by Hon. Robert Braithwaite

Real-World Descriptions of Legal Terms

Law schools provide academic explanations of legal terms, but those don't always paint a full picture of how they play out in the real world. I am writing this article to provide new attorneys insight into what some of those terms *really* mean.

Abuse of Process

Using court procedures to obtain a result that is unlawful or beyond the scope of a procedural rule. For example, serving a summons against someone just to try to intimidate them, not because you really want to have a trial. Put another way, abuse of process is like self-abuse. You have this handy tool that is designed for a specific purpose, and then you use it for something entirely different just to have your way. But perhaps I am wrong here because for this analogy to stand up, so to speak, some attorneys out there would have to be real jerks. And that idea is, of course, ludicrous (see below).

Advisement

Whenever you hear a judge say, "There are complex issues presented in this case that I need to reflect upon, so I am taking this case under advisement," what we're really saying is, "Whoa, I'm in over my head—this is my first medical malpractice case (or whatever), and I don't know what the hell to do, so I need more time."

I first used the phrase in a small claims case in Beaver, Utah. One farmer was suing another for killing his cow. The cow had grazed in the wrong field one time too many, so the second farmer grabbed a tool—a shovel, if memory serves me—and swung it like a baseball bat, killing the cow with a single blow between the eyes. The farmers came directly from work to court—one in bib overalls grimed with soil, which impressed me—the two of them unknowingly parking their pickups next to mine as we all pulled in to the court lot just in time for the trial. They both looked capable of lifting a bale of hay with each hand. I, myself, was only up to a half-bale, or maybe a sheaf, so when the case was over and they glowered at me awaiting my verdict, I announced I was taking the case under advisement (even though I knew how I was going to rule) knowing I would likely never see them again. You might think of me as cowardly. I think of me as still alive.

Arraignment

This is when a judge tells a defendant their rights and asks what the plea is. They should either say, "Guilty," or "Not guilty." The judge doesn't care which. Really. Technically, there is also, "No Contest," but this is treated exactly the same on one's record as a guilty plea and has absolutely no effect on the sentence. While it apparently makes people feel better about themselves because they didn't say the word "guilty," they are still agreeing to put a conviction on the record.

There is also a non-existent plea that I hear plucked out of the ether by misdemeanants at least once a month: "Guilty, your honor," they say, "but with an explanation!" The last part is delivered with a tone of anticipation, indicating that I will be knocked off the bench by its originality.

"Every guilty plea I've taken has had an explanation," I tell them, duly noting their shocked expressions. The fact is, it's rare for anyone to take full blame for a crime, and everyone angles for a little lenience at sentencing.

Cautionary Instruction

This refers to a judge's instruction to jurors to disregard certain evidence. It comes up most often when and attorney or witness attempts something out of line, like trying to introduce evidence that is improper, or has been excluded by the judge. Attorneys walk a fine line on this; if they get too aggressive, like mentioning an invalidly obtained confession, they risk mistrial or personal sanctions by the judge. On the other hand, I know at least one law professor who told students it was a good tactic if you could get away with it, because if it's dynamite stuff, the judge telling the jurors to ignore it "would be like telling them to ignore the red-hot poker that just got stuck in their eye." A more genteel representation of the same thought is that, "You can't unring the bell." Yet try we do, us judges, so we don't have to start over from square one on a multiday trial.

Common Sense

Not a legal term, but sometimes quoted as such by new lawyers and *pro se* litigants. The term is thrown at an opponent as if it was a knockout punch, and the judge will raise the arm of the declarant as the winner of the bout. When a judge asks, "Do

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you have *any* evidence or law supporting your position?" and you reply, "It's just common sense, your honor," you might just as well start packing your briefcase. Unless, of course, the other side is saying the same thing. In which case the argument pretty much goes:

> "It's just common sense, your honor."
> "It is not."
> "Is too."
> "Is not."
> In which case the judge has to rule on what *he* or *she* thinks is common sense.

And we all know *that's* a frightening prospect.

Constitutionalists

These people have access to the Internet and copy machines and share their patriotic ideas with each other. They are characterized by a strong belief in the basic right to RANDOM CAPITALIZATION in their writings, use of the term "admiralty law" in landlocked states, the right of all Americans to ignore traffic laws because of the Uniform Commercial Code, and an obsession with the thread color on flag borders—all of which are apparently covered by the Constitution of the United States of America. Who knew?

Evidence

These are the facts of the case. Sometimes after a jury trial, a new attorney will ask me, "What did I do wrong?" I don't bother mentioning the things that afflict all first timers—like wearing a new suit with the labels still sewn to the back of the sleeves or being so nervous that they get the names of the parties mixed up and twist themselves into verbal pretzels. Instead, I'll give them my opinion on something that could be a recurring problem if I thought I saw one, but just as often I say they did *nothing* wrong—they just didn't have the facts on their side. I don't think style wins out over substance. None of us are as smooth and resplendent as actors in a courtroom movie. (Which isn't to say an attorney or *pro se* litigant can just sit back and expect their evidence to present itself and win the case—preparation is key.) We're not talking about just my opinion here: I meet with jurors after a verdict. More than once they have said the attorney for the prevailing party didn't do a good job or that the losing attorney did a really good job—they just thought the plaintiff/defendant should prevail based on the evidence. What a concept.

