



# *Defining Terms of Art in Legal Writing*

BY ROBERT FUGATE

Each profession seems to come with its own unique set of technical words. This is as true of lawyers as it is of doctors, architects, and engineers. When a group declares itself to be a profession, it immediately coins its own jargon to prove it. As lawyers, we frequently use our own terms of art as well as those from other professions.

Although terms of art are often necessary in legal writing, many readers will not know the meanings of these terms and will not take time for a trip to the dictionary. Advocates should remember that judges — and other lawyers — are not blessed with an all-knowing vocabulary. Moreover, many technical terms are not found in standard dictionaries or in the outdated dictionaries found in many of our offices. Defining technical terms ensures that your message is conveyed to your reader.

Technical terms can be defined quickly and unobtrusively with footnotes, parenthetical phrases, phrases set off by dashes, dependent clauses, and follow-up sentences. In the following examples, legal writers have efficiently translated terms of art for their readers. Because many of the examples use footnotes to define terms, I have replaced the superscripted numbers in the original texts with asterisks to distinguish from the endnote citations provided for all examples.

### Medical Terms

Medical terms of art should almost always be defined in legal writing. If it is necessary to use the term, it is necessary that the reader understand it. In the following examples from court opinions, the authors used a dependent clause, a follow-up sentence, a parenthetical, and a footnote to define medical terms.

They allege that their mother died from mesothelioma, which is cancer of the lining of the lungs, caused by exposure to asbestos.<sup>1</sup>

Indications of shoulder dystocia were present. Shoulder dystocia occurs when an infant's shoulder becomes lodged against the mother's pelvic bone.<sup>2</sup>

For example, he first stated that Mrs. Ruiz had only a chemical jaundice (meaning not clinically detectable) on September 15, 1994 and that he was good at judging jaundice in dark skinned people.<sup>3</sup>

Dr. McNair examined Garner on July 30, 1980, and testified that on that day Garner was experiencing respiratory problems, anxiety, severe headaches, labile hypertension,\* severe muscle weakness, and abdominal pain.

\* Labile hypertension means that Garner's blood pressure was going up and down.<sup>4</sup>

In my last (and favorite) medical example, the advocate used humor to show that big terms are sometimes used to hide small problems.

Appellee claims that as a result of his "fracture through medial aspect of distal end, first proximal phalanx" (more commonly referred to as a broken big toe) he has suffered or will suffer damages in the amount of \$500,000.00!<sup>5</sup>

### Manufacturing Terms

Manufacturing technology is another growth area of technical terms that should be defined. The first two examples, both from the Texas Supreme Court, involve tire manufacturing, and both use a follow-up sentence to define the term.

These belts, along with the other tire components, are assembled into a "green tire," to which heat and pressure are applied in a process called "vulcanization." This process causes the components in the tire, including the skim stock, to chemically bond with each other.<sup>6</sup>

Five years later, the Court defined "skim stock," saying:

The plaintiffs claim that "the defect with the Firestone tires is a skim stock deficiency, which causes a lack of adhesion between the steel belts in the tires and separation of the tread and steel belts." Skim stock is a specially formulated rubber compound that coats the steel belts in a steel-belted radial tire and through vulcanization holds them together.<sup>7</sup>

In the next example, the Court used a dependent clause to define a technical term in a products liability case.

In addition to the evidence discussed by the court of appeals, Crane points to expert testimony that says there was "excessive excursion," meaning there was too much movement permitted in the vehicle's restraint system and that the Crane garbage truck as a whole was defective.<sup>8</sup>

### Engineering and Construction

Cases involving engineering, architecture, and construction are also frequent flyers for mystical terms. In lieu of clairvoyance, footnotes were used to provide a clear vision for readers in the following examples.

He bases his negligence in law argument on Easter's alleged violation of the following: (1) an OSHA regulation requiring that a tag line\* be used in moving a load likely to require guidance ...

\* A tag line is a line attached to a load that can be used to direct the load's movement. The use of a tag line enables a person to stand on the deck and at a safe distance from the load while helping the crane operator in moving it. It thus minimizes the danger that the load will strike the person directing its movement.<sup>9</sup>

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As he fell to the ground a few feet below, Olivo landed on his back on one of several drill pipe thread protectors that had been left on the ground during the previous shift.\*

\* A thread protector is a cap that screws onto the end of a drill pipe to protect the threads during transport.<sup>10</sup>

### Scientific and Measurement Terms

Scientific and measurement terms also provide fodder for clarification in legal writing. A quick reminder defining these terms may help the reader.

