

Avoiding *shall* when expressing policies

BY MARK COONEY

A common misstep in legal drafting is thinking of the future instead of the present. To clarify: yes, lawyers of course need to think ahead. Transactional lawyers and other drafters must anticipate issues, contingencies, and remedies. In fact, that's when a lawyer's experience and insight are at a premium.

Yet the document that emerges from a lawyer's careful forethought, negotiation, and drafting should speak to the present.¹ Once the document is activated — the contract signed or the law effective — it should have currency, immediacy. More simply, a well-drafted document is alive in the present whenever a user consults it.

One of our profession's historical tics has been to reflexively express policies in a *shall*-based future tense, as in "the Carrier **shall have no liability** for delays caused by inclement weather." This version of *shall* is, in essence, a hybridized blurring of future tense with a bogus duty signal. It's inapt and overwrought.

I'm using the word "policy" broadly to mean some truth or legal fact — perhaps a consequence or lack of consequence — that contracting parties have agreed to or that a legislature, agency, or board of directors has settled on. A drafter's default style should be present tense for these policy expressions.

Consider this redraft of my earlier example: "The Carrier **is not liable** for delays caused by inclement weather." The parties have agreed to this policy. And if, four years after the contract's signing, the carrier is delayed by a severe snowstorm, a party curious about the potential consequences will pick up the contract at that moment

and see the answer: "The Carrier is not liable . . ." This calls for present tense. There's no future about it. And because this provision does not impose a duty, no duty word (whether *shall* or *must*) should appear.

You'll see this present-tense preference from preeminent drafting experts. Consider Joseph Kimble's present-tense style in the federal rules. Under FRE 402, irrelevant evidence "**is inadmissible**" — not "shall be inadmissible" or "shall not be admissible." Under FRE 408, evidence of liability insurance "**is not admissible**" to prove negligence. Under FRCP 21, "[m]isjoinder of parties **is not** a ground for dismissing an action." Under FRCP 23(f), an appeal in a class-action case "**does not stay** proceedings in the district court unless the district judge or the court of appeals so orders."

Contract-drafting experts also embrace the present tense — and shun *shall* — when stating policies. Ken Adams advises, "Don't use *shall* in language of policy" because language of policy "doesn't impose obligations."² An example from his manual's sample contract:

- "The initial term of this agreement **ends** at midnight at the end of 31 December 20__"³ [*not* "shall end" or "will end" at midnight]

And in definitions:

- "'Continuing Director' **means** any person who"⁴ [*not* "shall mean"]

Adams's sample contract uses *shall* only — only — for imposing

duties.⁵ As many have pointed out before me, if a drafter can't logically replace *shall* with "has a duty to" or "is required to," then the *shall* should go.⁶

Bryan Garner's manual shows the same present-tense approach, even when the parties' policy term concerns a future contingency:

- "If a court for any reason **holds** a provision . . . to be unenforceable, the rest **remains** fully enforceable."⁷ [not "shall hold" or "shall remain"]
- "Melroy **is not** liable . . . for any incidental or consequential damages"⁸ [not "shall not be liable"]

Another example from Garner's sample contract:

- "Information **is not** confidential if the disclosing party approves it for release without restriction"⁹ [not "shall not be deemed confidential"]

For these reasons and the reasons you'll see below, the *shall-free* present tense is a sound default style for policy expressions. The sloppy, indiscriminate¹⁰ use of *shall* only invites confusion.¹¹ Present tense allows documents to speak clearly about present truths and even future possibilities — and prevents inaccuracy and wordiness.

Consider a typical contract that I found in my research. It contains 78 *shalls*. But 44 of those 78 *shalls* are incorrect. That's 56% — more than half the *shalls* — that are incorrect for one reason or another. I'll stay on topic and tackle just the misuse of *shall* for expressing policies. (I've already addressed another *shall* error — its use in clauses meant to grant discretion — in my May 2023 column.)

Let's start with definitions. A definition reflects a policy decision concerning a term's meaning.¹² When we express that policy, it is a fact that holds true in the present whenever someone reads that definition or defined term. Nevertheless, we often see wordy, future-facing *shall* definitions: "'Pool Area' shall refer to the pool, patio, and pavilion."

Appropriate definitional verb choices are present-tense expressions: *means* (for a full definition); *includes* (for a partial, enlarging definition); *does not include* (partial, limiting). *Shall* has no place in any of them.¹³

Below are examples from the form contract I studied. With a few exceptions, my suggested edits are limited to the misused *shalls*:

- "'Edition,' as used in this Agreement, **shall refer to** the Work as published in any particular content, length, and format."

[Edit: "Edition" **means** the Work as published in any]

- "'Electronic Edition,' as used in this Agreement, **shall refer to** any Edition of the Work that is sold, distributed, or accessed

in an electronic or digital format"

[Edit: "Electronic Edition" **means** any Edition of the Work that is]

For other types of policy expressions, we can cure false *shalls* by using the main verb's present tense or by using an *is* construction:

- "The Author acknowledges and confirms that the Publisher **shall have no liability** of any kind for the loss or destruction of"

[Edit: The Publisher **is not liable** for]

- "The date of publication as designated by the Publisher . . . **shall be** the 'Publication Date' for all purposes under this Agreement."

