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REVISOR OF STATUTES  
REPORT  
ON A PROPOSAL TO CHANGE  
*SHALL TO MUST* IN  
THE MINNESOTA STATUTES

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TO: Committee on Rules and Legislative Administration,  
Minnesota House of Representatives  
Committee on Rules and Administration, Minnesota Senate  
Legislative Coordinating Commission

Date: November 1, 2001

## Executive Summary

In 2001, the Minnesota Legislature required the Revisor of Statutes to report on a proposal to change *shall* to *must* in the Minnesota Statutes. The Revisor was also required to consult with the directors of House Research and Senate Counsel and Research.

After consultation with the directors of House Research and Senate Counsel and Research, there is no consensus about *shall* and *must*. While some drafters use *must* exclusively, some other experienced drafters prefer *shall* to impose duties on a person or a body. Our research of other state legislatures showed that states either use *shall* exclusively or permit some combination of *shall* and *must*. In light of these facts, the threshold issue for the Minnesota Legislature is whether or not to require exclusive drafting with *must* by legislation.

Depending upon how the Legislature answers this threshold question, there are several options:

### A. One-Time Replacement

If the Legislature decides to require exclusive drafting with *must*, the Revisor's Office could do a project to replace *shall* with *must* or another appropriate alternative:

- All 86,847 instances of *shall* would need to be reviewed by a drafting attorney;
- Not all *shalls* could be replaced with *must*;
- Some *shalls* would need to be retained in constitutional language and Uniform State Laws;
- The project would take two interims, and could be completed for the 2004 Minnesota Statutes publication;
- The project could be done with existing Revisor's Office staff, but it would be time-consuming, costing the opportunity to do other projects;

- The history entries at the end of the statutes affected would need to cite to authority for the project, thus increasing the size (up to an estimated 100 pages) and cost (by approximately \$1,500 per publication) of the statutes.

## B. Prospective Change

If the Legislature decides to require exclusive drafting with *must*, another alternative would be to implement the change prospectively.

- This is the manner in which jurisdictions such as Australia have implemented a change to *must*.
- This method would be less costly, both in terms of publication costs and lost opportunity costs, than a one-time replacement project.

## C. Evolutionary Change

If the Legislature decides not to legislate the elimination of *shall*, the current pattern of evolutionary change could continue.

- It is anticipated that the use of *must* would continue to grow, as has been the pattern since 1986:

	1986	2000
Instances of <i>shall</i>	83,128	86,847
Instances of <i>must</i>	6,042	26,939

- This would allow the Revisor's Office to have further discussion regarding *shall/must* before issuing a new drafting manual in 2002.
- This report, including specifically the Revisor's Office writing task force recommendations shown as Attachments 3 and 5, could be used as the basis for further dialogue.

Based on discussion of the *shall/must* question within the Minnesota legislative drafting offices, the Revisor recommends option C at this time. If the Legislature wishes to revisit the issue at a future time, the interim of 2004 might be appropriate, to allow for a full biennium with a revised drafting manual.

# Report

## I. Legislative Report Required

Laws of Minnesota 2001, First Special Session chapter 10, article 2, section 93, reads:

The revisor of statutes, in consultation with the directors of house research and senate counsel and research, must report to the house of representatives and senate rules committees and the legislative coordinating commission by November 1, 2001, on a proposal to change "shall" to "must" in Minnesota Statutes.

This document is the report required by Minnesota Law.<sup>1</sup>

## II. Background

The impetus for this report stems from the Plain English movement of the 1980's, which recommended that *must* be used as the verb of mandate in legal drafting rather than *shall*. The proponents of changing *shall* to *must* argue that:

A. Most speakers of English stopped using *shall* to mean "is ordered to" in the seventeenth century. *Shall* is rarely used today in spoken or written English. From this fact, they argue that:

1. Drafters have no internalized rules about how to use *shall*. They must learn these rules in law school or on the job.
2. Readers of the law who have no legal training are at a disadvantage, because they have neither internalized rules nor learned rules to help them interpret the usage of *shall*.
3. Using *shall* forces drafters to use a more formal, less user-friendly style.

B. Courts have sometimes interpreted *shall* to mean *may*, and *shall* is therefore ambiguous.

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<sup>1</sup> Under Minnesota Statutes, section 3.197, the primary cost of preparing this report was in staff time, which is estimated at 120 hours.

Because of these concerns about *shall*, several drafting experts, including Bryan Garner, Joseph Kimble, and Janice Redish, advise drafters not to use *shall* at all and to substitute *must*.

