
HOW TO USE DEFINED TERMS TO MAKE TRANSACTIONAL DOCUMENTS WORK BETTER

Joshua Stein

Defined terms can be a powerful tool,
but you need to structure
and use them strategically.

WHEN TRANSACTIONAL ATTORNEYS write legal documents, their fundamental job is to communicate intentions and meanings accurately through words. At the same time, however, a document should not be too much longer or more complex than necessary.

Joshua Stein is a real estate and finance partner in the New York office of Latham & Watkins. The author acknowledges the useful comments and suggestions provided by his partners Richard L. Chadakoff, James I. Hisiger, and Roger H. Kimmel, as well as by Donald H. Oppenheim. Any errors are solely the author's. Copyright © 1997 Joshua Stein (joshua.stein@lw.com).

A document should be internally consistent. When the same concept arises more than once, the drafter should express it the same way each time. Otherwise, someone will argue that the variation in words dictates some difference in interpretation. However weak the argument, it can lead to years of litigation while the parties conduct discovery and the judge eventually decides what the parties meant.

Any legal document must speak unambiguously, both today and five years from now, to the attorney, opposing counsel, both attorneys' clients, a future reader of the document, and a judge who might need to interpret the document when the parties are no longer friends.

Drafters who want to prepare documents that achieve these and other important goals will find themselves at least halfway there if they consistently use one simple tool throughout the job: defined terms. If the drafter starts with details like carefully setting up the right structure of defined terms, sometimes the larger document will almost take care of itself.

This article presents some ideas and suggestions for how to set up and use defined terms in legal documents. Many of those ideas and suggestions are reflected in the *Lender's Model State-of-the-Art Nonrecourse Clause (with Carveouts)* prepared by the author and published starting at page 31 in this issue. This discussion will refer

frequently to that model as an example. Terms defined there are capitalized here.

WHEN TO USE DEFINED TERMS •
As soon as you refer in a document to any concept that takes more than three or four words to explain, and then refer to the same concept a second time, that is the moment to consider setting up a defined term. Even then, that early in the process, it is usually less work to set up a defined term than to try to use the same string of words twice.

When a concept arises twice in a document, and you set up a defined term for it, later the same concept will usually arise a third time. That is when you really begin to achieve some return on your minimal investment in setting up a defined term. Instead of using the same long string of words a third time (and making sure you use exactly the same long string of words), you simply throw in a quick defined term.

The process of identifying and setting up a defined term has another great benefit: it forces the drafter to say once, completely and exactly, what the drafter is talking about. The drafter should therefore focus extra effort on getting it right. (Of course, if the drafter gets the definition wrong, the wrongness will then ripple through the whole document.)

When you prepare a legal document, you can start by considering

two types of defined terms, which might be called "external" and "internal."

External Terms

External defined terms are unique to the external circumstances of this particular transaction (names of parties, location of real property, and the like). They tie the document to the outside world and the larger transaction of which it is a part.

To communicate best, try to set up external definitions in the opening paragraph of the document and in the recitals, perhaps finishing up the job with a single collection of deal-specific definitions after the recitals.

By the time readers have finished the first few chunks of the document, they should ideally never again need to refer outside the four corners of the document to understand what the term "Borrower" means, who the "Major Lessee" is, who the "Broker" is, or any other piece of information about the parties or the larger transaction or business context. Collecting external information as early as possible in the document makes the document easier to prepare and easier to understand.

Flexibility

The use of "external" defined terms will make particular sense where exact details of the transaction are not yet known. For example, suppose Jane Roe and John Doe will definitely invest in a transaction, but Bill Roe still

hasn't decided if he wants to. The drafter will save time by setting up a single definition of "Equity Investors" early in the document. That definition will be adjusted, only once, when the final equity investors have been identified. The drafter will not have to parse through the document, looking for references to Jane and John, and adding a reference to Bill every time.

If you set up a "moving target" definition like this one, you should leave it blank, or bracketed in boldface type, until you have the right information. That way, you highlight the "loose end" and reduce the likelihood that the final document will be wrong. In contrast, if you fill in tentative information that may be wrong, someone needs to notice later that it needs to be fixed and remember to fix it. A gaping blank hole or bracketed bold type is less likely to be forgotten and ignored.

