

## Stipulative Definitions: A Useful Drafting Tool<sup>®</sup>

By Barbara Child

Barbara Child has written a first-rate book on the badly neglected discipline of legal drafting. All lawyers have to draft; few are trained in legal drafting.

Editor

### Stipulative Definitions and Dictionary Definitions

In *Alice in Wonderland*, Humpty Dumpty tells Alice that when he uses a word, it means just what he chooses it to mean. She questions "whether you can make words mean so many different things," and he replies, "The question is which is to be master—that's all."<sup>1</sup> When drafting a legal document, the lawyer is indeed master, empowered to stipulate not only what the terms are but also what they mean.

A stipulative definition *prescribes* meaning within a given document. Dictionary (lexical) definitions merely *describe* meanings in common usage. Drafters have no need to include lexical definitions in legal documents except perhaps to indicate a choice between different and equally common dictionary definitions or to save the user the trouble of looking up an unfamiliar technical term in a dictionary.

Stipulative definitions, properly used, are a valuable form of shorthand:

*"Easement" means easement granted after May 4, 1970.*

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*"Mortgage" includes deed of trust.*

*"Rental agreement" does not include oral agreement.*

Such definitions retain ordinary lexical meaning but restrict it ("means"), enlarge it ("includes") or confine it ("does not include").

### Complete Definitions Using "Means"

It is a valuable form of shorthand to be able to stipulate that in this statute "Act" means Landlord and Tenant Act of 1974, or in this agreement "Carrier" means Mid-continental Overland Shipping Company, Inc. The shorthand form is, of course, especially helpful if the restricted term appears often in the document and if the long form is very long. In a sense, such stipulations are not definitions at all. They do not explain what an Act or a carrier is; instead they restrict all references in a given context to a certain Act or carrier.

Definitions using "means" are *complete* definitions. They stipulate that the term in question means all of what it says it means and nothing else but that. When stipulating that a term "means" something, the drafter assumes the obligation to provide a definition that is complete for the context and then stick to it. Consider this definition:

*"Reserved Area" means the kitchen, club room, and sitting room in the clubhouse building.*

Is the hallway between the kitchen and the club room reserved? What about the restrooms reached by that hallway? The obligation to spell out

every detail can be burdensome indeed and is usually unnecessary.

### Partial Definitions Using "Includes" or "Does Not Include"

The *partial* definition forms, "includes" and "does not include," are usually less burdensome and accomplish just as much with fewer words. For example:

*"Swimming Pool" includes the contiguous paved areas.*

Everybody knows "swimming pool" means the place where the water is. There is no need to stipulate that "pool" means pool plus contiguous areas. For another example:

*"Lawyer" does not include student intern.*

Again, everybody knows what "lawyer" means, at least in a given context. There is no need to stipulate that "lawyer" means one who has passed a Bar examination and been admitted to practice by a court. It would be possible to explain all that and let the reader figure out that a student intern is not covered by the definition—possible but needless. The confining definition using "does not include" makes the point in far fewer words.

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## A Checklist for Drafting Stipulative Definitions

Sometimes lawyers become addicted to the power to define and let it carry them away into embarrassing excesses. Here is a checklist for avoiding such trouble.

1. **Avoid stipulating dictionary meanings.** If a reader does not happen to know the ordinary meaning of a term, that reader can go to a dictionary. Using the enlarging term, "includes," rather than "means" can help avoid getting sucked into giving exhaustive lists of details. Compare:

*"Institutional First Mortgagee" means a bank, savings and loan association, insurance company, mortgage company, real estate investment trust or other construction lender, or individual mortgage lender authorized to do business in the State of \_\_\_\_\_.*

*"Institutional First Mortgagee" includes individual mortgage lender authorized to do business in the State of \_\_\_\_\_.*

The drafter may fear a court's applying *expressio unius est exclusio alterius* to the definition and concluding that some form of mortgagee not mentioned was omitted on purpose. To avoid that possibility, the drafter can stipulate: "Institutional First Mortgagee" includes *but is not limited to* individual mortgage lender. . . .

Trouble does not come from leaving out the obvious but from putting in too many obvious particulars. In other words, the canon causes trouble when the drafter feels compelled to include the lexical definition in what purports to be an enlarging stipulative definition. If the definition begins, "'Institutional First Mortgagee' includes a bank," trouble is on its way. The principle boils down to this: Prefer partial to complete definition whenever possible, and leave lexical meaning out of partial definition.

2. **Avoid "means and includes."** A definition cannot be both complete and partial. "Means and includes" is self-contradictory.

*"Expressway" means and includes the Cross-Town Expressway, all of its roadways, related approaches, viaducts, bridges, interchange facilities, and service roads.*

The following variation separates the restricting definition from the enlarging one and thus eliminates the contradiction. It also removes the needless lexical component about the roadways themselves.

*"Expressway" means the Cross-Town Expressway, including related approaches, viaducts, bridges, interchange facilities, and service roads.*

3. **Put definitions where they will do the most good.** If a document contains enough stipulative definitions to gather them together in a definition section, that section commonly comes at the beginning of the document to alert the reader that ordinary meanings of the listed terms do not prevail in the document. However, if a de-

finer term only appears once, or in one subsection of the document, it is preferable to put the definition with the use.

