

Why, When, And How To Create And Use Model Documents



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Joshua Stein

They can save time and money, provide a great training opportunity, and make clients happy.

A MODEL DOCUMENT is a standardized version of a document you use often, available to anyone in the office working on a similar transaction, often maintained in a separate area of a document management system. A Model Document should offer a reliable starting point for further work, including reminders for the typical revisions for the particulars of each deal. Model Documents save you the trouble, and your clients the expense, of your re-inventing the wheel. By using Model Documents, you can save time, improve quality, and make your life easier.

Model Documents also help us produce top quality work under greater time pressure and deal pressure in a marketplace that becomes more and more impatient every year. You therefore make your clients happier.

Development of Model Documents can provide great training. An attorney or paralegal can work, without time pressure, side by side as a team with a more senior person, to produce the best possible written work. A Model Document can be rigorously thought through, paragraph by paragraph. The supervisor can take the time to explain each editing decision. The lessons conveyed may help improve future written work of all kinds.

The time that any attorneys spend developing, improving, and maintaining Model Documents represents an investment in the future of their business.

The following guidelines and comments provide some thoughts on how to create, develop, use, and improve real estate Model Documents, offering ideas and suggestions more than rules or requirements.

1. Creating Model Documents: Purpose and Principles.

1.1 Selection of New Model Documents. Any document that you use repeatedly may constitute a good candidate for a Model Document. This includes not only obvious candidates like mortgages and leases, but also minor but common documents like a memorandum of lease, estoppel certificate, or deed. All these documents may be quick and easy to prepare when needed, but they are also quick and easy to prepare wrong, especially under time pressure. Model Documents help prevent that.

1.2 Objectives for New Model Documents.

1.21 Quality. Any Model Document should reflect the highest possible quality. It should be substantively correct, complete, thorough, well-written, and well-organized. Take time to achieve perfection in ways that you might not bother with for a one-shot document prepared under time pressure. At the same time, make sure your Model Document does not seem “weird” or “unusual” or too different from similar documents ordinarily used by other attorneys.

1.2.2 Reflect Experience. A Model Document should reflect the state of the art and your experience, as well as current and recent legal developments, both statutory and judicial.

1.2.3 Ease of Use. Make your Model Document easy to use and modify. Use bracketed comments, footnotes, and blanks to note points or issues for special attention. A blank might show the user where to insert a party’s name or address or a loan amount. Use brackets and footnotes to flag issues that the user should consider, such as optional paragraphs.

1.24 Optional Provisions. Use optional provisions for flexibility and to limit the number of Model Documents you prepare and must then maintain. For example, combine a permanent loan mortgage and a construction loan mortgage into a single document with optional paragraphs. The user would select which paragraphs apply in each case. (Give the user some instructions and try to make the choices as simple and few as possible.) This avoids the need to try to maintain two Model Documents and keep them consistent for the rest of time. Also include optional paragraphs that might apply only occasionally, depending on each deal.

1.25 Completeness. Give the user—or at least remind the user of—everything they’ll need to prepare a professional and top quality document. Don’t leave a booby trap, hence a crisis at closing, such as leaving off acknowledgments, exhibits, etc. When in doubt about whether to include a particular provision, ordinarily include it, perhaps with a footnote to flag it as “optional.” You would rather rely on the user to delete what’s not needed for a particular transaction than to figure out what’s needed but isn’t there. This does, however, create a bit of complexity. If a provision will become relevant only very rarely, just leave it out, for simplicity and ease of use. Or offer it as a rider in back or as a separate document for use only when needed.

1.3 Issues to Consider.

1.31 Coverage Level. Determine the scope and depth of coverage. Do you want to create a “short-form” document or a “full” or “overkill” document? You may want two versions of a document where this dichotomy often arises, such as guarantees and mortgages. Or, if possible, collect the incremental “long-form” clauses at a single place in the document, with a reminder to the user to include or exclude the clauses as appropriate. (This latter approach leaves us with one less Model Document to maintain and update going forward, which is good.)

1.32 Advocacy. Determine the extent to which your Model Document should favor your client or be more balanced. So that you can properly follow your clients' instructions and preferences when using the Model Document, indicate in the cover sheet of your Model Document (see below) whether it is prenegotiated or possibly overreaching and one-sided.

1.4 How to Combine Model Documents with Transactional Work. Often you can develop a Model Document efficiently as you prepare documents for a transaction. Some examples:

1.41 A "New" Document. Suppose you have just prepared the first draft of a document for which you should already have a Model Document but don't. When you send out the first draft, save a copy of it. As you improve the deal document in response to comments, also improve the extra copy as you go along, but only where it helps your client or improves the document. The result, with some polishing, could become a new Model Document.

Even better, as soon as the deal closes, while you're still a hands-on expert on the document, run a computerized comparison from the first draft to the last. Then copy the first draft of the document and revise it to convert it into a Model Document, taking into account any changes over the course of the transaction that generically improved the document.

This approach is especially valuable if, for the particular deal, you find several good precedents and as your first draft combine them into a good new document for the deal. That work won't go to waste if you turn your first draft into a Model Document (with the benefit of any "good" changes you made during the transaction).

1.4.2 Reuse of a Prior Document. Suppose you need a certain kind of document, and someone has just given you a great precedent for that document via email. You can easily mark it up and use it for your transaction—or with about an hour's addi-

tional time, you can first mark it up to make it a generic example of the particular document, which you can easily convert into a Model Document. You would then save that generic version and immediately use a copy of it for your deal.

The process of turning an existing document into a non-deal-specific generic example of that document not only helps for developing a Model Document, but also helps you prevent mistakes on the current deal by forcing you to diligently squeeze out all deal-specific provisions before you begin to modify the document for the current deal.

After you close your deal, of course, you should again run a redline from your "new" model to the final closing document, as an opportunity to get the benefit of any improvements you made in the course of the deal.

1.5 Interaction with Other Documents. If a Model Document will interact with other documents (e.g., a note with a mortgage), think about consistency and coordination. Mention the interrelationship in the cover notes (if you choose to add cover notes) for each Model Document in the set. If more than one Model Document in the set will require the same exhibit, try to make exhibit designations consistent across all documents if you can. Ordinarily, when you develop a family of related Model Documents, develop them together and from the same family of precedents.

1.6 One Document at Once. If you are new to Model Documents and plan to work on more than one Model Document project, finish and submit for review one document first—and get comments—before going on to other Model Documents. You may save a great deal of effort.

2. Creating Model Documents:

The Process.

2.1 Resource. When you start work on any Model Document, you may be able to obtain: (a) model

cover notes for any Model Document and (b) a model starting point (or “skeleton”) for any Model Document. Item “a” gives you an easy checklist and structure for cover notes, if you choose to use them. Item “b” gives you a standard document skeleton for recorded documents, already set up for relevant (e.g., New York) recording requirements. The document skeleton includes all possible bells and whistles that anyone could ever need for a recorded document (fancy cover page in proper form for recording, table of contents, index of defined terms, full panoply of possible acknowledgments, etc.). You can delete any or all of these.

2.2 Choose a Strong Precedent. Use an excellent precedent as the starting point for your Model Document. It can come from your files, another attorney’s files, a high quality form book, or any other good source. Use whatever will produce the best result. Also, before you start, ask whether someone else in the office has already developed a similar Model Document. If someone has, stop work and let your supervisor know. (But don’t copy someone else’s Model Document under a new document number. That would create the risk of two conflicting versions to maintain and update periodically, and keep consistent—which, as a practical matter, probably won’t happen.)

2.3 Save Your Starting Point, Preserve an Audit Trail. Keep a copy of your starting point document (as version 1 of a new document with a new name) before making your current changes (starting in version 2). This will assure you can run a computerized comparison later to show every change, to facilitate later review of your work. You will also avoid any risk of overwriting any “deal document” that became a starting point for a Model Document.