Internal Terms

Once the external defined terms have laid a foundation for the document and connected the document to the reader's larger experience, the internal definitions will refer solely to concepts internal to the particular document, with appropriate references to external defined terms. In the Lender's State-of-the-Art Nonrecourse Clause, for example, "Property Income" will refer to certain generic types of income that arise from the "Property," a term that was al-

ready defined early in the document as an external definition.

LAUNDRY LIST LIMITATION • Creating defined terms produces another benefit: It helps assure that any "laundry list" will make only a single appearance in the document, in defining a term to use later as a surrogate for the list. The document therefore becomes shorter and more accessible. The reader is no longer forced to read, again and again, the same long lists of similar words.

Using defined terms in place of repeated use of laundry lists represents a practical response to the reality of how courts sometimes interpret documents. A business executive writing a memo can use the word "black" to mean "really dark grey" and "anything else that looks pretty close to black." It's short and to the point, and it works. In a legal document, however, when the drafter says "black," he or she cannot assume it will be interpreted with the same breadth and looseness as the word "black" in a business memo. A court might say "black" means "black," and if the drafter meant something more they should have said so. Hence arise laundry lists.

Simplicity and Certainty

A legal drafter knows, for example, that if he or she refers to "costs of collection," the courts won't include attorneys' fees unless expressly stated.

A legal drafter knows that if he or she prohibits assignment of a lease, the prohibition probably won't limit a sale of all the stock of a closely held company that has no assets except the lease—a transaction with precisely the same economic effect—unless he or she expressly includes the latter transaction. This is how simple ideas balloon into complex laundry lists. See also, Joshua Stein, *Cures for the (Sometimes) Needless Complexity of Real Estate Documents*, *Real Estate Review* (Fall 1995) (discussing case holding that an "as is" contract allows purchaser to rescind if seller failed to disclose that property was in flood zone; now every seller's litany of representations not made will expand to include whether property is in flood zone). Aggressive use of defined terms can help restore simplicity, maximize certainty, and save some space, by enumerating each tedious laundry list only once.

For example, in the Lender's State-of-the-Art Nonrecourse Clause, the term "Loss" occurs about a dozen times, as a substitute for a concept that takes half a dozen lines to explain in defining the term "Loss": all losses, damages, costs, and expenses (including attorneys' fees and expenses), and so on. By using a defined term, the Lender's State-of-the-Art Nonrecourse Clause avoids reciting the whole laundry list of concepts intended by "Loss" every time the subject arises.

FINE-TUNING THE DEFINED TERMS • The payoff from using defined terms will increase even more when you inevitably decide you need to fine-tune the string of words that you have tied to a particular defined term.

For example, the Lender's State-of-the-Art Nonrecourse Clause refers repeatedly to casualty and condemnation proceeds, via the defined term "Loss Proceeds." At one point in preparing that model, I wanted to include in casualty and condemnation proceeds any payments that the Borrower might receive in lieu of casualty or condemnation proceeds. I was concerned that a pro-Borrower court might conclude that without this specific reference, payments in lieu of casualty or condemnation proceeds were actually something different, and should be treated differently. This is precisely the thought process that leads to long laundry lists.

Without a defined term, this change would have required a half dozen revisions of the document, wherever the document discusses casualty or condemnation proceeds. Because the defined term "Loss Proceeds" already existed, I needed to tweak it only once. After that single tweak, every time the defined term appeared, it was automatically modified, with no further effort, to include a reference to the newly added payments.

Once a defined term exists, whenever you start to fine-tune or qualify references to that particular term,

consider whether you should instead go back to the definition and make the changes there. For example, when the Lender's State-of-the-Art Nonrecourse Clause refers to "Losses" arising from a particular matter, a Borrower might try, in a couple of references to the term, to qualify "Losses" to refer only to "actual" and "out of pocket" losses, and to limit attorneys' fees to "reasonable" attorneys' fees (as if there were any other kind). Although this is a good suggestion for Borrower to make, Borrower's counsel really should go a step further.

Borrower's counsel should go back to the definition of the term "Losses," and add the proposed qualifiers in the definition—once. By importing these entire concepts directly into the definition, Borrower's counsel avoids the risk that "Losses" in other contexts, where these qualifications are not mentioned, might not be subject to the qualifications. A court might conclude, for example, that when the parties intended to be "reasonable," they said so; if they didn't, it must have been deliberate. All the more reason to make the point once, as part of the definition, as soon as the idea arises.