It is often wise to wait to draft definitions until the rest of the document is finished. Only then does the drafter know how often a term actually appears. Drafting definitions last also prevents two other embarrassing problems: (1) a term defined one way in an opening definition section and used another way later in the document, and (2) a term defined in a definition section and never mentioned again.

4. **Keep substantive provisions out of definitions.** When rules creep into definitions, the resulting muddle tends to grow long and difficult to follow. It is a sign of trouble ahead when a new sentence begins in the midst of a definition. The rules do not help define the term. Worse yet, because

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the rules are out of their normal place, they are hard to find.

*"Authorized Driver" means the Customer or an additional Authorized Driver who has been approved in writing by the Company and has signed his or her name at the time of rental in Area 87 on page 2 of this agreement. The only other Authorized Driver is a person who has the Customer's permission to use the Vehicle, but that person must have a valid driver's license and be at least 18 years old. In addition, such person must be a member of the Customer's immediate family who permanently resides in the Customer's household or must be a business associate driving the Vehicle for customary business purposes. Customer agrees not to permit use of Vehicle by any other person without obtaining the prior written consent of Company.*

This whole paragraph condensed from an automobile rental agreement has no business in the definition section. First, there is no need to stipulate that "Authorized Driver" means the Customer. That is obvious. Then, instead of the remainder of the definition, a substantive provision should express the parties' agreement regarding who else is authorized to drive the vehicle.

**5. Stipulate definitions in the present tense, not future.** Documents speak constantly. That is, unless they specify otherwise, they—and the definitions they include—are presently effective as soon as signed, not after some unidentified point in the future. Yet many drafters erroneously write that a given term "shall mean" or "shall include" something or other.

It may be that lawyers are so used to giving orders and exerting power that they forget how else to express things. They write that the tenant

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"shall" pay the rent and the buyer "shall" pay the points, which technically is not even appropriate language for agreements. But even if the lawyer can give people orders in contracts, it does not make any more sense to order a term to mean something than to declare that it will mean something sometime in the future—but not now.

**6. Stipulate definitions that do not strain ordinary meaning too much.** Humpty Dumpty may be able to get away with making words mean whatever he chooses, but it is dangerous for humans, even lawyers, to push them too far. Human psychology gets in the way. A reader will likely accept a stipulation that "swimming pool" includes the contiguous paved areas. But what if the definition also includes a shuffleboard court and playground? Readers do not easily substitute the new meaning for a very different old one that automatically comes to mind. Worse yet, the drafter may lose track of such a strained definition and make trouble later in some substantive provision, such as one prohibiting toys in the swimming pool. Presumably then children dare not bring toys to the playground.

A more troublesome effect of strained definitions is the possibility that a court will not honor them.<sup>2</sup> For example, an insurance policy defined "burglary" as a felonious entry leaving "visible marks" on the "exterior of the premises at the place of such entry." Based on this definition, the company denied a claim because the burglar left visible marks on only interior doors.<sup>3</sup> The Iowa Supreme Court refused to apply the policy's definition, finding that it contradicted common understanding of burglary and thus contradicted the reasonable expectations of the insured.<sup>4</sup>

**7. Above all, choose with care the terms to define in the first place.** A stipulative definition does not explain what an unknown term means but invents a convenient shorthand label for something known but possibly complex and many faceted. Thus in-

surance companies, or the legislators who regulate them, invent labels like "Service Provider." Landlords invent "Common Areas," and realtors invent "Closing Costs."

The hard part is to stay alert to what connotations the label also attaches. For instance, one commentator points out the effects of the National Labor Relations Act's referring to strikers as "employees" rather than "Protected Individuals," thus suggesting that strikers are entitled to all of the benefits of employment, not just to the protections provided by the NLRA.<sup>5</sup>

Here is another example, also in the area of labor relations. The University of California at Berkeley reclassified all three of its graduate student teaching positions by giving them one label, "graduate student instructor." The graduate students charged that the purpose of the reclassification was to defeat their attempt to unionize. They argued that the new label suited the University's characterization of them as teacher trainees rather than employees and thus ineligible to bargain.<sup>6</sup>

In short, the choice of a label for definition purposes can serve as a powerful drafting tool. However, whether by intention or by accident, it can also set off a legal explosion.

#### Footnotes

1. L. Carroll, *Through the Looking Glass*, 163 (W.W. Norton & Co., D. Gray, ed., 1971).
2. See, Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. Pa. L. Rev. 21, 30-31 (1984).
3. *C & J Fertilizer, Inc. v Allied Mutual Insurance Company*, 227 N.W.2d 169, 171 (Iowa 1975).
4. *Id.* at 177-79.
5. H. Hurd, *Writing for Lawyers* 115-17 (Journal Broadcasting & Communications Co., Pittsburgh, Pa., 1982).
6. For an account of the students' charges filed with the California Public Employment Relations Board, see *Berkeley Graduate Students Protest Job Reclassification*, Chron. of Higher Educ., Oct. 2, 1985, at 27, 30. For a report of the Administrative Law Judge's ruling in the students' favor, see *Cal. Graduate Students Eligible for Bargaining*, Chron. of Higher Educ., Mar. 4, 1987, at 2.