Other experts, including Jack Stark, oppose the use of *must* and recommend *shall*. Some of the arguments for *shall* include:

A. There is no evidence that readers of the law do not understand *shall*.

B. *Must* is not clearly defined as mandatory or directive.

C. *Must* lacks the dignified assurance of *shall*. In other words, *must* has a bossy tone and sounds more impolite than *shall*.

D. If a court believes construing a mandatory verb to mean *may* is necessary to do justice in a particular case, that result is just as likely with *must* as with *shall*.

From this fundamental debate, three basic patterns of verb usage have emerged.

The first pattern is called the "ABC rule," with "ABC" standing for "Australian-British-Canadian." This rule uses only *must* as the verb of mandate. It is commonly used in the United States for legal documents aimed at lay audiences, but rarely used for statutes. For example, consumer contracts in the United States are typically drafted exclusively with *must*. As of January 1, 1999, by executive order, federal rules are required to be drafted with *must*.<sup>2</sup> For drafting of laws and statutes, the ABC rule, as its name suggests, is most commonly used outside the United States. For example, legislation in Australian provinces is now being drafted exclusively with *must*. Research showed that British and Canadian jurisdictions are not as uniform as Australian jurisdictions. For example, research found that only one Canadian province, British Columbia, had adopted the ABC rule. It should be noted that jurisdictions that

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<sup>2</sup> It should be noted, however, that this requirement in the federal rules has not eliminated the use of *shall*. A search of the Federal Register for the year 2000 shows that *shall* was used 64,419 times in 8,155 documents and *must* was used 124,458 times in 16,636 documents. For the first

have adopted the ABC rule have typically done so prospectively, without going back to change existing laws or rules.

The second pattern of verb usage is called the "strict American rule." The strict American rule uses *shall* only when it means "has a duty to" and uses *must* for requirements on inanimate objects and conditions precedent. In other words, this rule restricts the use of *shall* to those situations in which a duty is imposed on a person or body. The National Conference of Commissioners on Uniform State Laws essentially uses the strict American rule as its drafting standard. Many state drafting manuals also adopt the strict American rule, including Arizona, Iowa, and Indiana.

The third pattern of verb usage is called the "lax American rule." The lax American rule, as described by Bryan Garner, permits *shall* for requirements as well as for duties, but does not use *must*. A number of state drafting manuals have requirements that are equivalent to this rule.

In Minnesota, the Revisor's Office has alerted drafters to the *shall/must* debate since 1982. The most recent edition of the drafting manual, from 1997, permits the use of either *shall* or *must* (see excerpt from Minnesota Revisor's Manual, 1997 edition, marked Attachment 1).

For administrative rules, the Revisor's Office has recommended the use of *must* rather than *shall* for the imposition of duties (see excerpt from Minnesota Rules Drafting Manual, 1997 edition, marked Attachment 2). The reasons why different standards were developed for Minnesota Rules than for Minnesota Statutes include the largely non-attorney audience for rules and the statutory requirement that in determining the drafting form of rules the Revisor shall:

...to the extent practicable, use plain language in rules and avoid technical language...  
-Minn. Stat. sec. 14.07, subd. 3 (3).

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six months of 2001, *shall* was used 25,378 times in 4,642 documents and *must* was used 62,492 times in 9,414 documents.

In the current edition of Minnesota Rules, *shall* occurs 51,068 times and *must* occurs 37,529 times.

During the 2001 Special Session, the Minnesota Legislature added a subdivision defining *must* as mandatory (see Minnesota Laws 2001, First Special Session chapter 10, article 2, section 84, amending Minnesota Statutes, section 645.44, by adding subdivision 15a). The result is that both *shall* and *must* are now defined in statutes as mandatory terms, while *may* is defined as permissive.

After consulting with the Directors of House Research and Senate Counsel and Research, it is clear that there is no consensus about a particular drafting standard for *shall* and *must*. The Director of House Research doubts the wisdom and efficacy of rigid drafting mandates, but has no objection to new drafting standards and training aimed at stopping the excessive and inappropriate use of *shall* and encouraging alternative formations. House Research cautioned that exceptions would need to be made in certain circumstances. For example, some draft legislation comes to House Research already drafted with *shall* after delicate negotiations by a member, and with instructions not to revise the text. In addition, House Research expressed concerns that last minute changes of *shall* to *must* could cause unacceptable delays in the legislative process, particularly if this occurs just before critical deadlines. The Director of Senate Counsel and Research believes that the strict American rule is the best standard, which would permit drafters to use *shall* to impose duties on persons or bodies.

