyone can write.” (The Workshop does not believe anyone or everyone. Try promising the company that you will pay when the course is over.)
- “The Government decided the question did not need to be decided.” Becomes: “The Government decided that the question did not need to be decided.” (The Government did not decide the question.)

Nonstructural “that”:

- “The point that is [or points that are, that were] being made here is not to be wordy.” Becomes: “The point [or points that are, that were] being made here is not to be wordy.”
- “The point that he made is not to be wordy.” Becomes: “The point he made is not to be wordy.”

The discursive “that.” Use “that” to distinguish between direct and indirect discourse. Direct discourse: “The senior partner said, ‘Bill researched the issues.’” Indirect discourse: “The senior partner said that Bill researched the issues.”

Question: Can you string eight “that’s” together in one sentence? Answer: “The legal-writing teacher said that that ‘that,’ that ‘that’ that ‘that’ referred to, is a triply vague referent.” (Written differently, the sentence might read: “Said the legal-writing teacher: ‘The ‘that,’ which is the ‘that’ to which the ‘that’ refers, is a triply vague referent.’”)

The extra “that.” Avoid losing parallel structure by adding an unnecessary “that” in a string of clauses: “The paralegal explained that although she will draft the contract, that no one will read it.” Becomes: “The paralegal explained that although she will draft the contract, no one will read it.” The extra “that” is called a sentence extra.

The double “that.” “That that” becomes “that this” or “that the.”

That vs. Who

Differentiate between “that” (or “which”) and “who”: “Who” refers to people and to named animals (“Sox, the ex-First Cat”) and animals that have special qualities (“Mighty Mouse”). “That,” “which,” and “it” refer to things, entities, concepts, and animals. “He’s a man that always does the right thing.” Becomes: “He’s a man who always does the right thing.”

That vs. Which

Learn the difference between “that,” a demonstrative pronoun (“that law-review article”), and “which,” an interrogative pronoun (“which law-review article?”). Learning the difference will also help you use the following correctly: “who,” “whom,” “whose,” “whoever,” “whichever,” and “whatever.”

Go which hunting. “That” is restrictive (or defining). “Which” is not restrictive (or nondefining).

A tip: If the word or concept before the “that” or the “which” is one of several, use “that.” If the word or concept before the “that” or the “which” expresses a totality, use “which.”

Question: That or which? “Judge X must impose a sentence that [or, which] she does not want to impose.” Answer: If Judge X, who has several sentences to impose, does not want to impose

CONTINUED ON PAGE 60
only one of them, the correct word is “that.” If Judge X has but one sentence and she does not want to impose it, use “, which,” placing a comma before the “which.”

Question: That or which? “I’m involved in litigation that [or , which] troubles me.” Answer: If you’re involved in lots of litigation and only one piece of it troubles you, it’s “that.” If you’re involved in one piece of litigation only, and that one piece troubles you, it’s “, which,” placing a comma before the “which.”

“That” & “which.” “That which becomes “what”: “That which does not kill us makes us strong.” Becomes: “What does not kill us makes us strong.”

Which

The modifying “which.” Keep modifiers next to the words and thoughts they modify: “Family Court rendered judgment for respondent which the Second Department reversed.” Becomes: “Family Court rendered a judgment that the Second Department reversed.” Or “The Second Department reversed Family Court’s judgment for respondent.”

The hard-working “which.” Don’t make your “whicthes” work too hard. The antecedent becomes vague as the relative becomes remote: “Respondent stared wildly around the courtroom, which was noticeable to everyone.” (What was noticeable? Respondent’s staring wildly? The courtroom?) One solution is to divide the sentence into two: “Respondent stared wildly around the courtroom. Everyone noticed his wild stares.” A better solution is to rearrange the sentence: “Everyone noticed that respondent stared wildly around the courtroom.”

The elegant “which.” Use the elegant “which” to replace the second “that”: “This is the format [delete nonstructural that] the associate uses and which [not that] the client adopted.”

The appositive “which.” Excise your “which” after an appositive: “This opinion, which was written for publication, is a masterpiece.” Becomes: “This opinion, written for publication, is a masterpiece.”

The legal “which.” Withdraw your legal “whicthes”: “The parties entered into a contract in March 1955, which contract is binding.” Becomes: “The parties entered into a binding contract in March 1955.”

Knowing the difference between “that” and “which” separates the master from the apprentice. And that’s not all, folks: Using that “that” correctly helps the reader understand which “which” is which. Which of us could disagree with that?

GERALD LEBOVITS is a judge of the New York City Civil Court, Housing Part, in Manhattan. An adjunct professor at New York Law School, he has written Advanced Judicial Opinion Writing, a handbook for New York’s trial and appellate courts, from which this column is adapted. His e-mail address is GLebovits@aol.com.