THE "TOP-DOWN" APPROACH • Computer programmers are familiar with "top-down" or "structured" programming. If a programmer wants to instruct a computer to perform a particular complicated task

or calculation repeatedly at various locations in the program — such as figuring out a monthly mortgage payment or displaying a screen image of the current database record — he or she writes the necessary software commands only once. It's called a "subroutine" or a "function."

Every time the programmer wants the computer to perform that particular complicated task, a software command will "call" or "invoke" the subroutine or function. This command will, in effect, incorporate by reference all the tedious steps set forth in the subroutine or function. After those steps are performed, the software will then continue with its business. Programmers use building blocks like these to create an entire program. Many pieces of the program refer to smaller building blocks, and some of the building blocks refer to other smaller building blocks. Building blocks can be reused and nested within each other without any limit.

If a particular element of the program logic changes (for example, because the lender switches from a 360-day year to a 365-day year), the programmer modifies the central "subroutine" or "function" only once, and the job is done. In fact, one of the basic principles of computer programming dictates that a program should be easy to modify, because it always will need to be. "Subroutines" and "functions" help computer pro-

grammers achieve this goal. Definitions in legal documents are their functional equivalent.

Computer programmers have one great luxury that attorneys don't. If a programmer makes a mistake in writing program code (such as calling the wrong subroutine), their program will usually "crash" during the testing process, a process that consumes far more time and resources than writing the program code in the first instance. The programmer will be able to figure out and fix the problem before anyone in the real world knows about it.

Attorneys, in contrast, cannot meaningfully test their work in actual or even simulated real-life circumstances. They might not know about a problem in their documents until several years after the closing, when it's too late to do anything about it. This is one reason attorneys need to be more careful, and carry more malpractice insurance, than computer programmers.

Preserve Intuitive Meaning

Just as a computer programmer needs to make sure that a modified subroutine continues to work correctly, and in the way expected, as part of the larger computer program, the drafter of a legal document needs to make sure that as he or she develops and modifies a defined term, that term continues to mean what anyone will intuitively expect it to mean.

For example, it's dangerous to define the "Loan Documents" to mean all the loan documents except the unsecured loan documents such as guaranties. Someone—either the drafter or some future reader of the document—may assume that the term "Loan Documents" really means what he or she intuitively expects it to mean, i.e., all the loan documents. If the term actually means something less than all the loan documents, then the drafter or the reader will probably misuse or misinterpret it, and create an anomaly or worse.

Set Up the Right Terms—Strategically

In this last example, if you wanted to be able to refer to all the loan documents except the unsecured loan documents, you might prevent problems by carefully setting up three interacting defined terms: the "Loan Documents" (meaning all the documents) versus the "Secured Loan Documents" (meaning a subset of the Loan Documents) and the "Unsecured Loan Documents" (meaning the remaining Loan Documents). In each case, the defined term gives you and the reader an easy reminder of what it means. The likelihood of confusion or mistake is low.

The Super-Duper Defined Term

Breaking up concepts like "Loan Documents" into smaller terms to refer to smaller concepts is better than trying to create a new super-duper de-

defined term even broader than the "Loan Documents," such as the "Total Loan Documents," which would include not only the secured "Loan Documents" but also the unsecured documents.

A super-duper defined term like this one forces the drafter, and later the reader, to remember that "Loan Documents" doesn't really mean all the loan documents. They have to remember to use some other broader, super-duper new term (not just the intuitive term "Loan Documents") when they really mean all the loan documents. In this example, a routine "merger" clause could wreak havoc if it referred only to the "Loan Documents," as would be perfectly intuitive and reasonable for any drafter to do.

The Lender's State-of-the-Art Nonrecourse Clause bends this guideline a bit in defining "Losses." The definition of that term starts off by defining Losses to include losses, damages, costs, and expenses, and so on, suffered by a party, such as Lender. Then it says that any reference to a "Loss" suffered by Lender also automatically includes any losses, and the like, suffered by anyone who purchases the mortgaged property at a foreclosure sale (the "Successor"). This expansion applies whether the Successor is "Lender" or anyone else.