Within the Revisor's Office, the opinion of drafting attorneys varies. Some attorneys prefer to draft exclusively with *must*, while others prefer to follow the strict American rule. A small group of Revisor's Office staff was established as a writing standards task force in 1999, and made recommendations in October of 2000. The task force did extensive research about the



use of *shall* and *must*, and that research forms the basis for much of this report. The section written by the writing standards task force has been produced as an excerpt and is Attachment 3 to this report. Essentially, the writing standards task force recommends restricting the use of *shall* to the imposition of duties on persons or bodies, but allowing *must* for duties as well. This segment of the writing standards task force recommendations has been discussed within the Revisor's Office, but has not been adopted by the office as a whole, and is being shared with the other legislative drafting offices through this report.

Within the Revisor's Office, there was also considerable discussion about the logistics of making word changes late in the legislative process. In this regard, the Revisor's Office has perhaps even greater concerns than those expressed by House Research. Particularly at the end of a session, the Revisor's Office sometimes has very little time to produce documents. If it were necessary at these critical times to change *shall*s to *must*s, it could cause unacceptable delays.

Regardless of these differing opinions about the use of *shall* and *must*, it is clear that the use of *must* in drafting has greatly increased. The increase includes uses of *must* to impose duties as well as the passive-voice uses that were first recommended by the Revisor's Office in 1982. In 1986, there were only 6,042 instances of *must* in Minnesota Statutes, compared with 83,128 instances of *shall*. In Minnesota Statutes 2000, there were 26,939 instances of *must*, compared with 86,847 instances of *shall*. In 1986, 93% of the mandatory verbs were *shall* and 7% were *must*. By 2000, 76% of the mandatory verbs were *shall*, while 24% were *must*. Nearly all the growth has been in the use of *must*, but *shall* continues to appear often in new language.

### **III. Proposal Options**

Before discussing any options for changing *shall* to *must*, it is important to understand that not every instance of *shall* can logically be replaced by *must*. Many of the 86,847 instances

of *shall* are straightforward orders in the active voice, and could be replaced with *must*. For example, "The commissioner *shall* review the proposal and approve or deny the request" can be changed to "The commissioner *must* review the proposal and approve or deny the request."

There are many other instances of *shall*, however, that would need to be rewritten in another manner. In many instances a change to the present tense would be appropriate. For example, the best alternative to "Each state delegation *shall* be entitled to three votes in the commission" is "Each state delegation *is* entitled to three votes in the commission." The proper replacement is even more difficult to determine if the term is "shall not." Opinions differ as to whether "must not" or "may not" is the appropriate term in this case. For a more comprehensive discussion of instances in which *shall* should not be replaced with *must*, please see Attachment 4 to this report.

Because not all instances of *shall* can be replaced with *must*, each of the nearly 87,000 instances of *shall* would need to be reviewed by a drafting attorney. If a similar project were to be done for the Minnesota Rules, that would require the review of more than 51,000 instances of *shall*. With these facts in mind, there are three basic options for change.

#### **A. One-Time Replacement**

If the Minnesota Legislature wishes to begin drafting exclusively with *must*, the Revisor's Office could do a project to eliminate *shall* from the Minnesota Statutes. The Revisor's Office would replace the word *shall* with *must* or another appropriate alternative. Some exceptions would need to be made for constitutional language, Uniform State Laws, and perhaps other appropriate circumstances. The Revisor's Office has experience to draw upon from the project to eliminate gender-specific language from Minnesota Statutes 1986. In that project, approximately 26,000 gender-specific instances were reviewed, and the project was completed in two interims.

Although there are nearly 87,000 instances of *shall* in the statutes as a whole, experience with smaller-scale projects such as the replacement of *shall* in Minnesota Statutes 2000, chapter 10A, leads us to believe this project could be completed in two interims. As there is insufficient time to complete the project for inclusion in the 2002 statutes, the earliest timing for completion in a full publication year would be 2004.

At the current time, we believe the project could be completed without hiring additional staff. To review 87,000 instances of *shall*, however, the project would be very time-consuming for the Revisor's Office, and would cost the opportunity to do other projects or more comprehensive recodifications.

If a one-time replacement option is chosen by the legislature, special statutory authority would need to be given to the Revisor's Office. This authority would probably be in the form of a Revisor's instruction, as most of the changes could be done editorially. In the event that potential replacement could change statutory meaning, however, it might be necessary to draft a special Revisor's bill for a subset of revisions. For ongoing editorial authority to change *shall* to *must*, it would also be advisable to add a provision to Minnesota Statutes, section 3C.10.

