

## DRAFTING: A SOLUTION FOR THE CONSISTENTLY INCONSISTENT USE OF SHALL

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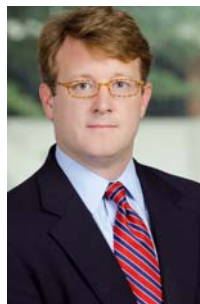
The practice of Business Law involves, on almost a daily basis, drafting legal documents for business transactions and business entities. While the use of archaic words, such as hereinafter and wheretofore and many others from the mid-last century, is considered to be a bad habit by some lawyers, the overuse of *shall* in current document drafting appears to have reached the level of an addiction, according to Kenneth A. Adams in [A Manual of Style for Contract Drafting](#) 32 (2d. ed. 2008). To help you break this addiction, some suggest quitting cold-turkey, abandoning your use of *shall* all together.

According to noted lexicographer and author Bryan Garner, “few reforms would improve legal drafting more than if drafters were to begin paying closer attention to the verbs by which they set forth duties, rights, prohibitions, and entitlements. In the current state of common-law drafting these verbs are a horrific muddle—and, what is even more surprising, few drafters even recognize this fact. The primary problem is *shall*.” Bryan A. Garner, [A Dictionary of Modern Legal Usage](#) 939 (2d ed. 1995). To the contrary, we propose that the problem is not the overuse of *shall*, but its inconsistent use. We suggest limiting your use of *shall* when drafting legal documents only to express an obligation—a duty to act.

*Shall* is a verb. Or more precisely, an auxiliary verb, such as *can*, *may*, *must*, and *will*. In grammar classes, we called these verbs “helping verbs.” In those grammar classes, we were taught to use a helping verb to modify the main verb of a sentence. For example: I *can* prevent confusion when drafting legal documents by using a particular helping verb consistently. In the same contract *shall* is sometimes used to



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express a future time, an obligation, and a condition: *the agreement shall terminate upon transfer of the property; buyer shall purchase the property from seller; buyer shall be entitled to purchase the property from seller at a reduced price if . . .*

It should come as no surprise that the Virginia Supreme Court has long reviewed the word *shall* in legal documents subjectively. See *Pettus v. Hendricks*, 113 Va. 326, 330 (Va. 1912) (“[I]n endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, [the courts] will construe ‘may’ and ‘shall’ as permissive or mandatory in accordance with the subject matter and context.”). At least with regard to statutes, the Court’s subjective approach is more predictable. Recently the Court stated that when a statute is not concerned with the actions of a public official, “. . . the legislature chose to use the mandatory and directive term *shall*.” *Zinone v. Lee’s Crossing Homeowners Ass’n.*, 282 Va. 330, 336, 714 S.E.2d 922, 925 (2011). But for statutes requiring action by a public official, the use of *shall* “is directory and not mandatory unless the statute manifests a contrary intent.” *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994). In contract disputes, however, rather than the actor’s actions, the problem typically depends on whether the use of *shall* signifies a condition or an obligation.

The following contract clause was the subject of recent litigation in the Eastern District: “Voice calls that are transmitted, in whole or in part, via the public Internet or a private IP network (VoIP) shall be compensated in the same manner as voice traffic . . . .” *Cent. Tel. Co. of Va. v. Sprint Commc’n Co. of Va., Inc.*, 759 F. Supp. 2d 789, 791 (E.D. Va. 2011). Judge Robert E. Payne held that the “unqualified use of shall” clearly indicated that the contract clause in dispute called for mandatory action, “rather than optional or conditional on some later event.” *Id.* at 799. Is it possible that using “*must* be compensated” or “*will* be compensated” would have averted this dispute? Perhaps. But eliminating *shall* entirely doesn’t necessarily resolve the problem of whether a condition or obligation resulted from the use of *shall*. The best solution to this problem is to limit your use of *shall* in legal documents to express an obligation.

We suggest you follow the recommendation of Kenneth Adams to determine whether your use of *shall* imposes an obligation: “check whether the sentence would still make sense grammatically if you were to replace *shall* with *has* [or *have*] a *duty to*.” Kenneth A. Adams, *A Manual of Style for Contract Drafting* 32 (2d. ed. 2008).

Admittedly, this approach is not a cure for those addicted to overusing *shall*. Even if you can't stop overusing it, at least this approach may help you to use *shall* more consistently when drafting legal documents.

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