I made the judgment that whenever a drafter refers to Lender's "Losses," the drafter will probably also want to refer to any "Losses" suffered by a

Successor. The drafter is, however, reasonably likely to forget to do so. In that case, a court would probably interpret the term "Losses" to exclude a Successor's losses if the Successor were anyone other than the Lender, such as Lender's Affiliate or nominee.

To prevent this problem, I expanded the definition of "Losses" so that "Losses" incurred by a Successor are the same as "Losses" incurred by a Lender. Every reference to "Losses" will therefore carry along this concept. A Borrower might suggest that the drafter should define Lender's Losses to include simply those incurred by any Affiliate, designee, or nominee of Lender, to avoid bestowing benefits on a third-party foreclosure sale purchaser.

Similar issues arose in defining "Borrower Payments" in the Lender's State-of-the-Art Nonrecourse Clause. In an early version of the model, I defined the term "Distributions" to mean distributions and dividends paid by Borrower to its principals. For reasons similar to my expansion of "Losses," I extended the term "Distributions" to include management fees, development fees, and other fees paid to Borrower's principals but not technically constituting distributions. Again, the goal was to use a term broad enough to include some related concepts likely to travel with the basic concept of the particular definition.

An early reader of the document didn't notice the reference to "management fees" in the definition of

"Distribution." That reader told me I should have included a reference to management fees somewhere in the carveouts. She tried to claim the five-dollar reward being offered to anyone who first identifies any category of "carveout" liability not already included in the Lender's State-of-the-Art Nonrecourse Clause.

I was able to avoid paying the reward by pointing out that the definition of "Distribution" already did include management fees. Although I was right, I was also wrong. I saved five dollars, but only because I had slipped a small counterintuitive surprise into my document. But documents aren't supposed to conceal counterintuitive surprises, small or large, that snag the user and produce unexpected results. My definition of "Distributions" violated this rule.

Although in this particular incident my nonobvious drafting saved me money (five dollars), the next time it could cost me or my client money. For example, in negotiations my client might agree to modify the loan documents to state, categorically, that regular periodic "Distributions" permitted by the Borrower's partnership agreement are automatically acceptable. Later, my client and I might be surprised to learn that this language unintentionally validated an excessive monthly management fee that the partnership agreement expressly allowed—simply because that fee came within the overbroad scope of the defined term "Distributions."

To prevent the problem, I replaced "Distributions" with a broader defined term— "Borrower Payments"— more consistent with the broader term I was defining. The result was a better and clearer document with one less surprise waiting to trap someone. Maybe I should have paid the reward after all.

BREADTH VS. NARROWNESS • If you create broad defined terms, you need to make sure that when you use one of these defined terms, you use it in a context that requires breadth. In another similar example, legal documents often define the term "Affiliate" very broadly. That works very well for a Lender trying to cast a broad net and refer, for example, to all bad acts committed by Borrower or anyone remotely related to Borrower.

If, however, you are negotiating a "permitted transfer" clause (an exception from the "due on sale" language), you should not categorically permit the Borrower to transfer to any "Affiliate," as that term will allow the Borrower very wide latitude.

You can prevent problems by remembering which defined terms are extremely broad or narrow, by setting up terms that remind the user of their breadth or narrowness, and by focusing on whether the context in which a term is used requires particular breadth or particular narrowness. In this example, Lender's counsel might want to set up a defined term for

"Permitted Transferee"— a carefully circumscribed subset of "Affiliates" perhaps contemplating minimum net worth, delivery of organizational and other documents to Lender, and other criteria.

If the term "Permitted Transferee" will also incorporate a requirement for Borrower to obtain Lender's consent to the transfer, you have another decision to make: Whether to set forth the consent requirement only in the definition of "Permitted Transferee," or to discuss the issue more fully somewhere else in the document.

Although either approach will probably do the job, you can reduce the potential for confusion and mistakes by expressing the consent requirement as a "covenant," and not merely in a definition. Definitions should only explain what you are talking about— what you intend your words to say, in greater detail— when they use a particular word. If, instead, you want to require someone to take some action, or not to take some action, then you should more appropriately address those actions directly, as a covenant.