[Edit: . . . **is** the "Publication Date" for all purposes]

- "Nothing contained in this section **shall be construed as** limiting, modifying, or otherwise affecting"

[Edit: Nothing in this section limits, modifies, or otherwise affects]

[Edit: Nothing in this section **alters**]

- "This Agreement **shall be binding on** the heirs, executors, administrators, successors, and assigns of the Author"

[Edit: This Agreement **binds** the Author's heirs]

- "All rights not expressly granted to the Publisher **shall be** wholly reserved by the Author."

[Edit: . . . **are** wholly reserved]

[Better (active voice): **The Author reserves** [retains?] all rights not granted to the Publisher.]

- "[T]he Publisher has no obligation to initiate litigation on such claims, and **shall not be** liable for any failure to do so."

[Edit: The Publisher . . . **is not** liable for]

- "Upon the expiration or termination of this Agreement, any rights reverting to the Author **shall be subject to** all licenses and other grants of rights made by the Publisher"

[Edit: . . . **are subject to**]

Sometimes a misused *shall* is surplus in the truest sense. Removing the *shall* is an easy first edit in these examples (which desperately need more edits beyond that):

- “The provisions of this Agreement **shall** apply to each revision of the Work by the Author”
- “Any and all rights of the Publisher under such licenses and grants of rights . . . **shall** survive the expiration or termination of this Agreement.”
- “Notwithstanding any editorial changes or revisions by the Publisher, the Author’s warranties and indemnities under this Agreement **shall** remain in full force and effect.”
- “[A]nd upon such repayment, all rights granted to the Publisher under this Agreement **shall** revert to the Author.”

Although I’ve focused on policy expressions here, my best advice for *shall* adherents is more broad-sweeping: if you aren’t imposing a duty, don’t use *shall*. Experts who tout *shall* as a legitimate term of art give the same advice.¹⁴ Every misused *shall* burdens a document with more words and less clarity.



Mark Cooney is a professor at Cooley Law School, where he chairs the legal-writing department. He is a senior editor of *The Scribes Journal of Legal Writing*, coauthor of the book *The Case for Effective Legal Writing*, author of the book *Sketches on Legal Style*, and coreipient (with Joseph Kimble) of the 2018 Clear-Mark Award for legal documents.

ENDNOTES

1. Garner, *Garner’s Guidelines for Drafting & Editing Contracts* (St. Paul: West Academic Publishing, 2019), pp 205–207.
2. Adams, *A Manual of Style for Contract Drafting* (5th ed) (Chicago: ABA Publishing, 2018), p 107.
3. *Id.* at 577 (emphasis added).
4. *Id.* at 580 (emphasis added).
5. *Id.* at 64 (“This manual recommends not using *shall* in contract drafting to express any other meaning” than to impose a duty.), and at 69 (“Using *shall* to mean only ‘has a duty to’ . . . is a big step toward curing the ailment” of “chaotic verb structures” in contracts.).
6. *Id.* at 69–72; Garner’s *Guidelines for Drafting & Editing Contracts*, p 156; Kimble, *The Many Misuses of Shall*, 3 *Scribes J Legal Writing* 61, 64 (1992).
7. Garner’s *Guidelines for Drafting & Editing Contracts*, *supra* n 1, p 205 (emphasis added).
8. *Id.* at 513 (emphasis added).
9. *Id.* at 511 (emphasis added).
10. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan: West Group, 2012), p 112.
11. See, e.g., *S End Enterprises, Inc v City of York*, 913 A2d 354, 358–59, 360 (Pa Cmmw 2006) (refusing to find a duty in this seemingly clear duty language because *shall*’s general overuse clouds its meaning: “[T]he code official shall employ the necessary labor and materials to perform the required work.”).
12. *A Manual of Style for Contract Drafting*, *supra* n 2, p 194.
13. *Id.*
14. *Id.* at 64 (“This manual recommends not using *shall* in contract drafting to express any other meaning” than to impose a duty.), and at 69 (“Using *shall* to mean only ‘has a duty to’ . . . is a big step toward curing the ailment” of “chaotic verb structures” in contracts.); Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed) (Frederick: Aspen Publishing, 2014), p 183 (“[Y]ou should use *shall* only to signal an obligation. But drafters incorrectly use *shall* so frequently that they think they are using it correctly, even when they are not.”).

THE CONTEST RETURNS!

After a long hiatus, the contest is back. I’ll send a free copy of *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (new 2d edition) to the first two readers who submit an “A” revision of the sentence below, which appeared in an old Federal Rule of Evidence. (No fair looking for the current rule.) Hint: start with the active voice (you’ll need to name a subject that’s only implied in the sentence) and use a three-item vertical list. It will take a little ingenuity to create a list, but you can do it.

Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

Send your revision to kimblej@cooley.edu. I have to be the sole judge of the winners. The deadline is June 15, but the sooner, the better.