Mr. Pritsker, the chemical engineer, testified that he was the director of the Dallas Laboratories at Dallas, Texas; ... that the pH (a chemical term indicating the acidity or basicity of a solution) was found to be 8.9; ...<sup>11</sup>

Throughout this period, the average daily discharge ranged between 500 to 1200 barrels per day.\*

\* A barrel contains 42 gallons.<sup>12</sup>

### Latin Terms

By the time I started law school in 1990, legal writing instructors were actively discouraging the use of legalese, such as Latin phrases. Some Latin phrases are well known and, apparently, a permanent part of our dialogue. These phrases include *res judicata*, *res ipsa loquitur*, and *quid pro quo*. Latin phrases that are less well known should be defined when used. In the first example (from the Supreme Court), the Latin phrase goes undefined. While high courts can afford to leave readers scratching their heads, advocates must make their writing plain and clear on the first read. The Supreme Court example follows:

Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*.<sup>13</sup>

Other courts have found quick, efficient, and unobtrusive ways to define this same Latin phrase.

The maxim "*expressio unius est exclusio alterius*" is frequently applied in the construction of statutes, and it means simply that the "inclusion of the specific limitation excludes all others."<sup>14</sup>

We rely on the well-known canon of statutory construction, *expressio unius est exclusio alterius* — or, "the expression of one thing implies the exclusion of another."<sup>15</sup>

In the next example, the author used the Latin phrase and English translation interchangeably; the Latin phrase was used first, and the English translation followed in the next paragraph.

Texas, as well as most other states, has followed the rule laid down in *Bilbie v. Lumley*, 2 East 469, 102 Eng. Rep. 448 (1802), which established the doctrine of "*ignorantia*

*juris non excusat*." Only the states of Kentucky and Connecticut refused to follow this dogma. Smith, *Correcting Mistakes of Law in Texas*, 9 Texas L. Rev. 309 (1931).

Because of the legal maxim that ignorance of the law is no excuse, the courts have sometimes arrived at strained interpretations and distinctions when reviewing claims of mistake in an effort to reach a just result. ...<sup>16</sup>

As shown in the next example, dashes are also an effective tool for defining terms and phrases without sending your reader to a footnote.

The other arises out of the doctrine of *volenti non fit injuria* — voluntarily encountering a risk — which is regarded as a defense to all negligence actions.<sup>17</sup>

Many courts choose to define even common Latin phrases in their legal opinions. The first example gives a full definition of *res ipsa loquitur*; the second example gives a shorter definition, citing the earlier case.

Before discussing the method of submission, it is helpful to focus on exactly what is encompassed within the doctrine of *res ipsa loquitur*. The phrase, meaning "the thing speaks for itself," was used by Pollock, C. B., in discussing a barrel of flour which fell from the defendant's window, *Byrne v. Beadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Ex.1863), and has come to signify that in certain limited types of cases the circumstances surrounding an accident constitute sufficient circumstantial evidence of the defendant's negligence to support such a fact finding.<sup>18</sup>

*Res ipsa loquitur*, meaning "the thing speaks for itself," is used in certain limited types of cases when the circumstances surrounding the accident constitute sufficient evidence of the defendant's negligence to support such a finding.<sup>19</sup>

As these examples show, writers who translate Latin reach more readers.

### Evolving Legal Terms

Because legal terms evolve with case law, courts frequently define new or morphing terms. In the first example, the 5th Circuit began its opinion by discussing an evolving legal term.

Today we decide a narrow but not unimportant question regarding diversity jurisdiction in federal courts and the application of the doctrine of "improper joinder."<sup>\*</sup>

\* We adopt the term "improper joinder" as being more consistent with the statutory language than the term "fraudulent joinder," which has been used in the past. Although there is no substantive difference between the two terms, "improper joinder" is preferred.<sup>20</sup>

The second example, also from the 5th Circuit, includes a list of synonymous terms that have all been used for a single legal principle.