Two years after the closing, when a user of the document wants to figure out what the document says about whether Borrower can transfer property to its wholly owned subsidiary, the user is likely to look first in the covenants. They should be able to find their answer, or at least a direct route to their answer, by looking there.

To prevent the problem, I replaced "Distributions" with a broader defined term — "Borrower Payments" — more consistent with the broader term I was defining. The result was a better and clearer document with one less surprise waiting to trap someone. Maybe I should have paid the reward after all.

BREADTH VS. NARROWNESS • If you create broad defined terms, you need to make sure that when you use one of these defined terms, you use it in a context that requires breadth. In another similar example, legal documents often define the term "Affiliate" very broadly. That works very well for a Lender trying to cast a broad net and refer, for example, to all bad acts committed by Borrower or anyone remotely related to Borrower.

If, however, you are negotiating a "permitted transfer" clause (an exception from the "due on sale" language), you should not categorically permit the Borrower to transfer to any "Affiliate," as that term will allow the Borrower very wide latitude.

You can prevent problems by remembering which defined terms are extremely broad or narrow, by setting up terms that remind the user of their breadth or narrowness, and by focusing on whether the context in which a term is used requires particular breadth or particular narrowness. In this example, Lender's counsel might want to set up a defined term for

"Permitted Transferee"—a carefully circumscribed subset of "Affiliates" perhaps contemplating minimum net worth, delivery of organizational and other documents to Lender, and other criteria.

If the term "Permitted Transferee" will also incorporate a requirement for Borrower to obtain Lender's consent to the transfer, you have another decision to make: Whether to set forth the consent requirement only in the definition of "Permitted Transferee," or to discuss the issue more fully somewhere else in the document.

Although either approach will probably do the job, you can reduce the potential for confusion and mistakes by expressing the consent requirement as a "covenant," and not merely in a definition. Definitions should only explain what you are talking about — what you intend your words to say, in greater detail — when they use a particular word. If, instead, you want to require someone to take some action, or not to take some action, then you should more appropriately address those actions directly, as a covenant.

Two years after the closing, when a user of the document wants to figure out what the document says about whether Borrower can transfer property to its wholly owned subsidiary, the user is likely to look first in the covenants. They should be able to find their answer, or at least a direct route to their answer, by looking there.

A user should not, for example, have to search the document to figure out that an "Event of Default" includes a transfer of the property to someone other than a "Permitted Transferee"; a "Permitted Transferee" is defined in a way that refers to the defined term "Satisfactory Criteria"; and then somewhere deep in the list of "Satisfactory Criteria" appears the concept that Lender needs to issue its approval to the particular matter. Documents should not place this kind of burden on the user.

AVOIDING A MAZE OF CROSS REFERENCES • Defined terms also allow you to avoid perpetrating internal section cross references within a document. By using defined terms, you can refer to concepts by name rather than by section number. A reader is much more likely to derive substantive meaning from a reference to the "Normal Cash Flow Waterfall" and the "Post-Default Cash Flow Waterfall" than a reference to Section 8.12 or Section 8.13 of the document.

Of course, over time you and the reader will learn that Section 8.12 really means "the waterfall" — but by the time you have both memorized that, the section numbering will probably change. When that happens, someone will need to go through the document (and all other documents in the transaction) changing the cross references, probably at the last minute and probably making some of the cross references wrong. It would have been

much easier — less work for the drafter as well as more friendly to the user — to set up a defined term at the very beginning.

SELECTING AND PLANNING DEFINED TERMS • If you use defined terms, you should carefully select and plan the terms you create. Each term should be a cue to the reader, a surrogate for a concept, in such a way that the reader will easily remember which concept travels with which term.

Defined terms that start with the word "Applicable," or "Actual," or "Selected," or "Operative," or similar terms violate this principle, because they don't help the user remember what the defined term is about. Everything in a document should be "Applicable" and "Operative" — or it shouldn't be there at all. And if something was "Selected," the defined term should provide some clue why it was selected or for what or by whom.

Suppose, for example, you want to refer to whatever interest rate the Borrower will actually have to pay on a note (e.g., base plus margin plus reserve adjustments). You can call it the "Actual" or "Applicable" rate, in which case anyone who ever sees that term needs to go back and read the definitions to remind himself or herself of what the particular term really means. (What was it actually "Applicable" to?) Or you can choose a defined term that better communicates what the concept is about, such as "Gross Interest Rate Payable."