This point was actually brought home to me just before closing arguments in a jury trial when I was a prosecutor. Defense counsel was a law school friend of mine. As the judge instructed the jury, my opponent leaned over to me and dared me to make the following closing argument: "My case is so strong I'm not going to say anything. I'm just curious to hear what *he* has to say." I'd been friends with him for a long time, but I did not accept his dare.

While he groaned I gave my closing argument, and the jury convicted the defendant and I closed my prosecutorial career 1-0 against my friend. *But not because I was the more skillful trial lawyer.* It helps if the guy you're prosecuting thinks he's at an intersection when there isn't one for another 100 yards, executes a perfect left turn embedding himself into a ditch, and then blows

an air sample so high that the breathalyzer needs a full 24 hours to dry out.

Ludicrous

This is a word used by some big-city people. (In southern Utah we prefer the all-purpose phrase "fer ignernt" to denigrate something an opponent has said.) In other words, "It is *ludicrous* for opposing counsel to even suggest [fill in the blank]…" By doing this, though, the speaker unwittingly alerts the trial judge and jury that we will be dealing with at least one emotionally overwrought person, that being the lawyer who just made this ignernt declaration.

Perjury

This is the court system's dirty little secret. Lying under oath is a felony. I was shocked when I became a judge and realized that it happens on an almost daily basis and is almost never prosecuted. I don't mean testimony involving honest people having differing opinions based on their perspective and ability to see and remember events. That too happens all the time. I'm talking about the situation where the landlord says he was never paid April's rent, and the tenant says he paid cash and handed it to the landlord in person—and it happened just two months ago, so someone is lying. Or the drunk driver who says he'd only had "two beers," despite the fact he couldn't touch his nose or recite the alphabet—you get the picture. Why isn't perjury prosecuted more often? Because of that "proof beyond a reasonable doubt" thing (stay tuned—definition coming). And it bugs the heck out of me, but who's going to file a case you can't win?

Pro Hac Vice

This Latin phrase literally means, "for this occasion." When an out-of-state attorney wants to represent a client in another state, he must file a *pro hac vice* motion. Then the judge decides if he should be allowed to enter that case. *Pro hac vice* is pronounced "Pro-hawk-vee-chay," which is pretty peculiar if you ask me. "Vice" is pronounced "vee-chay?" Seriously? Gluttony is one of the seven deadly vee-chays? The Vee-chay Squad is going to bust the drug dealers? That makes no sense, so I don't give in to this elitist pronunciation. I just pronounce it the way it is spelled: "Pro-hack-vice" and then watch the visiting attorneys' eyes light up as they think, "Alright! I got me a real bumpkin here! I can run circles around this guy."

My family says sometimes I latch onto things that bother me and harp about them much too long. They say it is one of *my* vices. But they're wrong of course, because technically, I have no vices. Just vee-chays.

Reasonable Doubt

This one is tough to define. In one Utah Supreme Court decision, the following language was "approved" (that is—it wasn't reversed, which is as close to "approved" jury instructions as you can generally get). I think a lot of courts use it:

> A reasonable doubt is a doubt based on reason and one which is reasonable in view of all the evidence. It must be reasonable doubt and not a doubt which is merely fanciful or imaginary or based on wholly speculative possibility. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it, and obviates all reasonable doubt.

This language has always struck me as being disturbingly similar to the *Mr. Ed* theme song. ("A horse is a horse, of course of course … That is, of course, unless the horse …" or however that song went.) If you look at the jurors at this point, you will know who has been listening—those with the "*Say what???*" expressions on their faces.

Judges are timid about changing approved instructions. The bravest I have been with this particular instruction is to change the word "obviate" to "prevent" because when I first saw it, I didn't know what "obviate" meant, and no jurors I asked in two straight felony trials knew what it meant. I looked in the dictionary and found a synonym (whatever that is) for "obviate," and everyone has been happy ever since.