2.4 Cover Notes. If you choose to use cover notes for your Model Document, you can use a standard template as the starting point for those cover

notes, or any other format you deem appropriate. Cover notes might mention, for example, any of these, as appropriate: (a) brief explanation of purpose, including the type(s) of transaction(s) where one could use this Model Document; (b) the party from whose perspective the Model Document was prepared and whether it was prenegotiated to any extent (i.e., deliberately included concessions to the other party, to save negotiating time); (c) instructions and pointers; (d) references to related documents and outside issues to consider; (e) explanations of, or quick references to, optional provisions; (f) references to issues that a user might want to cover in the document but that you have decided not to address (so the user can decide whether to add them—if they do add them, then ideally they will remember to later provide a new optional paragraph to add to the Model Document); (g) lists of issues that the other side might reasonably raise; (h) discussions of substantive issues; (i) references to particularly good articles or other secondary sources; (j) acknowledgments of substantial assistance; (k) practical issues about execution of the document, such as likely need for an escrow or other ancillary documents; and (l) anything else that might help the user.

2.5 Use or Replace Document Skeleton. If a standard Model Document skeleton works for you, keep it and modify it to meet your needs. Otherwise, ignore it and use your own starting point for your Model Document.

2.6 Remove Deal-Specific Items. Replace each reference to the original parties, deal, etc., with blanks. If your starting point document includes any substantive provisions that were deal-specific but might apply in future deals, consider generalizing them and offering them as options. Add a note in the cover notes or text or footnotes to tell the user about each option.

2.7 General Editing. Try to clarify and improve the language in the Model Document (see some drafting suggestions below). Look for inconsistencies and ways to improve the document both stylistically and substantively.

2.8 Compare Precedents. Compare your preliminary Model Document against at least two or three other precedents from your own files, your colleagues, high quality form books, or any other good source. This is the most important part of preparing a Model Document. Carefully read through the other specimens. Ask how two or three other people who knew what they were doing dealt with the same legal situation. Sentence by sentence, paragraph by paragraph, issue by issue, think about how your other specimen documents handled the same legal situation differently or better than your precedent. If you read another precedent and think it doesn't have anything to teach you, read it again!

If you look through several precedents and start to realize diminishing returns, though, you can probably stop, assuming you started from a sound precedent. If, however, you are responsible for maintaining the particular Model Document, never stop checking it periodically against precedents and secondary sources you encounter in your practice.

2.9 Questions to Ask. In developing your Model Document and comparing it against other precedents, ask these questions:

2.9.1 What's Missing? What provisions should (or might) your Model Document contain, but doesn't? This is the hardest question to answer. Comparison against other good precedents is probably the best way to answer this question or to convince yourself that the answer is "Nothing."

2.9.2 Make Sure You Understand. Think about what you read in your Model Document. Insist on understanding each sentence and its purpose. If you don't understand a provision, ask someone who

does or spend some time in the library researching why that provision exists and how you might accomplish that goal better. (A "library" is a room that contains books and other resources, often on paper, and often offering structured and systematic discussions of a subject area that can be more insightful and useful than running an online search to answer a question. Unfortunately, use of a "library" can require leaving one's primary computer and email stream for more than 10 minutes.) Revise accordingly. Think of Model Document projects as an opportunity for professional education. What you learn here will help in unexpected ways down the road.

2.9.3 Can You Say Anything Better? In your Model Document, can you express anything in a better way? Make this comparison on both a macro level (what concepts and entire areas of coverage are missing?) and on a micro level (do other precedents suggest ways to fill minor gaps, such as adding items to a list, or ways to say things better?).

2.9.4 Does a Different Approach Make More Sense? Sometimes a precedent you use for comparison will suggest an entirely different approach to a legal problem. Critically decide whether that approach or the approach you've been using makes more sense. Don't fall in love with what you've done.

2.10 Review of Document. When you have put together a preliminary Model Document, review and cross-check it in as many ways as you can. Does it accomplish the intended objectives? Does it provide the right level of coverage and advocacy? Does it establish correct rights, obligations, and remedies for the legal relationship intended? Can you improve its structure or style? Does it look like other similar documents?

2.11 Review by Second Person. Before you place any Model Document in service, at least one senior person with experience in the area should care-

fully critique the entire Model Document. Your editor should carefully and critically suggest improvements and catch flaws or imperfections that you might have missed because of your proximity to the document or for other reasons. One cannot overemphasize the importance of this step.

3. Drafting Suggestions.

As you work on any Model Document, keep in mind these suggestions on drafting. First, however, understand any existing style guidelines that you should follow. They would supersede anything suggested here.

3.1 Organization, Structure, and Format. Organization, structure, and format are always important in any document. They are especially important in Model Documents. They may make the difference between a helpful Model Document and one that creates confusion rather than clarity. Consider these guidelines, combined with your own judgment and common sense.

3.1.1 Table of Contents. For a substantial document, you might want to include a Table of Contents. It can collect just one level of headings or all headings (or anything in between). If you decide to have the table of contents include just one level of headings, then format them to eliminate blank lines between rows in the table of contents.

3.1.2 Recitals. Start your document with appropriate recitals, i.e., preliminary explanations of who the parties are, why they want to enter into this document, what related documents have already been (or are simultaneously being) entered into, what real property is involved, and similar foundational elements. Set up most of your deal-specific defined terms in the recitals or other preliminary paragraphs. Recitals force the user to ground the document in a factual foundation and connect it to the rest of the transaction and the rest of the world. Recitals will also help tremendously when someone tries to understand the document later, or decides to amend it, or contemplates taking it by assign-

ment. For these and other reasons, set up recitals to force the user to make them 100 percent clear and correct. Even slight inaccuracies create confusion and uncertainty (i.e., potential litigation).

3.1.3 Short Paragraphs. Keep paragraphs short. Break ideas into separate pieces, each a paragraph, whose structure collectively reflects and communicates the structure of the document and the relationship it creates.

3.1.4 Numbering and Headings. Use automatic subdivision numbers and italicized headings. This makes the document easier to use for everyone—including you as author, editor, or user. Eliminate numerical subdivision cross-references (unless updated automatically), to avoid crises and mistakes caused when the user forgets to update section cross-references after adding new subdivisions early in the document. Instead of using numerical section cross-references, rely on defined terms or cross-references to subdivisions by name. Cover notes should also use automatic subdivision numbering. The template for model cover notes already does. Except for differences in the indentation of the first line, all paragraphs, even at subordinate levels within the document, should be flush to the same left margin.

3.1.5 Completeness. Include these details in your Model Document: (a) full acknowledgments in any document that requires them; (b) signature blocks for the most likely type of entity that will sign the document (or just a limited liability company if appropriate); (c) a list of exhibits and attachments right after the signatures for easy reference and document assembly; and (d) dummy exhibit pages (also mentioned in the cover notes) to remind the user to focus on exhibits. Set up your Model Document to encourage the user to attach as exhibits any written material that a future reader of the document will probably need or want to see. This minimizes the probability that the other written material will get lost.

3.1.6 Recording Requirements. If the user should record the document, then comply with, or remind the user to comply with, all applicable recording requirements. For New York documents, save time by starting from the Model Document skeleton for a recorded document as described above.

3.1.7 Typography and Page Format. The following stylistic conventions are optional. Don't justify text (use a ragged right margin). Keep margins at one inch, throughout, using only indentation of the first line of each paragraph to indicate its structural level within the document (same format as this document). Boldface any reference to an Exhibit attached to the particular document you are working on, but not references to exhibits attached to other documents. State each number once (without repeating it in parentheses). Spell out only the numbers up to nine. For 10 and higher, use numbers. Italicize headings and anything else you might otherwise underline, except signature lines. Single-space all documents, skipping a line between paragraphs. Search for and delete any space characters at the end of paragraphs. If left in place, they will only cause weird formatting problems later.

3.18 Special Formatting. For special formatting, use the correct formatting features (including columns and block indents) rather than tabs, spaces, and hard returns.

3.2 Defined Terms. Strategic use of defined terms can help make your Model Document easy to prepare, use, modify, and understand. Whenever you refer to the same concept more than once, you have a candidate for a defined term. Take advantage of that opportunity as soon as possible and start saving time immediately. Don't make your user choose between the same two options again and again; instead create a suitable defined term the first time the choice arises, and then use that one defined term consistently. Assuming you establish a good set of defined terms, they will help prevent mistakes and minimize changes when the facts change or the

user decides to modify the concept embodied in a defined term. A few suggestions on defined terms:

3.2.1 Where to Define a Term. Particularly when you set up a defined term that will vary from deal to deal (such as the name of the "Lender" or the "Interest Rate"), try to define it early in the document, preferably in or before the recitals, but in any case at your earliest reasonable opportunity. When preparing a Model Document, reorganize your document so that you collect most or all of the variable provisions (including defined terms that will vary from deal to deal) up front, if you can do it gracefully. Defining terms early will make the document easier to use and save time and prevent mistakes later. Underline the first occurrence of each defined term (the "Defined Term").

3.2.2 Pitfalls. By setting up defined terms in a careful, user-friendly and intuitive structure, you can prevent mistakes and avoid leaving pitfalls for the user to fall into. More specifically:

3.2.2.1 Follow the User's Intuition. Each defined term should mean whatever a reasonable user would intuitively expect it to mean based on potentially sloppy and imperfect memory. Don't assume users will carefully check the definition every time they use a defined term. In setting up a defined term, don't establish counterintuitive exceptions or inclusions, such as defining "black" to include "green" for certain purposes, and, on Tuesdays, to not include "black" if the premises are located more than 100 feet from a public street.

3.2.2.2 Coordinate Items in a Group. If a group contains several coordinate items, give each a name to distinguish it from other items in the group. For example, if a transaction includes multiple mortgages, don't call one "the Mortgage" and another "the Purchase Money Mortgage." Definitions like these invite confusion and mistakes. (In this example, you might do better by defining, for example, the "Purchase Money Mortgage" and the "Future Advances Mortgage," or whatever.)

3.2.2.3 *Vague Terms.* Avoid vague terms that don't remind the reader what they mean, like the "Rights," or the "Applicable Sites," or the "Applicable Percentage," or "Mortgage A." (These examples might work better as: the "Intangible Collateral"; the "Non-Operating Sites"; the "Commission Percentage"; and the "Land Mortgage," depending on the deal.)

3.2.3 *Consistency.* Be consistent. If you define "Property Tax," don't then set up "Real Estate Tax Reimbursement Rent." Call it "Property Tax Reimbursement Rent." This way the user won't have to remember (and perhaps forget) it's "Property Tax" in one context but "Real Estate Tax" in another.

3.2.4 *Alternative Defined Terms.* Don't set up defined terms that vary depending on how the Model Document is used—such as a brokerage agreement that forces the user to choose either "Seller" or "Landlord" every time the Model Document refers to whoever engaged the broker. Forcing the user to choose repeatedly between these two words creates extra work, confusion, and a risk of mistakes—exactly what Model Documents are supposed to prevent. In the preceding example, you could either set up a single defined term "Owner" or "Client" or ask whether maybe you really do need two separate standard brokerage agreements (one for "Landlord" and one for "Seller"), even though one prefers to combine similar documents when possible. (Global search and replace doesn't solve the problem, because any careful editor should check every occurrence of the particular term when replacing it.)

3.2.5 *Dictionary of Defined Terms.* Particularly in large documents, you might want to collect most or all defined terms in alphabetical order as Article I.

3.2.6 *Index of Defined Terms.* If the document exceeds 10 pages or so, consider including an Index of Defined Terms.

3.2.7 *References to Defined Terms.* Try to be consistent in whether you use an article ("a" or "the") before each particular defined term referring to a party, with a bias against using any article.

3.3 *Stylistic Suggestions.* When you prepare a document under pressure of a transaction, you often don't have time to think about quality of writing. When you prepare a Model Document, you do have that extra time. Use it. That's part of what Model Documents are about. Make stylistic improvements that you might not bother with if the document were to be used only once. You will use a Model Document repeatedly. Make it excellent, stylistically and substantively. Edit freely. Consider these guidelines, among many others.

3.3.1 *Use Active Voice.* Aside from being less reader-friendly, the passive voice can create legal risks by not clearly identifying who must do something.

3.3.2 *Reduce Overcomplex and Run-On Text.* Make your sentences and paragraphs short, simple, and straightforward. Avoid run-on sentences, e.g., a string of "provided, however" conditions, exceptions, exclusions, limitations, qualifications, and restrictions. Run-on sentences like these often work better as separate sentences or even separate paragraphs integrated by a single introductory paragraph. You may need to rewrite run-on sentences from scratch. They may have become too convoluted and complexified to line-edit into clarity. Then review your work to assure you have accurately tracked the original substance, except intentional substantive changes.

3.3.3 *Use Gender-Neutral Language.* Watch for language that assumes all parties involved in legal transactions are male. Correct this archaic language gracefully, without drawing attention to the changes. Avoid constructions like "he/she" or "ombudsperson."

3.3.4 *Brevity.* Brevity is important. Clarity is even more important. Eliminate redundan-

cies to achieve brevity and prevent inconsistency. If, however, you reduce the sheer word count of a document at the cost of reducing its effectiveness in unmistakably communicating the intentions of the parties, then you have hurt it rather than helped it and you have probably increased the risk of litigation.

3.4 Plain English. Use Plain English where appropriate, but don't change meaning or replace litigation-tested words and phrases with language a court might not understand. You can sometimes identify words and phrases of this type if they seem to be unusual or archaic yet reappear verbatim in several different precedents you are looking at (another good reason to look at more than one precedent). Some "Plain English" documents try too hard and sound as if they were written for first-graders. This is not what we have in mind. Here are some common sins in legal documents, along with related Plain English changes to consider, when appropriate, in preparing Model Documents:

3.4.1 Two Sentences in One. Two independent thoughts, each of which could be a separate sentence, joined by "and." Solution: Break into two sentences.

3.4.2 "Herein," Etc. Use of any word starting with "here" or "there" ("herein," "hereinabove," etc.). Solution: Express the same thought in normal language, using defined terms as appropriate. If you are at a computer, you can search repeatedly for the character string "here." Consider revising "herein," "hereinabove," "thereunder," and so on. Also, the word "there" often correlates with lame, long-winded or confusing sentences.

3.4.3 Synonym Strings. Three or more synonymous words strung together. Solution: Delete duplicative words that truly add nothing. But leave any words that add any value at all. As soon as you see the same laundry list twice, create a defined term.

3.4.4 "To Be" or Not "To Be." Use of the verb "to be" often signals legalistic, complicated, and passive prose. Solution: Try rewriting using nouns and active verbs—people doing things, assuming responsibilities, agreeing to make things happen. Nouns and active verbs make a document easier to read, follow, and understand.

3.4.5 Verbs. Use verbs (except "to be") rather than nouns when possible. Choose simpler, shorter verbs when you can. For example, instead of talking about "commencement of construction," say that someone must "begin construction." Any noun formed from a verb, followed by the preposition "of," usually signals an opportunity to change a noun to a verb. The grammatical word for this is "nominalization"—turning a verb into a noun—and you can solve the problem just by undoing it.

3.4.6 Other Red Flags. The following words often signal opportunities to cut down and simplify: "such"; "said"; "in the event that"; "prior to"; "subsequent to"; "the provisions [or terms] of"; and "in order to."

3.4.7 Negatives. Express principles positively, rather than negatively, particularly if you need to establish one or more layers of exceptions and exclusions (potentially triple negatives). Positive is easier to understand. Remember that "negatives" include not only "not" but also words like "cancel," "prohibit," and "forbid."

3.4.8 Structure of Conditions. To help the user understand where a complex condition ends and the consequence of satisfying that condition begins, consider setting up an "if"/"then" structure, if you think it works well.

3.4.9 Notwithstanding. Most lawyers prefer to say "notwithstanding" rather than "despite," notwithstanding Plain English principles that might suggest otherwise.

4. Internal Review of New Model Documents.

No Model Document should be placed in service until someone else with expertise in the area has reviewed and approved it. This review process always produces changes in the document and a better product. It is perhaps the most important step in developing any new Model Document. Exactly who must review what raises an issue outside the scope of this article, but someone should review any Model Document before you add it to your collection. Regardless of who reviews your work, you may want to follow these suggestions whenever you submit any draft Model Document for review:

4.1 Cover Notes. Submit full cover notes as part of your Model Document. Think through the cover notes as you develop your Model Document. They are part of the Model Document.

4.2 Printout. Print out and attach both: (a) a clean printout of your Model Document; and (b) a printout marked to show all the changes you made from whatever precedent you used as your starting point. Mark deletions with strikeout text. Underline any additions. If you rearranged the document to the point where a marked copy doesn't usefully show your changes, then don't bother to include a marked copy.

4.3 Machine-Editable Version. If your reviewer prefers to receive or edit documents electronically, accommodate them. If you prepared your Model Document in a document management system, give the reviewer the document number rather than an attachment. This reduces the likelihood of creating chaos in editing.

4.4 Follow-through. Use Model Document review not only to improve the particular Model Document but also to learn about real estate law and legal drafting generally. Insist on understanding the

changes and ideas added by whoever reviews your Model Document. Ask questions. If you disagree with anything, speak up.

5. Using Model Documents.

5.1 Location of Model Documents. When Model Documents are ready for use, place them in any applicable document management system. If the firm maintains a Model Documents guide, update it as appropriate.

5.2 Checklist. When you use a Model Document, do the following:

5.2.1 Latest Version. When you begin, duplicate the Model Document directly from your document management system or the Intranet. You will constantly update and revise your Model Documents. Therefore, always start with the current version to assure the best possible starting point.

5.2.2 Copy the Model. Don't edit the Model Document. Instead, copy over the Model Document under a new document number with a deal-specific new title. Keep the Model Document as version "1" of your new document, and start editing for your transaction in version "2." That way, you can easily (and with no need to do any detective work) generate a marked copy of your "deal document" to show all changes you made from the Model Document.

5.2.3 Cover Notes. The cover notes will suggest points to consider in using the Model Document, and help prevent errors and omissions. The cover notes may also include useful checklists for the transaction, including other document requirements to think about and pitfalls to avoid.

5.2.4 Remove Cover Notes. Delete the cover notes. Ordinarily, don't send cover notes out of the office.

5.2.5 Search for Blanks. Wherever you find a blank in a Model Document, add the variable information required or think about the point being raised.

5.2.6 Print and Review. Print out and read the entire first draft on paper (not just on your computer screen) and critically consider every sentence, as if you had never seen it before. Revise freely.

5.3 Issues to Consider. As you use any Model Document, keep the following thoughts in mind.

5.3.1 View Model Document as Starting Point. A Model Document does not substitute for your own thought, creativity, and thorough legal analysis. It is only a starting point. The first question you should ask is whether the particular Model Document you want to use is even the right starting point. Perhaps your entire approach to documenting and structuring the transaction is wrong. Once you are confident the Model Document reflects a correct approach, review the entire Model Document critically, no matter how routine or standard the transaction may seem. (A routine or standard transaction does not exist. Every transaction requires thought and possibly changes in any Model Document.) Think of the Model Document as a piece of canvas on which you will paint a painting. Revise your draft freely. After you take your first pass through it to search for blanks, fill in variable information, and accept or reject optional paragraphs, print out the result and read it carefully from beginning to end. Does anything require some change, or not apply at all? Does this transaction require any special variations? Think about every paragraph.

5.3.2 Don't Assume It's Right. Don't rely too much on any Model Document. Although it is supposed to be correct, consistent, and a good document (at least for whatever transaction the drafter had in mind), recognize that it might not be perfect. Ask questions and think as you use the Model Document. If appropriate, check other sources (such as recent articles and case law) to see whether the Model Document needs a tune-up. As you receive comments from opposing counsel and co-counsel, consider whether to incorporate them into the Model Document, either (a) by way of prene-

gotiation for next time or (b) simply to make the document work better and require less time next time around. Many comments on a document fall in category "b." Take full advantage of these free suggestions to improve the Model Document. You are the key to capturing them. Forward them all along to whoever maintains the particular Model Document.

5.3.3 Ask What's Not There. As in reviewing or preparing any other document, think about what isn't in the document but should be, whether deal-specific or because it's needed in this type of document per se but no one previously thought of it.

5.4 Provide Feedback. If you find problems or ways to improve the Model Document or you discover gaps in coverage, you should notify the person who maintains it. The cover notes for the Model Document may identify that person (if the Model Document has cover notes). This helps assure continued improvement of Model Documents. Also, if you add entire paragraphs to the Model Document based on particular deal-specific issues that might recur later, forward these insertions to the person who maintains the Model Document. Perhaps those insertions should be added to the Model Document (or its cover notes) as optional provisions. Users of a Model Document are the best possible people to provide feedback on it. If users don't, you will not learn from your experience and you will miss opportunities to improve your Model Document.

6. Improving Model Documents.

You need to regularly scrutinize, update, and improve your Model Documents. If you don't update and improve a Model Document, it may become outdated, not reflect new law, and fall below state of the art. You therefore must "maintain" any Model Document so it stays as good as it can be and consistent with market expectations.

6.1 Responsibility for Maintenance. Maintenance of Model Documents can be assigned as a project like any other project, particularly if other work is relatively light. It can be staffed on a junior-senior basis, with two people working together to do the best possible job. You can also assign Model Document maintenance work as part of a transaction involving the particular Model Document, if time permits.

6.2 Maintenance Procedures. Each Model Document prepared by anyone should be kept available and periodically updated in one readily accessible place, to avoid the risk of variations between multiple versions in the future. One person (and only one person) should assume continuous responsibility to update and improve the Model Document, based on these guidelines:

6.2.1 Cover Notes. Don't forget about the cover notes. Sometimes new legal developments, new ideas about a particular Model Document, and new deal issues should be brought to users' attention. Often you can do this by updating the cover notes.

6.2.2 User Comments. Whoever maintains a Model Document should collect any comments from users, consider them, and update the document as appropriate. If the user of the Model Document identifies the final negotiated "deal" document, then the person maintaining the Model Document, by generating a marked copy, can eas-

ily identify all changes the user made and consider whether the Model Document needs changes.

6.2.3 Review of Changes. All changes in a Model Document should be reviewed by a second person, with expertise in the area, before the changes go "into service" for others to use.

6.3 Legal Developments. Whoever maintains a Model Document should also keep their eyes open for legal developments, other precedents, and relevant articles, and routinely make changes (with appropriate review and approval) as needed from time to time. When a court interprets or applies a document similar to one of your Model Documents, think about how the same court would have ruled if the parties had instead used your Model Document. Would your Model Document have prevented any undesirable result? Can you add (or subtract or clarify) particular language in your Model Document to prevent whatever problem led the reported case into litigation and the judge to an undesirable result? What does the case tell you about ways in which a document of this type can be misconstrued? Exactly what language was at issue in the case, and how should you deal with the corresponding issues in your Model Document? Does the case suggest any other improvements in your Model Documents? Look for inspiration wherever you can find it.

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