On August 10, 1984, before trial, Seaguard filed a motion to amend its answer to include the government contractor defense.\*

\* Courts have given this defense several different names, including the government contractor defense, *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985); the government contractor's defense, *McGonigal v. Gearhart Indus.*, 851 F.2d 774 (5th Cir. 1988) (using both government contractor defense and government contractor's defense); the government specifications defense, *Dorse v. Armstrong World Indus.*, 798 F.2d 1372 (11th Cir. 1986); and the military contractor defense, *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985). Throughout this opinion, we refer to the defense as "the government contractor defense" or as "the defense."<sup>21</sup>

### Non-Latin Legal Terms

Sometimes it is necessary — or at least helpful — to define common legal terms. The definition of a critical term can help frame the legal analysis, as demonstrated by the following examples:

The two elements of proximate cause are cause in fact and foreseeability. *City of Gladewater v. Pike*, 727 S.W.2d 514, 517 (Tex. 1987). "Cause in fact" means that the act or omission was a substantial factor in bringing about the injury, and without it harm would not have occurred. ...<sup>22</sup>

In the next example, a Canadian court defined the term "natural forum" as part of its analysis, saying:

While he held that British Columbia was a more natural forum than Texas, he also held that the United States was a natural forum and that some state other than Texas was a more natural forum but did not specify which state that was. ... The term "natural forum" is by definition the forum that has the closest connection with the parties and the case.<sup>23</sup>

Several courts have included definitions of the sometimes misunderstood term "hedonic" damages. The first defines hedonic damages, while the second describes these types of damages and then includes the legal term in parentheses.

Non-economic damages include compensation for pain, suffering, mental anguish, and disfigurement. "Hedonic" damages are another type of non-economic damages and compensate for the loss of enjoyment of life.<sup>24</sup>

The Peeks plead for lost care, nurture, guidance, education, wages in the past and future, pain and suffering, mental anguish, grief, loss of companionship, and loss of enjoyment of life (hedonic damages), together with interest and costs.<sup>25</sup>

### Criminal Cases

Although most of the examples in this collection are from civil cases, the need to define technical terms applies equally to

criminal cases. The following example, from the first sentence of a criminal case, shows how effective a one-word parenthetical can be.

These appeals are taken from convictions for possession of a controlled substance, to wit: psilocybin (mushrooms) in an amount less than twenty-eight grams and for possession of a controlled substance, to wit: cocaine in an amount of less than twenty-eight grams.<sup>26</sup>

### Acronyms

Acronyms should always be defined when first used. Even if the acronym is common shorthand to you, it may not be known to your reader. In the following example, the Texas Supreme Court used parentheses in the first sentence of an opinion to define two common insurance acronyms.

This case presents the following issues: (1) whether uninsured/underinsured motorist (UIM) insurance covers pre-judgment interest that the underinsured motorist would owe the insured in tort liability; (2) if so, how to apply settlement and personal injury protection (PIP) credits to the interest calculation; and (3) the circumstances under which an insured may recover attorney's fees from the UIM insurer under Chapter 38 of the Civil Practice and Remedies Code.<sup>27</sup>

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### Foreign Terms

Foreign words also fall into the “must define” category. The use of foreign terms or regional slang occurs more frequently in cases from border regions, where people, cultures, and languages mix. In the first example, the court uses the term “resaca” 32 times, but does not provide a definition until the sixth time the term is used. When defined, the court explained the term as follows:

The resaca in question is a reservoir located between West Robinson and West Zaragosa Streets in San Benito, Texas.<sup>28</sup>

The term “resaca” is first used when quoting the plaintiff’s petition. The term should have been defined at that point, which could have been accomplished unobtrusively with a footnote. Except for the quoted portions of the plaintiff’s pleading, the opinion would be better if “reservoir” had been substituted throughout for “resaca.”

There are, however, instances when it is necessary to use a foreign term that does not have a good English equivalent. The following two examples used footnotes to keep readers on track.

Lee is currently Chairman and CEO of SEC and formerly served as the Chairman of the Samsung Chaebol\* during the earliest events at issue in this case.

\* A chaebol is a Korean conglomerate in which subordinates are extremely deferential to their hierarchical superiors.<sup>29</sup>

Hearing loud music, shouting and “gritos,”\* the two officers followed the sounds in an effort to investigate.

\* The parties tell us that a “grito” is best characterized as “an exuberant yelp.”<sup>30</sup>

### Ordinary Meaning

We sometimes use words in their plain vanilla, everyday, ordinary sense. Because we often use terms in their technical or statutory sense, it can occasionally be helpful — even necessary — to tell readers when we are using terms in their customary sense. The following example illustrates the point.

This diversity suit was filed by plaintiffs ... to recover damages they suffered as a result of Mrs. Smith’s fall in a bathroom\* of a Wal-Mart Store. ...

\* At times we use the term “bathroom,” at other times “restroom.” There are no bathing facilities in the room in which plaintiff fell. The terminology used in this case — in the statutes, regulations, complaint, and summary judgment proceedings — is not uniform. No substantive consequence springs from our use of more than one descriptive term.<sup>31</sup>

As legal writers, our job is to communicate with the reader in clear, simple terms. When we use terms of art, we are doing our readers a favor by providing a definition immediately fol-

lowing the technical term, thus ensuring that our message is conveyed. As this collection of examples illustrate, definitions can be added with footnotes, parentheses, dashes, dependent clauses, separate sentences, and an occasional touch of humor.

### Notes

1. *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 67 (Tex. 1989) (Gonzales, J.).
2. *McIntyre v. Ramirez*, 109 S.W.3d 741, 743 (Tex. 2003) (Wainwright, J.).
3. *Ruiz v. Bouaziz*, 103 A.C.W.S. (3d) 860, 2001 A.C.W.S.J. Lexis 13088, at \*18–19 (British Columbia Court of Appeal 2001).
4. *Garner v. Santoro*, 865 F.2d 629, 632 (5th Cir. 1989) (King, J.).
5. Appellant’s Brief at 7, *Pace, III, Inc. v. Bechter*, No. 05-97-02054-CV (Tex. App. — Dallas, served Feb. 4, 1998) (by John M. Skrhak, Jr. & James W. Ribman).
6. *In re Continental Gen. Tire, Inc.*, 979 S.W.2d 609, 610 (Tex. 1998) (orig. proceeding) (Phillips, C.J.).
7. *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 731 (Tex. 2003) (orig. proceeding) (Hecht, J.).
8. *Bostrom Seating, Inc. v. Crane Carrier Co.*, 140 S.W.3d 681, 684 (Tex. 2004) (Schneider, J.).
9. *Melervine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 708 (5th Cir. 1981) (Ruben, J.).
10. *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 526–527 (Tex. 1997) (Baker, J.).
11. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967) (Norvell, J.).
12. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 551 (5th Cir. 1996) (King, J.).
13. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).
14. *Brookshire v. Houston Indep. Sch. Dist.*, 508 S.W.2d 675, 679 (Tex. App. — Houston [14th Dist.] 1974, no writ) (Coulson, J.) (quoting *Harris County v. Crooker*, 112 Tex. 450, 248 S.W. 652 (1923) (Cureton, C.J.)).
15. *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 677 n.2 (5th Cir. 1999) (Smith, J.).
16. *Cherokee Water Co. v. Forderhause*, 727 S.W.2d 605, 615 (Tex. App. — Texarkana 1987) (Grant, J.), rev’d, 741 S.W.2d 377 (Tex. 1987).
17. *Robert E. McKee, Gen. Contractor, Inc. v. Patterson*, 153 Tex. 517, 519, 271 S.W.2d 391, 393 (1954) (Calvert, J.).
18. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 250 (Tex. 1974) (McGee, J.).
19. *Haddock v. Arnsperger*, 793 S.W.2d 948, 950 (Tex. 1990) (Hightower, J.) (citing *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 250 (Tex. 1974)).
20. *Smallwood v. Illinois Central R.R. Co.*, 385 F.3d 568, 571 (5th Cir. 2004) (Higginbotham, J.).
21. *Garner v. Santoro*, 865 F.2d 629, 632 (5th Cir. 1989) (King, J.).
22. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992) (Gammage, J.).
23. *Workers’ Compensation Bd. v. Anchem Prods., Inc.*, [1993] 1 S.C.R. 897, 935, 1993 S.C.R. Lexis 32 (Supreme Court of Canada 1993).
24. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 763 (Tex. 2003) (Owen, J.).
25. *Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 803 (Tex. 1989) (Phillips, C.J.).
26. *Roth v. State*, 917 S.W.2d 292, 297 (Tex. App. — Austin 1995, no pet.) (Onion, J.).
27. *Brainard v. Trinity Univ. Ins. Co.*, 216 S.W.3d 809, 811 (Tex. 2006) (Jefferson, C.J.).
28. *City of San Benito v. Cantu*, 831 S.W.2d 416, 418–425 (Tex. App. — Corpus Christi 1992, no writ).
29. *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 175 (Tex. 2000) (orig. proceeding) (Abbott, J.).
30. *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982) (Goldberg, J.).
31. *Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 288–289 (6th Cir. 1999) (Godbold, J.).



**ROBERT FUGATE**

is an assistant city attorney in Arlington. He has prior experience as a staff attorney for the Dallas Court of Appeals and has done plaintiff’s and defense work. He is board certified in civil appellate law.