For all the revisions, it would be necessary to cite to the authority for the change in the history section of each affected statute. These citations would add volume to the Minnesota Statutes, which is estimated at up to 100 pages. Adding 100 pages to the statutes would cost about \$1,500 in the first year of publication, and would be repeated with each future publication. Currently, this cost could be absorbed in the publication budget for the Revisor's Office.

## **B. Prospective Change**

If the Minnesota Legislature is ready to eliminate *shall* in most new drafting, another alternative would be to implement a change prospectively. As noted earlier, jurisdictions such as

Australia have made a drafting change prospectively. Choosing this method assumes that the many instances of *shall* in old law would disappear gradually with repeals and recodification bills. As with a one-time project, some exceptions would need to be made for constitutional language, Uniform State Laws, and other appropriate circumstances. As with the one-time replacement option, the Minnesota Legislature would need to be ready to require nearly all new drafting to be done with *must*, even though there are objections from many legislative drafters. If the Legislature is ready to make a change to *must*, the prospective change would be easier and less costly than a one-time replacement option.

### **C. Evolutionary Change**

If the Minnesota Legislature wishes to wait and see how the *shall/must* debate proceeds in other state legislatures and at the National Conference of Commissioners on Uniform State Laws, another option would be to continue our current path of evolutionary change. As noted earlier, the instances of *must* in the statutes have grown from 6,042 in 1986 to 26,939 in 2000, while *shall* has grown only from 83,128 to 86,847 during the same time period. The Legislature could require that an assessment of *shall/must* usage occur at some specified future date to review the course of this evolution.

In addition, the Revisor's Office intends to revise the bill drafting manual in 2002. At a minimum, it is our intent to give drafters more specific guidance, with particular examples of how to use *shall* or *must*. More specifically, the Revisor's writing standards task force has proposed new language about *shall/must* for possible inclusion in a 2002 drafting manual, which restricts *shall* to be used only for imposing duties. That language is produced as Attachment 5 to this report. The proposed new language, together with this report, could be used as the starting

point for further discussion with House Research and Senate Counsel and Research about this drafting issue.

#### **IV. Recommendation**

The Revisor's Office is concerned that there is no consensus among the legislative drafting offices to eliminate *shall* and begin drafting only with *must*. In fact, there are a number of experienced drafters in House Research, Senate Counsel and Research, and the Revisor's Office who believe the best standard is to follow a strict American rule and use *shall* for duties and *must* in the passive voice. In light of these opinions, the Revisor's writing standards task force suggestion is a compromise worth considering. It would move the official standard from one of allowing *shall* or *must* for any mandatory purpose to one of restricting the use of *shall* to imposing duties, while allowing *must* to impose duties as well. It is recommended that further discussion take place among the Revisor's Office, House Research, and Senate Counsel and Research in advance of a new, 2002 Revisor's bill drafting manual. Consistent with this recommendation, it is further recommended that we continue to allow evolutionary change to occur. Finally, if the Legislature wishes to revisit this issue at a future point, the interim of 2004 is recommended as an appropriate time, after the new drafting manual has been in place for a full biennium.

If the Minnesota Legislature wishes to take action to require new drafting to be done exclusively with *must*, then it is recommended that the prospective change option be chosen for implementation. If this option were chosen, it would be possible to revisit the issue of a one-time replacement at a future point, when the number of instances of *shall* would be significantly reduced by attrition.

If the Minnesota Legislature wishes to have a presentation based on this report, or additional information, the Revisor's Office would be happy to provide it.

**Attachment 1**

**Excerpt from Revisor's Bill Drafting Manual,**

**1997 edition**

## 10.9 "Shall" and "Must"

Some readability experts have criticized the lawyer's use of *shall* as a verb of command, and have encouraged drafters to use *must* to express commands and requirements. Others defend the use of *shall*. See section 2.2 and Redish, "How to Write Regulations (and Other Legal Documents) in Clear English," *Drafting Documents in Plain Language* 1981, p. 253.

Objections to the use of *must* include the following:

- (1) It is difficult to use consistently.
- (2) It is another alternative verb to keep track of.
- (3) *Must* lacks the dignified assurance of *shall*.