Similarly, instead of referring to the "LIBOR Rate" (which might mean either just the London Interbank Offered Rate or Lender's actual LIBOR-based rate) the drafter might prevent confusion by referring to the "LIBOR Index Rate" and the "Spread," which add up to the "LIBOR-Based Interest Rate."

Defining Related Concepts

If defined terms refer to related concepts—some more generally, others more specifically—the defined terms should interact in a way that tracks the interactions of the underlying concepts. For example, if a transaction involves two promissory notes, you invite confusion if you call one "the Note" and the other "Note B." Typically this occurs because "Note B" is grafted onto the transaction at a late date, and the drafter thinks he or she will save time by not going back and changing the old references to "the Note" to clearly distinguish the two notes.

The drafter can, instead, prevent confusion by setting up parallel definitions of "Note A" and "Note B," with a defined term "the Notes" to refer to both of them. Neither the drafter nor a reader would ever misconstrue any reference to any Note. By spending a few extra minutes to create a logical structure of interacting defined terms, you help maximize the overall return—more clarity and less risk of error—that you can realize by using defined terms.

In defining a term, try to keep that term short and simple if you can. Particularly when you are defining a group of related terms, you may be tempted to make some of them rather long and unwieldy, such as the "Landlord's Post-Possession Off-Premises Work Substantial Completion Outside Date." Figure out a way to say it in fewer words. In this example, you could refer instead to the "Building Upgrades Deadline." Otherwise, defined terms become a caricature of themselves.

Don't hesitate to use the same terms that real people use in the real world to refer to a concept. Call it a "Spread" rather than an "Adjustment Factor." Require a "Paydown" or a "Margin Call Payment" rather than a "Supplemental Special Amortization Installment." Set up a "Waterfall" instead of "Income Application Priorities." Your document will communicate better that way. Your reader won't need to internally translate from your defined term to what the term "really" means. They will be able to focus more closely on understanding the substance of the document instead, without distraction.

Where To Put Definitions

Although defined terms usually help a document communicate, if you merely throw in a quick defined term the first time any particular concept arises, you may make a long document harder to read, not easier. You need to take one more step. In most

cases, you should try to collect all definitions in one place, as "Article One" of the document. This way, whenever the drafter (or reader, or user) of a long document wants to understand what a defined term means, he or she knows exactly where to go look.

If a drafter doesn't take the time to create a single consolidated "dictionary," and instead strews defined terms throughout a long document like bread crumbs left behind in a maze, the drafter forces the user to search back and forth through the document to understand any capitalized term. The document becomes hostile. If a particular concept involves more than one or two defined terms, understanding that concept becomes an exercise in torture by cross reference rather than a communicative experience.

Indexing Isn't Enough

Although a computerized "index of defined terms" somewhere in the document can help, you should instead invest a little more effort and religiously collect all defined terms in one place. As soon as you set up a definition, you simply need to take one more step and move that definition into a single integrated dictionary of definitions. Put it where it belongs.

If a defined term is complicated, such as the "Normal Cash Flow Waterfall," or an "Event of Default," either of which might take two pages to explain, you should include the term in the dictionary with a cross-reference to where the definition can be found. Cross-references from the

dictionary to complex definitions like these should, if you use defined terms aggressively, be the only section cross-references in your entire document. At the "target" page of the cross-reference, the defined term should be underscored or in boldface type so that someone looking for it will be able to find it instantly.

This Approach Makes Checking Easier

Use of a single dictionary of defined terms also makes it very easy for you to check, when you use a defined term, that you are using the right term (for example, "Exculpated Persons" rather than "Exculpated Parties").

You also need to make sure that any defined term you refer to has in fact been defined. Otherwise, you might merely assume that a term has been defined, just because it "obviously" should have been. Referring to a defined term that has not been defined is one of the pitfalls most readily available to you if you otherwise try to follow the advice in this article. An integrated dictionary gives you an easy way to prevent this problem.