Rulings

Don't take an adverse ruling personally. I rule against attorneys I respect every day, and so does every other judge. No judge thinks, "I'm going to enter judgment against plaintiff/defendant because I hate his attorney." We rule according to what we think is right. And sometimes we're wrong. I have to give this same advice to myself sometimes. I have made it a practice over the years as both a state trial judge and now as a magistrate that when I get a ruling from a higher court, I close the door, rip open the envelope (or electronic missive nowadays), and scan the opinion for the overall ruling. Then I pretty much go nuts: If it says affirmed, I *feel* affirmed, and brilliant, and vindicated. This feeling lasts about three seconds. Then I think, "Of course I was affirmed. I was right. I'm *supposed* to do it right." And the euphoria evaporates. And if it says "reversed," I usually think "that was a close case—I wish I'd ruled the other way." But other times, I'm sorry to say, I feel stupid, and embarrassed, and angry. So I pull out the case file and re-read it. If I agree that I made a mistake, I vow not to do that again. If I feel that the appellate court was wrong and I was right—well … heck … I'm *still* stuck with the decision (like you usually are with mine) because it's what the person one step up the ladder thinks, so I still vow not to do that again. I stew about it for a little while and then mentally stick it on a shelf and close the cupboard door. I suggest you do the same thing, because we can't do nimble footwork in the courtroom if we have a death grip on a bunch of baggage. And it's not personal.

Voir Dire

This is the series of questions asked of jurors so that you can intelligently remove potential jurors with improper perspectives and biases that would hurt your client (bad juror) and select jurors with proper perspectives and biases that will be favorable to your client (good juror). It ensures an impartial jury—or so the thinking goes. I'm told *voir dire* is properly pronounced: "Vwaaah-dear." Kind of like Barbara Walters trying to say the word "water." (Okay, like Gilda Radner might have had "Baba Wawa" try to say "water.") But if you say it that way in southern Utah, you'll sound like a fancy pants, and the regular Joes on the jury will snicker. On the other hand, if (like me) you say it the other way, "Vore-die-yerr," all multisyllabic and slowly

drawn out, you sound like a hick, and people will look to see if you scraped the manure off your boots before you came in. So I guess either way you can't win.

With All Due Respect to Opposing Counsel

Say this just before firing below-the-belt personal insults at opposing counsel. And if the other attorney says it, take a deep breath, 'cause here it comes at you.

Good luck, and you're welcome. (Oh, and don't bother to ask another judge if I speak for them—I don't. We all see ourselves as independent contractors.) ⊙

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case appeal that the Board resolves either on the merits or on procedural grounds").

[15]*Conforto v. MSPB*, 713 F.3d 1111 (Fed. Cir. 2013).

[16]*Conforto*, 713 F.3d at 1116.

[17]*Conforto*, 713 F.3d at 1116.

[18]*Conforto*, 713 F.3d at 1117.

[19]*Conforto*, 713 F.3d at 1116-17.

[20]*Conforto*, 713 F.3d at 1118. *See also Kafele v. U.S. Postal Service*, 513 Fed. Appx. 987 (Fed. Cir. 2013) (following *Conforto*).

[21]*Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013).

[22]*Id*. at 1154.

[23]*Id*.

[24]*Taylor v. MSPB*, Case No. 2013-3113 (Fed. Cir., Sept. 18, 2013).

[25]*Id*. at 5 (citing *Garcia v. Dep't of Homeland Security*, 437 F.3d 1322, 1348 n.6 (Fed. Cir. 2006)).

[26]*Brooks v. Dep't of the Air Force*, Case No. 2013-3033 (Fed. Circ., Nov. 21, 2013).

[27]*Id*. at 3 (quoting *Mills v. USPS*, 119 M.S.P.R. 482, ¶ 9 (M.S.P.B. 2013)).

[28]*Bean v. U.S. Postal Service*, 2013 M.S.P.B. 98 (MSPB, Dec. 16, 2013).

[29]*Bean*, *supra*, at ¶ 9.

[30]*Bean*, *supra*, at ¶ 10.

[31]*Bean*, *supra*, at ¶ 11.

[32]*Id*.

[33]*Kloeckner*, 133 S.Ct. at 607.

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[15]S.619, available online at beta.congress.gov/bill/113th/senate-bill/619 (accessed Jan. 13, 2014).

[16]Niraj Chokshi, "State Spending on Prison Health Care Is Exploding. Here's Why," Washington Post, Oct. 30, 2013, available at www.washingtonpost.com/blogs/govbeat/wp/2013/10/30/state-spending-on-prison-health-care-is-exploding-heres-why/?tid=hpModule_ba0d4c2a-86a2-11e2-9d71-f0feafdd1394&hpid=z13.

[17]Monica Davey, Safety Is Issue as Budget Cuts Free Prisoners, NY Times, March 4, 2010, available online at www.nytimes.com/2010/03/05/us/05parole.html?pagewanted=all (accessed Jan. 13, 2014).

[18]The Chief Justice's 2013 Year-End Report on the Federal Judiciary, available online at www.supremecourt.gov/publicinfo/year-end/2013year-endreport.pdf.

[19]The Chief Justice's 2012 Year-End Report on the Federal Judiciary, available online at www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf (accessed Jan. 13, 2014).

[20]See U.S. Department of Justice, U.S. Parole Commission, "Report of the U.S. Parole Commission Oct. 1, 1988, to September 30, 1989," at pages 10 and 7, respectively, available at www.ncjrs.gov/pdffiles1/Digitization/131426NCJRS.pdf.

[21]Supra note 4.

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