While some drafting experts recommend the use of *shall* in the active voice and *must* in the passive, and try to distinguish carefully between duties of people and requirements for things, in practice these distinctions become blurred. For drafters who use *must*, a simple rule is to use *must* for duties, *must not* for prohibitions (*may not* is potentially ambiguous), and *may* for permissions. When choosing which verb to use, the context is very important. If the drafter is amending a body of existing law that uses "shall" the alternative "must" should not be introduced, and vice versa.

For definitions, use *means*. For stative provisions (also called "self-enforcing provisions" or "provisions true by operation of law") use *is* or *are*. For examples of the distinctions, see Dickerson, *Materials on Legal Drafting*, p. 180-185.

For advice about special situations like creating a crime or establishing an agency, see Robert J. Martineau, *Drafting Legislation and Rules in Plain English*, p. 109-110.



**Attachment 2**  
**Excerpt from Revisor's Rule Drafting Manual,**  
**1997 Edition**

## Limit Your Use of "Shall"

The revisor's office recommends using *must*, not *shall*, to impose duties. Most speakers of English stopped using *shall* to mean "is ordered to" in the seventeenth century. Dictionaries show that we generally use *shall* as a formal form of *will*; so to most readers the lawyer's *shall* is an obsolete legalism.

If you prefer the traditional *shall*, minimize its use as follows:

*Shall*. Use *shall* only when you are imposing a duty on a person or body:

"The licensee shall give the debtor a copy of the signed contract."

or

"An association that issues shares by series shall keep a record of every certificate that it issues."

In conditions, don't use *shall* at all. Use present perfect tense, not future perfect. Don't write, "If it *shall* have been established..."

Write, "If it has been established..." Don't write, "When the officers *shall* have completed their investigation..." Write, "When the officers have completed their investigation..."

*Must*. Use *must*, not *shall*, to talk about a thing rather than a person:

"A copy of the signed contract must be given to the debtor,"

or

"A record must be kept whenever a certificate is issued."

Use *must* to express requirements, that is, statements about what people or things must be rather than what they must do:

"Public members of the board must be broadly representative of the public interest and must not be members of health professions licensed by the state of Minnesota..."

*Need not*. Use *need not* or *is not required to*, to say that a thing is not required:

"If fewer than seven people object to the rule, a hearing need not be held," or "no hearing is required."

*Should*. Do not use *should* in rules. A statement that a person should do something is not a rule.

*May*. Use *may* to mean "is permitted to" or "is authorized to" or "has power to":

"The commissioner may call a special meeting of the board when necessary."

When you use *may*, be sure that your sentence does not grant impermissibly broad discretion to any agency or official. The amount of discretion permitted depends on the matter being regulated and on the statutory language that grants the rulemaking authority.

*Must not.* Use *must not* to mean "is forbidden to" or "is prohibited from." Don't use *shall not*. Say "no person may" or "a person must not," not "no person shall."

*Means.* In definitions, write *means*, not *shall mean*. Write "have the meanings given them," instead of "shall have the meanings given them."

*Is.* Don't use *shall* to say what the law is, to make a statement that is true by operation of law. For example, say that a person *is* eligible for a grant under certain conditions, not that he or she *shall* be eligible.

**Attachment 3**  
**Recommendations of Writing Standards Group**  
**Regarding *Shall/Must***

Excerpt from the report of the revisor's writing standards group. This material was largely researched and written in 1999 and adopted by the group in 2000. It has not yet been acted on by the office as a whole.

TO: Michele Timmons, Revisor of Statutes  
FROM: Writing Standards Group  
SUBJECT: Background information for drafting recommendations on *shall*, *must* and other verbs  
DATE: October 22, 2001

The text of this memo is intended to accompany the recommendations of the writing standards group concerning the use of *shall* and *must* in drafting whenever those recommendations are presented. We have given specific advice to drafters about those verbs and the situations that call for their use. This memo is intended to provide background information concerning our drafting advice.

### **History of the question**

The pressing questions about verbs in drafting have to do with *shall*. Many, if not most, drafters now working were taught to use *shall* exclusively as the verb of mandate. For the past twenty years, however, a school of thought arising from the Plain English movement has argued against *shall* and for *must*. That school argues that *shall* as a command is poorly understood by average readers and also that drafters use *shall* sloppily and inconsistently. Advocates of *shall* have contended that *shall* is the only verb defined by statute as mandatory (*Minnesota Statutes*, section 645.44, subdivision 16; however, Laws 2001, First Special Session chapter 10, article 2, section 84, provides that *must* is now also defined as mandatory). They further contend that *shall* is the appropriate verb for formal legal writing. They also believe that *must* has a bossy tone and that an alternation between *shall* and *must* would raise questions about whether a difference in meaning is intended. We have tried to consider both sides of the question.