If a particular group of defined terms relates solely to a particular part of an agreement (such as the definitions of "Basis," "Amount Realized," and other variables for calculating participation payments), you might want to collect just those terms in a small dictionary at the beginning of the relevant article, particularly if the structure is complicated and very sensitive. But don't fully define the term both in a "local" dictionary and

in the "general" dictionary; this defeats the goal of consistency and saving work.

Coordination Among Documents

If a transaction involves more than one document, as it typically does, the use of a single dictionary of defined terms will also make it easy for you to coordinate the use of defined terms across the entire transaction, and minimize the risk of confusion, inconsistencies, and mistakes.

You can simply copy the dictionary between documents (sometimes you might make it a standard exhibit to all the documents rather than designate it as Article One), and then consistently use the same definitions throughout the transaction.

You must, however, beware of some possible problems with documents that are filed or recorded:

- Even if you want to call the parties "Lender" and "Borrower" throughout, local mortgage law in a particular state may dictate that they be called "Mortgagor" and "Mortgagee" in any recorded mortgage. In that case, you will need to make an exception to the consistent use of the terms "Lender" and "Borrower," or change all the documents to refer to "Mortgagor" and "Mortgagee";
- You need to be careful about recording a mortgage or filing a U.C.C.-1 financing statement that uses defined terms from, say, the loan agreement, but does not repeat those definitions within the four corners of the public document. Someone who

searches the public record is supposed to be able to understand from the public record itself exactly what collateral is affected by the particular filing. If he or she can't figure out the answer to that question without obtaining more information, such as the meaning of a defined term, from an off-record source such as the debtor or secured party, he or she might be able to argue that the mortgage or filing was not effective; and

- On the other hand, if the parties simply attach the entire dictionary of defined terms to every public filing, they may disclose more about the transaction than they want to disclose. They need to be strategic and aware regarding the unique concerns of using defined terms in public documents.

A FINAL THOUGHT • Although defined terms are often a powerful tool to make documents work better, don't go too far. Some words don't need to be defined, and may be more effective without help from a definition.

In the Lender's State-of-the-Art Nonrecourse Clause, for example, a Lender may create a stronger document by referring to lower-case "fraud" or "waste" (as discussed in the introductory notes of the model) than by laboriously trying to define these terms. Sometimes, a prudent drafter should just let the words speak for themselves.

PRACTICE CHECKLIST FOR**How To Use Defined Terms To Make Transactional Documents Work Better**

Your goal in drafting a transactional document is to make it speak unambiguously and accurately. Future readers should know exactly what your document means—regardless of whether those future readers are your client, your client's successors, some other party, or a judge. One great way to achieve this goal is by using defined terms.

- When should you use defined terms?
 - As soon as you know you will refer to the same concept more than once in the document; and
 - When it takes more than a few words to explain the concept.
- In general, how do defined terms work?
 - "External" defined terms are unique to the external circumstances of the particular transaction (names of parties, location of real property, and the like). They tie the document to the outside world and the larger transaction. External defined terms are especially useful when facts are subject to future development and the exact details of the transaction are not yet known. They should all be defined early in the document;
 - "Internal" definitions, by contrast, refer solely to concepts internal to the particular document. They might refer to "external" defined terms.
- How can defined terms simplify transactional documents?
 - They can assure that any particular laundry list will appear only once in the document. This preserves simplicity, certainty, and consistency;
 - If properly structured, defined terms can allow you to make a necessary change only once—by fine-tuning or modifying a defined term—as the terms of the transaction are negotiated and modified over time; and
 - Defined terms can help you prevent a maze of cross references.
- How should you create defined terms?
 - Take a "structured" approach, setting up definitions as "building blocks" that work together;
 - As much as you try to broaden or clarify a defined term, it should still mean what it intuitively seems to mean without close scrutiny of the definition;
 - Beware of setting up a "broad" defined term and then using it in a context where you need a "narrow" defined term;
 - Avoid using words like "applicable" or "actual" or "selected" or "operative." They don't help the user remember what the term is about;
 - When defining related concepts, the defined terms should interact in a way that reflects the interaction of the underlying concepts; and
 - Collect your definitions in one place.
- Don't get carried away. Some concepts are simple enough, basic enough, or sufficiently well understood (or vagueness may work in your favor) that they don't need a definition.

THE GRAMMATICAL LAWYER

(Continued from page 9)

the ego gratification supplied by this new title. Anyone who wishes to succeed in politics in northeastern Pennsylvania, and certainly any attorney who harbors judicial aspirations, must have considerable *drag*, a slang word for *pull*, or influence that gains special or undeserved favors. Only once have I heard this term used outside the region. On the television show *Masterpiece Theater*, then-host Alistair Cooke used the word in summarizing the previous week's episode in explaining that one of the characters possessed considerable *drag*, which aided his ambitions.

In passing through Pennsylvania, we traveled through innumerable cities, *townships*, and *boroughs*. Local governmental units in this state all fall into one of these three categories.

The word *borough*, which sometimes is shortened to *Boro*, particularly when it is used as a suffix, as in Wellsboro, is derived from the Middle English and German word *burg*. It originally meant a fortified town sitting on high ground. In England, a *borough* was a municipal corporation with rights to self-government granted by royal charter. In Pennsylvania, a *borough* may be thought of as a self-governing, smaller version of a city. In England, a *township* originally denoted a parish or a division of

a parish, as a unit of territory and administration. In the United States, a township in eastern states such as Pennsylvania and New Jersey usually is a form of local government that exists in rural and suburban areas. In other parts of this country, it refers to a unit of territory that is generally six miles square and contains 36 mile-square sections.

Every state has places with interesting names, and Pennsylvania can certainly hold its own in this department. Once we crossed the Alleghenies — no mean feat even as recently as 60 years ago, when autos often littered the sides of the roads, gasping for water — I phoned my cousin to arrange for a visit. She and her husband reside in the Borough of *Nanty Glo*, which I gather is properly spelled *Nant-y-glo* and is Welsh for "stream of coal." (Residents of the eastern part of the state know of our own oddities. Ninety minutes north of Philadelphia, the Borough of *Jim Thorpe*, named for the famous athlete and currently promoted as the "Switzerland of Pennsylvania," was once known as *Mauch Chunk*, the translation of which I am unable to supply.)

Nanty Glo is just 20 miles or so from Indiana, Pennsylvania, which movie fans should recognize instantly as the hometown of the late actor Jimmy Stewart. We were fortunate to

arrive in town the day before, and later attended, a memorial service that was held for him in front of the courthouse in Indiana. There were few dry eyes in the crowd as the speakers recited the movie and military accomplishments of the revered native, known for his distinctive *stutter* or *stammer* as he delivered his lines. These two words, often used interchangeably, come from very different roots. *Stutter* is derived from the German word *stossen*, meaning to knock or push. It means to make a series of repeated sounds. *Stammer* can be traced to the Middle English word meaning to stumble in speech, and is defined in one dictionary as "to speak or say with involuntary pauses or blocks, often with rapid repetitions of syllable or initial sounds, as temporarily from excitement, embarrassment, or chronically as a result of muscles spasms believed to result from mental conflicts." Jimmy Stewart's trademark "Well-ll, well-ll . . ." sounds more like a stammer than a stutter to me, but that may be *putting too fine a point on it*, as people used to say.

Our trip concluded with a two-day stay in Gettysburg and our eventual return to Philadelphia on the Pennsylvania *Turnpike*, the nation's first. The names of many Pennsylvania

roads include the word *Pike*. In the Philadelphia area we travel along Germantown Pike and may take Bethlehem Pike north to the Lehigh Valley. The term *pike*, which in this case refers to a long pole, indicates that these roads once were (or, in the case of the Pennsylvania and other state turnpikes, are) toll roads. Early roads in this part of the state were sometimes built privately, and the builder would place a booth of some sort at the entrance to the road to assess a toll to recover the costs of construction. The toll collector would turn the *pike*, which blocked access to the road, only after the traveler paid the toll.

As we traveled toward home down the infamous Schuylkill Expressway which winds its way through Fairmount Park in Philadelphia, a few moments passed before we saw our first near-collision. A minute or so later, that fellow who always seems to follow me was already glaring at me in my rear-view mirror, as I had the temerity to drive only 60 miles per hour in the 50 m.p.h. zone. And, as I feared, the warmth and kindness I had expected from the perfect strangers in the more rural areas of the state were soon give way to the mirthless "smiles" we associate with so many encounters in our urban existence. Well, back to life as usual.