



# New Drafter Training - What Does That Mean?

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National Conference of State Legislatures: Legal Services Staff Section

**New Drafter Training**

**September 2014**

**What Does That Mean?  
Crafting and Using Definitions in Statutes**

**Presented by: Angela Alexander**

*This hour-long webinar is meant to introduce new legislative drafters to the topic of using definitions in statutes.*

Presenter Biography

Angela Alexander is a Senior Legislative Counsel with the Texas Legislative Council. She graduated from The University of Texas School of Law and has been with the council for 16 years. Angela drafts and reviews legislation and provides legal counsel to members of the Texas Legislature in the areas of insurance regulation, property law, civil practice and remedies, and alcoholic beverage regulation. She was one of the four chief revisors of the Texas Insurance Code. In addition to her legislative work, she drafts and reviews contracts entered into by the Texas Legislative Council.

**INTRODUCTION**

## OVERVIEW

### TOPICS

- ❖ FORMAT AND STRUCTURE
- ❖ WHY DEFINE?
- ❖ DO YOU NEED A DEFINITION?
- ❖ TYPES OF DEFINITIONS
- ❖ USES AND FUNCTIONS
- ❖ DEFINING BY REFERENCE
- ❖ SUBSTANTIVE AND ARTIFICIAL DEFINITIONS
- ❖ ALTERNATIVES TO DEFINED TERMS
- ❖ TIPS AND BEST PRACTICES

## FORMAT and STRUCTURE



## PLACEMENT OF DEFINITIONS



- **AT THE BEGINNING** of the unit of law to which they apply.



- **CLOSE TO THE SMALLEST UNIT OF LAW** in which the term is used.



- **GROUPED** in a single definitions provision.

## ABC STRUCTURE AND PUNCTUATION

- **SPECIFY THE UNIT OF LAW**
  - In this (Act, code, title, subtitle, chapter, subchapter, section, subsection)
- **NUMBERED LIST** (when more than one)
- **ALPHABETICAL ORDER**
- **CAPITALIZED** (if in separate subdivision)
- **TERM IN QUOTATION MARKS**
- **COMPLETE SENTENCES**, ending in a period.

## STAND-ALONE DEFINITIONS

A **complex or particularly important definition** may merit its own definition section, outside of a general definitions provision.

A separate section allows deeper division into parts and subparts. Separate subsections can cover inclusive and exclusive elements or further define or expand on elements of the core definition.

Headings:

- Sec. 101.001. GENERAL DEFINITIONS.
- Sec. 101.002. BUILDER DEFINED.

## WHY DEFINE?



## WHY DEFINE?

- **Providing CLEAR MEANING**
  - When a term is ambiguous or its meaning is otherwise unclear, a definition can establish the clear meaning of the term.
- **DRAFTING CONVENIENCE (“drafting economy”)**
  - A definition can also be used to avoid burdensome repetition of the substance of the definition.

## DRAFTING PHILOSOPHIES



- **LESS IS MORE**

One of the greatest abuses of definitions is their **overuse**. There is no need to define a term if, in the context in which the term appears, the meaning is clear without a definition. Texas Legislative Council Drafting Manual, Sec. 3.07(a).

It is difficult, and often risky, to try to formulate definitions that correspond with the ways in which the draftsman actually uses the defined terms elsewhere in the same document. **(It is apparently easier to use words properly than to define them accurately.)** Dickerson, Legislative Drafting, Sec. 8.1.
- **MORE IS MORE**

Definitions are an important tool to ensure **legislative intent** is observed by the courts. A well-crafted definition leaves less room for a judge's discretion or for a statute to be misconstrued by the courts or by others who are affected by it.

## DO YOU NEED A DEFINITION?

### • DON'T DEFINE IF:

- COMMONLY UNDERSTOOD
- CONTEXT makes the meaning clear
- APPLICABLE DEFINITION is already in law
- A BETTER ALTERNATIVE IS MORE EFFECTIVE OR EFFICIENT



### • DO DEFINE IF:

- NOT COMMONLY UNDERSTOOD
- NOT CLEAR FROM CONTEXT
- BOUNDARIES OF MEANING need to be clarified or *reasonably* expanded or narrowed
- UNDESIRABLE DEFINITION would otherwise apply



## COMMONLY UNDERSTOOD

- Consider the **AUDIENCE** to whom the law is primarily addressed.
- Some terms that might be considered "commonly understood":
  - Website
  - Internet
  - Contract

## CONTEXT

### • Deductible, copayment

- Insurance context, goes undefined

### • Lot

- Real property—not typically defined
- Sale of goods—defined in commercial provisions
- Elections—"casting of lots"—not defined

## FINDING APPLICABLE DEFINITIONS

### • CONSTRUCTION OF LAWS STATUTES

- Chapters 311 and 312, Texas Government Code

### • EACH UNIT OF LAW CONTAINING THE UNIT YOU ARE WORKING WITH

### • DEFINITIONS THAT APPLY OUTSIDE THE UNIT OF LAW IN WHICH THEY APPEAR

- Sections 1.03 and 1.07, Texas Penal Code



## TYPES OF DEFINITIONS

- **EXCLUSIVE**  
*Provides complete definition*
- **NONEXCLUSIVE**  
*Clarifies, expands, or illustrates*
- **LIMITING**  
*Clarifies or narrows*



## THE LANGUAGE OF DEFINITIONS

- **EXCLUSIVE (RESTRICTIVE, EXHAUSTIVE, ALL-INCLUSIVE)**
  - Use "MEANS"
  - **Example:** "Person" means an individual or corporation.
- **NONEXCLUSIVE (INCLUSIVE, EXTENSIVE)**
  - Use "INCLUDES"
  - **Example:** "Person" includes a corporation.
    - "Includes but is not limited to"—use depends on the state.
- **LIMITING**
  - Use "DOES NOT INCLUDE"
  - **Example:** "Person" does not include a government or governmental subdivision or agency.



## HYBRID DEFINITIONS

"Funeral service" **means** a service performed incident to a funeral ceremony or for the care and preparation of a dead human body for burial, cremation, or other disposition. **The term includes** embalming.

"Recycling" **means** any process by which equipment that would otherwise become solid waste or hazardous waste is collected, separated, and refurbished for reuse or processed to be returned to use in the form of raw material or products. **The term does not include** incineration.

## USES AND FUNCTIONS

PROVIDING CLEAR MEANING

DRAFTING ECONOMY

APPLICABILITY OR SCOPE OF LAW



## CLEAR MEANING



## AMBIGUITY AND VAGUENESS



- **Usually** to be avoided.
- Sometimes a client will not want to clarify for **political or strategic** reasons or will be satisfied so long as the target situation is clearly covered.
- Sometimes the goal is to give an implementing agency **room for interpretation** and the ability to develop more specifics through the rulemaking process.
- Occasionally, **great breadth** is desired over complete clarity. This is often accomplished with multiple illustrations of included components and a broad "catchall" description.

## TECHNICAL TERM



### Medical terminology

From Texas law governing asbestosis and silicosis claims:

(23) "Pulmonary function testing" means spirometry, lung volume, and diffusion capacity testing performed in accordance with Section 90.002 using equipment, methods of calibration, and techniques that meet:

(A) the criteria incorporated in the American Medical Association Guides to the Evaluation of Permanent Impairment and reported in 20 C.F.R. Part 404, Subpart F, Appendix 1, Part (A), Sections 3.00(E) and (F)(2003); and

(B) the interpretative standards in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values and Interpretative Strategies," as published in 144 American Review of Respiratory Disease 1202-1218 (1991).

## GUIDANCE AND MODELS

- Get clarity on **CLIENT INTENT** if possible.
- Can the client provide **CONTENT**?
- If the client can't define the term, they may want you to craft something that can be considered in the legislative process. Look for **MODELS**. Inform the client about the **SOURCE** you used.

## DRAFTING ECONOMY

- NAMES OF AGENCIES OR OFFICIALS
- UMBRELLA TERMS
- COMPLEX CONCEPTS



## AGENCIES AND OFFICIALS



- **USE SHORT FORM:** For widely used terms in larger body of law  
From the Texas Insurance Code:  
In this code and other insurance laws:  
(1) "Commissioner" means the commissioner of insurance.  
(2) "Department" means the Texas Department of Insurance.
- **DON'T USE SHORT FORM:** For limited use in smaller unit of law  
Once the full name is used in an operative provision, it can often be referred back to with a shorter form.



