Ending *That* and *Which* Trauma

A NEW COLUMN on the Legal Written Word

Dear Drafting Diva,

A few years ago, I worked for an attorney who instructed me—in the interest of brevity—to delete the word *that* in all motions and briefs I drafted for him. Some of those *that*s seemed necessary to me, though. Was she right? Should I strive to delete the word whenever possible?

—Perplexed in Phoenix

Dear PIP,

For heaven's sake, don't throw *that* out with the bath water. When in doubt, include the much-maligned word. Legal writers are taught to omit needless words. Some writers take this to the extreme, however, randomly deleting *that* wherever it is found. Although *that* often can be deleted—"the letter he dictated" rather than "the letter *that* he dictated"—many deletions cause troublesome miscues.

For instance: "The attorney moved the car should be awarded to the husband." This sentence creates an initial miscue telling the reader that the attorney actually moved the car someplace.

In his book *The Winning Brief,* legal writing commentator Bryan Garner defended the word:

"*That* is the most wrongfully persecuted word in the English language. Some people want to murder it wherever it appears. But the word is quite useful and even necessary. … True, you can sometimes advantageously cut the word—'the documents she offered' rather than 'the documents that she offered'—but the cuts often create gross miscues."

Dear Drafting Diva,

Years ago, I clerked for a judge who changed almost all my *which*es to *that*s. I have never learned the difference between

the two words and, thus, continue to experience trauma when faced with a choice between the two.

—**Help My Healing**

Dear Healing,
This can be a tough one. Please thank your sixth-grade teacher if she taught you to diagram sentences; a good background in sentence structure will make this lesson a breeze.

That is used to introduce a restrictive or defining clause, one that defines the noun it is attached to and cannot be omitted. *Which*, however, introduces a nonrestrictive or parenthetical clause, one that adds information but could be omitted without changing the meaning of the sentence. In general, *that* is underused, and *which* is overused.

In *The Elements of Style,* E. B. White and William Strunk cautioned writers to use these two words with care: "Careful writers, watching for small conveniences, go *which*-hunting, remove the defining *which*es, and by doing so improve their work."

Bryan Garner bluntly states that the distinction between these two words "has become the acid test for the careful legal writer." In *The Winning Brief,* he offers two examples:
• All the cases that were decided before the 1995 legislation support this argument.
• All the cases, which were decided before the 1995 legislation, support this argument.

Here the difference in meaning between the two sentences is obvious. In the first sentence, the writer implies that there are cases decided after 1995 that do not support the argument. In the second sentence, all the cases support the argument. You could leave out the *which* clause in the second sentence and not change the meaning.

I can suggest two shortcuts to get this right. If you use *that* in every circumstance in which it sounds correct to do so, you will rarely err. Another way to skirt error is to remember that in most instances there is a comma before *which*. If it doesn't seem right to put a comma beforehand, you should probably be using *that*. ◣

Suzanne Rabé is an Associate Clinical Professor of Law and Director of Legal Writing at the James E. Rogers College of Law in Tucson.