The present state of the question seems to be as follows: Those who advise about the drafting of consumer documents are uniformly recommending *must*, but for legal material the advice is less unanimous. For administrative regulations, jury instructions, and court rules, drafting authorities are moving toward allowing, if not requiring, *must*. For legislation, we have not yet found a similar movement; writers of state legislative manuals seem to prefer using *shall* for duties, and those that mention *must* reserve it for requirements and conditions. Here are the specifics for these types of legal writing:

Administrative regulations were among the earliest materials redrafted with *must* (along with other changes) and tested on lay audiences in the old and new versions. Those tests were conducted by the Document Design Center, an organization within the American Institutes for Research that has been publishing materials on readability since the earliest days of the Plain English movement. The Document Design Center has been recommending *must* in regulation

drafting since the early 1980s.<sup>1</sup> The online guide *Drafting Legal Documents* (published by the Office of the Federal Register and designed to guide drafters of federal regulations) tells drafters to use only *must*, never *shall*, in their drafting.<sup>2</sup> It appears, though, that this directive is not being uniformly followed.<sup>3</sup> The Oregon Attorney General's Administrative Law Manual allows both *shall* and *must* in the drafting of duties in rules.<sup>4</sup> For some years now our own rule drafting manual has encouraged *must* and has allowed *shall* but restricted its use to duties in the active voice. It has also explained to drafters which uses of *shall* are not recommended or are unnecessary.<sup>5</sup> California rule material available on the Internet appears to be drafted with *must*;<sup>6</sup> by contrast, Kentucky's publication on administrative regulations mentions only *shall* and *may*.<sup>7</sup>

For jury instructions, there is research evidence to prove that jury instructions using *must* are well understood.<sup>8</sup> Iowa is one example of a state that undertook the redrafting of its jury instructions some years ago; those instructions now generally use *must*.<sup>9</sup>

Court rules are another variety of legal language in which *shall* has been the verb of mandate. The most recent court rule drafting guide is by Bryan Garner, a widely recognized drafting consultant and the editor of a legal dictionary and a guide to legal usage. Garner's court rule drafting guide presents a set of instructions for the redrafting of federal court rules. In it, Garner presents a terminology for three patterns of verb usage; the terms are "ABC rule," "strict American rule," and "lax American rule." The ABC rule (Australian-British-Canadian) uses only *must* to impose duties. The strict American rule uses *shall* only when it means "has a duty to"

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<sup>1</sup> Janice C. Redish, "How to Write Regulations (and Other Legal Documents) in Clear English," *Drafting Documents in Plain Language*, 1981 (New York: Practising Law Institute, 1981), pp. 253-254.

<sup>2</sup> *Drafting Legal Documents* (Washington, D.C.: National Archives and Records Administration), at [www.nara.gov/fedreg/dldhome.html](http://www.nara.gov/fedreg/dldhome.html)

<sup>3</sup> Internet searches of federal rule material turn up many instances of *shall* in rules that were apparently proposed after the date when the drafting directive took effect: January 1, 1999. On the one hand, searches of proposed and adopted rules in the Federal Register during 1998 and during 1999 show a proportionate decrease in instances of *shall* (76,369 to 63,784) and a proportionate increase in instances of *must* (99,713 to 107,001). On the other hand, when we look directly at specific rule text proposed during 1999, we still see a good many *shalls*.

<sup>4</sup> *Oregon Attorney General's Administrative Laws Manual and Uniform and Model Rules of Procedure under the Administrative Procedures Act* (State of Oregon, 1997), p. B-7.

<sup>5</sup> *Minnesota Rules Drafting Manual with Styles and Forms*, (St. Paul: Office of the Revisor of Statutes, 1997), pp. 34-35.

<sup>6</sup> See, for example, California Air Resources Board, *Final Regulation Order: Chromate Treated Cooling Towers*, at [www.arb.ca.gov/toxics/atcm/cltwtatcm.htm](http://www.arb.ca.gov/toxics/atcm/cltwtatcm.htm).

<sup>7</sup> *Information Bulletin 118, Kentucky Administrative Regulations* (Frankfort, Kentucky: Legislative Research Commission, 1996), p. 57.

<sup>8</sup> Robert Charrow and Veda Charrow, "Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions," 79 *Columbia Law Review* 1306 (1979).