## UMBRELLA TERMS



From Texas' Structured Settlement Protection Act:

- (7) "Interested party" means, with respect to any structured settlement:
- the payee;
  - any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death;
  - the annuity issuer;
  - the structured settlement obligor; and
  - any other party that has continuing rights or obligations under the structured settlement.

## COMPLEX CONCEPTS



From Texas Trust Code:

- (7) "Presumptive remainder beneficiary," with respect to a particular date, means a beneficiary of a trust on that date who, in the absence of notice to the trustee of the exercise of the power of appointment and assuming that any other powers of appointment under the trust are not exercised, would be eligible to receive a distribution from the trust if:
- the trust terminated on that date; or
  - the interests of all beneficiaries currently eligible to receive income or principal from the trust ended on that date without causing the trust to terminate.

## CHOOSING YOUR TERM

- For umbrella terms and complex concepts, choose a term to define that has some **CONNOTATIVE VALUE** and is an **ACCURATE** representation of the content of the definition.



- Examples:**
  - CONSTRUCTION CONTRACT versus CONTRACT
  - HEALTH BENEFIT PLAN versus HEALTH INSURANCE

## APPLICABILITY OR SCOPE



## APPLICABILITY OR SCOPE OF LAW

- EXAMPLE:**
  - "Insurer" means an insurance company or other legal entity authorized to engage in the business of insurance in this state, **including** a reciprocal or interinsurance exchange, a Lloyd's plan, and a county mutual insurance company. The term **includes** an affiliate. The term **does not include** a farm mutual insurance company or an eligible surplus lines insurer regulated under Chapter 981.
- If **artificially or arbitrarily** carving down or expanding a generic term for the purpose of controlling applicability, consider defining a more specific term or drafting an applicability provision instead.

## DEFINING BY REFERENCE



## HOW TO CROSS-REFERENCE

- Use **“has the meaning assigned by”** in a **definitional sentence.**
  - (3) **“Family” has the meaning assigned by** Section 71.003, Family Code.
- Use **“as defined by”** in the sentence in which the term is used.
  - In an action for personal injury or death resulting from an **asbestos-related injury, as defined by Section 90.001**, the cause of action accrues....
- **Don’t use PINPOINT CITES.**

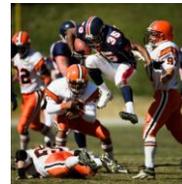
## CROSS-REFERENCE versus RESTATEMENT

- **CONSIDER THE POSSIBILITY OF FUTURE AMENDMENTS**
  - Texas construction of laws provisions provide that amendments to a referenced provision will apply to the law where the provision is referenced.
- **CLOSELY RELATED OPERATIVE LAWS?**
  - Increases likelihood that picking up amendments will be desirable.
- **SOURCE LAW IS PRIMARY STATUTE ASSOCIATED WITH ITEM BEING DEFINED?**

## REFERENCING OUTSIDE SOURCES

- May constitute **UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY**
- **STATIC REFERENCES** to an existing version of a source are not a delegation.
  - the National Electrical Code...as that code existed on January 1, 1985
  - the Diagnostic and Statistical Manual, 4<sup>th</sup> Edition
- **AMBULATORY REFERENCES** are not limited to an identifiable version or are explicitly prospective.
  - Courts may interpret the reference as static, find it permissible, or strike it down.
- **Potential cure: Authorize a regulatory body or political subdivision to adopt future versions.**

## DEFINITIONS TO AVOID



## SUBSTANTIVE DEFINITIONS

DON'T HIDE THE BALL.



## AVOID SUBSTANTIVE DEFINITIONS

Substantive definitions place **operative provisions** of law in a segment of law that purports to define the meaning of a word. Asks a definition provision to carry weight it is not designed for and makes the statutes less accessible.



**RED FLAGS:** Are you using the language of definition ("means," "includes," "does not include") or the language of duty, requirement, authorization, prohibition ("shall," "must," "may," "may not")?

## SUBSTANTIVE DEFINITION

From the Texas Health and Safety Code:

**(11) "Hospital eligibility system" means the financial criteria and procedure used by a hospital to determine if a patient is eligible for charity care. The system shall include income levels and means testing indexed to the federal poverty guidelines; provided, however, that a hospital may not establish an eligibility system which sets the income level eligible for charity care lower than that required by counties under Section 61.023 or higher, in the case of the financially indigent, than 200 percent of the federal poverty guidelines. A hospital may determine that a person is financially or medically indigent pursuant to the hospital's eligibility system after health care services are provided.**

## SUBSTANTIVE DEFINITIONS

- **Example from Alabama Drafting Manual:**
  - "Agreement" means a written agreement.
    - Don't impose a requirement that an agreement be in writing by definition.
- **Example from Arizona Drafting Manual:**
  - "Annual inspection" means an inspection conducted by the department at least sixty days before a facility's license expires and at which time the facility shall be in full compliance with this article and rules adopted pursuant to this article.

## ARTIFICIAL DEFINITIONS

“WHEN I USE A WORD,” HUMPTY DUMPTY SAID, IN RATHER A SCORNFUL TONE, “IT MEANS JUST WHAT I CHOOSE IT TO MEAN -- NEITHER MORE NOR LESS.”



## AVOID ARTIFICIAL DEFINITIONS

Artificial definitions provide meanings that are so far from what any ordinary meaning of a term would suggest that confusion may arise.

Example from Minnesota Drafting Manual:

“Hospitals” includes day care centers.

**RULE OF THUMB:** Someone reading the operative provisions alone should be able to get a good idea of what the law is about.

Can often be avoided by:

- (1) choosing a **broader or narrower term** to define that bears some reasonable relation to the content of the definition;
- (2) using an **applicability provision** instead;
- (3) just **saying what you mean** in the operative provisions.

## ALTERNATIVES TO DEFINED TERMS



## APPLICABILITY PROVISION

**SECTION 1. DEFINITION.** In this Act, “county” means a county with a population of 500,000 or more.

**SECTION 1. APPLICABILITY.** This Act applies only to a county with a population of 500,000 or more.



## DEFINE IN PLACE

...a **public improvement such as** a civic center, civic center building, auditorium, opera house, music hall, exhibition hall, coliseum, museum, library, recreational building or facility, or other public building or related facility...



...the existing total amount of groundwater in **drainable storage** within the district, **which means** the total volume of the aquifer in the district multiplied by the specific yield...

## SHORTHAND REFERENCES

### MAKING A GENERIC TERM SPECIFIC:

A contract **described by** Section 102.002...

An insurer **to whom this chapter applies**...

An insurer **that issues** a homeowners insurance policy...

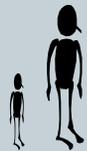
### PICKING UP A COMPLEX CONCEPT:

...fraudulent, **as described by** Section 51.901(c), Government Code...

...robbery **as described by** Section 29.02, Penal Code...

### REFERENCING AN EXISTING LIST:

An entity **listed in** Subsection (a)(1)...



## TIPS AND BEST PRACTICES



## SEARCHES



- Search for **OTHER STATUTORY USES** of the term you are defining. You may find it is widely used **without definition**, in which case consider whether there is a special reason to do so in your draft. You may also find an appropriate definition to reference or replicate.
- If you **REPEAL OR AMEND** a definition, search for all uses of the term in the unit of law to which it applies, for any **cross-references** to the definition in other law, and for matching definitions appearing elsewhere. Conform the law as appropriate.

## UNUSED TERMS



- **GENERAL RULE: Don't define a term that is not used in the law.**
  - **COMPOUND DEFINITIONS:** Practice of defining terms for use only in other definitions is controversial. A stand-alone definition provision for the primary term may be a useful alternative.
- **AVOID ABANDONED DEFINITIONS when:**
  - **OPERATIVE PROVISIONS ARE REPEALED OR AMENDED**
  - **CHANGES ARE MADE DURING LEGISLATIVE PROCESS**

**LEAVE NO UNUSED DEFINITION BEHIND**

## QUESTIONS?

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## Questions?

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