

Defined Terms in Pleadings and Correspondence

by Pete Haskel

I would like to see more creative and extensive use of defined terms, consistent with the advice that writing coaches give us to "front-load" our memoranda and briefs. In addition, if done creatively in adversarial communications (e.g., pleadings, briefs, letters to opposing counsel or the court, and trial memoranda), the choice of defined terms can subtly influence the dynamics of argument. There are undefined but recognizable lines dictated by the rules on ethics, good taste, and against ad hominem attacks that we should not cross in selecting defined terms. Some examples should help recognize them.

Be Descriptive Selecting the Short Form or Acronym. The boring and non-productive version: *American Deep Pocket, Inc.* (a ToxicWaste Group Company), Defendant ("ADP"),[1] as opposed to going too far: *American Deep Pocket, Inc.,* Defendant ("Polluting Pig" or "PP"),[2] and one that strikes the right balance: *American Deep Pocket, Inc.,* Defendant ("Alleged Polluter").

Create Eye-Catching Acronyms. For this approach, you have to be lucky enough for your opponents to give you an opening. For several years, I litigated against a group of paper terrorists calling itself the "Republic of Texas." They liked to abbreviate their name as "RTC," but I preferred "ROT." The courts let me get away with it in writing, but made me spell out the acronym, rather than pronounce it "ROT" as a word, in open court.

Omit the Unnecessary Components of Definitions. The use of defined terms is sufficiently common in the legal community to permit us to exclude such lead-ins as "hereinafter" and "herein"[3] (where else would it be, anyway?). However, there is one defined term lead-in that I do find useful, particularly when I'm marking up someone else's work and deadlines do not permit a careful cleanup. I refer to the ever-popular "sometimes." (I have seen the term as "sometimes herein" or "herein sometimes.")

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Using "sometimes" in my definition lets me use the defined abbreviation, acronym, or other shortened term, while allowing for the possibility that earlier authors might have used a different referent that I did not catch in my review. "Sometimes" might also, perhaps, substitute for the "unless the context otherwise requires" phrase, but I hope that we can choose definitions that make that qualifier unnecessary.

Front-Load Correspondence and Memo Reference-Lines with Defined Terms. My favorite use in defined terms is to front-load all important definitions in reference lines, thereby leaving the substantive text in letters and memos concise and direct. If used imaginatively, defined terms in reference lines can also allow us to hide meanings that the reader would not catch without careful study—if we want to make the communication difficult to understand at first reading. For example, this letter:

> Re: Demand to perform and cure breach of (together, "Cure"), failure to plan, build, and inspect (collectively, "Erect") a building at Lot 32 Block 1233 in the City of Blackacre (the "Building"), as required under Clause 12, paragraph C of the contract between ABC Corp. ("ABC") and the City of Blackacre ("City"), dated as of July 1, 1999 (the "Contract")
>
> Counsel:
> The City demands that ABC promptly Cure its failure to Erect the Building under the Contract.
>
> Sincerely, ...

Thoughts on Style

ABC's ("ABC") short-sighted idiocy ... — I don't include the possessive in the definition. Do you?

UniComm, Inc. ("UniComm") — I usually will use the defined entity's preferred capitalization. Should I?

Notes

1. Also, I would not include the parenthetic company affiliation even at first use, whether or not American Deep Pocket likes to do so.
2. I like, sometimes, to define two terms for the same thing for a two reasons: It prevents boring repetition in the discussion, and it allows alternative usage depending on the context. For example, if I defined ABC Corp as "Plaintiff" or "Alleged Polluter," I could refer to it as "Plaintiff" in any procedural discussion and as "Alleged Polluter" in a substantive discussion. *See also* text accompanying note 1, *supra*.
3. As in: (hereinafter, "ABC Corp.").