<sup>9</sup> *Iowa Civil Jury Instructions*, 2 vols., Iowa State Bar Association.

and uses *must* for requirements on inanimate objects and conditions precedent. The lax American rule permits *shall* for requirements as well as for duties. Garner's guidelines recommend the ABC rule<sup>10</sup> and in another publication, he reports that the ABC rule was adopted in late 1992 by the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.<sup>11</sup>

Advice about legislative drafting has not yet moved so far toward *must*. Outside the United States, opinion is mixed. Legislation in Australian provinces is being drafted exclusively with *must* as far as we know.<sup>12</sup> However, the legislative drafting conventions of Ontario require the use of *shall* exclusively to impose a duty or a prohibition.<sup>13</sup>

Among American treatises, textbooks, and articles on legislative drafting, again opinion is mixed. Few such works are current, and the older books predictably recommend *shall* (the works of F. Reed Dickerson are typical). In examining the recent works (fewer than ten titles) that we owned or found with the help of the Legislative Reference Library, we found two American authors who advocate drafting legislation entirely without *shall*: Bryan Garner and Joseph Kimble, professor of law at the Thomas M. Cooley Law School and the author of many works on plain language.<sup>14</sup> Robert Martineau, professor of law at the University of Cincinnati, advocates the strict American rule.<sup>15</sup> The most conservative position among modern authors is taken by Jack Stark, assistant chief counsel at the Wisconsin Legislative Reference Bureau, who recommends drafting with *shall* exclusively.<sup>16</sup>

In addition to textbooks and treatises, we examined legislative drafting manuals. We requested current manuals from the states participating in NCSL's LEGALSERV discussion list, and we received approximately sixteen of them. Several of the manuals we examined advocate the strict American rule; they restrict *must* to passive voice and requirements on inanimate objects.<sup>17</sup> The

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<sup>10</sup> Garner, *Guidelines for Drafting and Editing Court Rules*, pp. 29-30.

<sup>11</sup> Garner, *Advanced Legal Drafting* (Dallas, Texas: LawProse, 1998), p. 15.

<sup>12</sup> See "Plain English Legislation," Ministerial Statement by the Hon. J. H. Kennan, MLC, Attorney-General, in the Legislative Council on 7 May, 1985, pp. 5-6. The statement says in part, "The term *must* will replace the term *shall*...wherever *shall* is used to impose an obligation."

<sup>13</sup> Legislative Drafting Conventions/ Protocole de redaction legislative (Ontario: Queen's Printer for Ontario, 1991), p. 7.

<sup>14</sup> Garner, *Advanced Legal Drafting* (Dallas, Texas: LawProse, 1998), p. 15. See also *A Dictionary of Modern Legal Usage* (2d ed. 1995), pp. 939-942, and Joseph Kimble, "The Many Misuses of 'Shall,'" 3 *Scribes Journal of Legal Writing* 61 (1992).

<sup>15</sup> Martineau, *Drafting Legislation and Rules in Plain English* (St. Paul: West Publishing, 1991), p. 80.

<sup>16</sup> Stark, "A Toolbox Approach to Shall," *The Legislative Lawyer*, vol. 11, no. 1 (Winter 1997), at [www.ncsl.org/programs/legman/LegalSrv/Vol11No1.htm#tool](http://www.ncsl.org/programs/legman/LegalSrv/Vol11No1.htm#tool).

<sup>17</sup> See, for example, *Arizona Legislative Bill Drafting Manual 1999* (Arizona: Arizona Legislative Council), pp. 83-84; *Manual for Drafting General Bills*, (Tallahassee, Florida: Office of the Secretary of the Senate, Fifth Edition, 1999), pp. 13-14; *Form and Style Manual for Legislative Measures* (Indiana: Office of Code Revision, Legislative Services Agency, October 25, 1995), p. 6.

National Conference of Commissioners on Uniform State Laws also approximates the strict American rule: it recommends *shall* "if the verb it qualifies is a transitive verb in the active voice" and *must* "if the verb it qualifies is in the passive voice or the subject is inanimate."<sup>18</sup> Of the state manuals, Nebraska's is the most liberal, leaving the choice among *shall*, *must*, *will*, or the present tense entirely up to the preference of the drafter.<sup>19</sup> Most of the manuals we examined do not mention *must* and do specify *shall*.<sup>20</sup> Federal legislation available on the Internet is obviously drafted with *shall*.<sup>21</sup>

## Our position

We believe that in many cases *shall* and *must* can be used interchangeably without harm. Having reviewed the history and state of the question, we have designed our advice to guard against constructions that are ambiguous or needlessly wordy, to match as far as possible advice that is current among drafters of state legislation, and to allow drafters a choice of verbs in creating duties and prohibitions, so as to respect different points of view.

1. Guard against constructions that are ambiguous.

Our advice recommends against using *shall be*, *shall not be*, *may be*, and *may not be*. Each of these constructions can be shown to be ambiguous in some cases. Examples appear in the advice itself.

2. Guard against constructions that are needlessly wordy.

Our advice recommends against using *shall mean* and *shall be entitled to* simply because *means* and *is entitled to* are equally effective, shorter, and in the present tense, which is preferred.

3. Match advice current among drafters of state legislation.
4. Allow drafters a choice of verbs in creating duties and prohibitions

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<sup>18</sup> *Procedure and Drafting Manual* (Chicago, Illinois: National Conference of Commissioners on Uniform State Laws, 1997), draft rule 8.

<sup>19</sup> *Drafting Guidelines of the Nebraska Bill Drafting Office* (Lincoln, Nebraska: Office of Revisor of Statutes, November, 1998), p. 85.

<sup>20</sup> See, for example, *Colorado Bill Drafting Manual* (1999), pp. 5-21; *Guidelines for Bill Drafting*, (Tallahassee, Florida: Florida House of Representatives, 1999); Richard C. Edwards, *Guide to Drafting Legislative Documents* (Illinois Legislative Reference Bureau, n.d.) n.p.; *Bill Drafting Manual, Kentucky General Assembly, Information Bulletin No. 117* (Frankfort, Kentucky: Legislative Research Commission, 1997), p. 21; *The Essentials of Bill Drafting* (Jefferson City, Missouri: Committee on Legislative Research, Missouri General, 1980), pp. 13-15; *Assembly Legislative Drafting Manual* (New Mexico Legislative Council Service, 1999 Update), p. 99; *Bill Drafting Manual* (Salem, Oregon: Legislative Counsel Committee, 1998), pp. 3.10 and 4.5; *Revised Drafting Guidelines* (Vermont: Legislative Council Staff, 1995); *Wisconsin Bill Drafting Manual 1999-2000* (Wisconsin Legislative Reference Bureau, 1998), p. 39.

<sup>21</sup> See examples at [thomas.loc.gov](http://thomas.loc.gov)



We allow must in duties in the active voice because there is a small group of drafters who have been influenced by the arguments of the Plain English movement and who prefer to draft laws and rules entirely without *shall*.

Most state manuals adhere to some form of the American rule, which restricts *shall* to the imposition of duties. In our advice we opt for the strict American rule as recommended by the National Conference of Commissioners on Uniform State Laws, with one difference: to allow either *shall* or *must* in duties.

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#### FURTHER READING

Asprey, Michele. *Plain Language for Lawyers*, 149-52.

\_\_\_\_\_. " 'Shall' Must Go," 3 Scribes J. Legal Writing 79 (1992).

Bennett, J.M., "In Defense of 'Shall'," 63 Austl. L. J. 522 (1989).

\_\_\_\_\_, "Final Observations on the use of 'Shall'," 64 Austl. L.J. 168 (1990).

Eagleson, Robert, and Michele Asprey, "Must We Continue with 'Shall'?" 63 Austl. L.J. 75 (1989).

\_\_\_\_\_, "We Must Abandon 'Shall'," 63 Austl. L. J. 726 (1989).

Main, Jim. " ' Must' Versus 'Shall,' " 63 Austl. L.J. 860 (1989).

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**Attachment 4**  
**Recommendations for Replacement of *Shall* in Special**  
**Circumstances**

TO: Michele Timmons, Revisor of Statutes  
FROM: Maryann Corbett, Language Specialist  
SUBJECT: Proposal to change *shall* to *must* in Minnesota Statutes  
DATE: August 27, 2001

This memo considers the proposal to change *shall* to *must* in Minnesota Statutes. Its conclusion, briefly, is that to be workable, the proposal must be amended or reinterpreted. This is necessary because not all *shalls* can be changed to *must* and retain their original meaning. Some must be changed to different words.

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Many of the 86,847 instances of *shall* in Minnesota Statutes could be replaced with *must* without trouble. Straightforward orders in the active voice, for example, present few problems: "The commissioner *shall* review the proposal and approve or deny the request" could simply be changed to "The commissioner *must* review the proposal and approve or deny the request."

On the other hand, there are many other instances of *shall* for which a change to *must* is not appropriate. For many of the instances of *shall* in Minnesota Statutes, replacement with *must* does not preserve the meaning, and some other substitution works better to save meaning and produce normal English sentences. