

Words of Authority¹

by Raymond P. Ward²

Words of authority are those that set forth duties, rights, prohibitions, and entitlements. Most lawyers have only one word of authority in their vocabularies: *shall*. The problem with this workhorse word is that it has too many meanings and purposes to be precise. The uses of *shall* include:

- To show that something is mandatory. It can express an obligation: “The lessee shall pay the rent on the first of each month.” Or it can express an order: “You shall leave.”
- To show entitlement: “The employee shall be reimbursed reasonable expenses.”
- To indicate future tense: “The lease shall terminate on December 31, 2003.”
- To express a promise, or the speaker’s determination: “They shall not pass.” “My firm nerves shall never tremble.” “I was born an American; I will live an American; I shall die an American.” (Note Daniel Webster’s distinction between *will* and *shall*.)
- To show the speaker’s intent to do something: “I shall try to correct errors when shown to be errors.”
- To show inevitability: “When the Coliseum falls, Rome shall fall.”
- To make a suggestion: “Shall we dance?”
- To convey high moral seriousness: “We shall overcome.”
- To state a non-mandatory directive. Black’s Law Dictionary lists *should* as one definition of *shall*, according to many courts’ interpretations.

It’s not always easy to tell what *shall* means in a given context. Consider the Gospel sentence, “The truth shall make you free.” Is Jesus predicting a future event? Making a promise? Declaring that something is inevitable? Saying that the truth should produce freedom?

Multi-layered meanings can add depth to Scripture or poetry, but can be disastrous in legal writing. Ambiguity plants the seed of litigation. Legal-language expert Bryan Garner

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points out that some 76 pages of *Words and Phrases* are full of small-type blurbs from cases interpreting *shall*. So much litigation over the meaning of a word is a sure sign that the word is not precise.

Garner and Richard Wydick advocate doing away with *shall*, and substituting a word with a narrower, more precise meaning. Their approach has two advantages. First, when the writer uses unambiguous words, the reader is more likely to grasp the writer's meaning. Second, by getting rid of a fuzzy, imprecise word like *shall*, the writer is forced to think more clearly about what he or she is trying to communicate. Words don't just express thought; they shape thought too. Clarify your language, and you will clarify your thinking.

You don't have to invent your own glossary of words of authority; Garner has already done that. Here is his list, slightly modified:

Must means "is required to." Use *must* to show that the subject of the sentence is obligated to do something. "The employee must send notice within 30 days."

Will means future tense. "The lease will expire on December 31, 2003." *Will* is also useful to express obligations when tact is required. For instance, imagine that you are on your state bar association's court-rules committee, and are drafting rules that impose obligations on judges. And imagine that the political support of the judges affected by the rules is necessary for the rules to become reality. In that situation, you probably don't want to flat-out tell the judges that they *must* do something. Use *will* instead. "In bench trials, the court will render judgment within 30 days after the case is submitted." The judges will find such a rule more palatable than a demand that they *must* render their decisions within 30 days.

Garner suggests using *will* to express both parties' contractual obligations when the relationship is delicate, and when expressing your own client's obligations in an adhesion contract. The reason is the same as in the preceding paragraph: *will* sounds more tactful than *must*.

May means "has discretion to" or "is allowed to." "An obligee may put the obligor in default by a written request for performance."

Must not or **may not** are nearly synonymous. *Must not* means "is required not to." *May not* means "is not permitted to." But be careful with *may not*, because sometimes it is ambiguous. An example: "The clerk may not accept papers for filing after 5:00 p.m." Does that mean that the clerk *might not* accept anything after 5:00 p.m., or that the clerk *is not allowed to* accept anything after 5:00 p.m.? If the former, write, "The clerk is not required to accept . . ." If the latter, try, "The clerk will not accept . . ."

Is entitled to means "has a right to." "The employee is entitled to be reimbursed for reasonable expenses."

Should means "ought to." "A judge should avoid even the appearance of impropriety."

“Lawyers should conduct themselves civilly when dealing with one another.”

For a more complete essay on words of authority, read Garner’s *A Dictionary of Modern Legal Usage* pp. 939–42 (2nd ed. 1995). Other references include Garner’s *Guidelines for Drafting and Editing Court Rules*, 169 F.R.D. 176, 212 (1997), and Wydick’s *Plain English for Lawyers*, pp. 66-71 (4th ed. 1998).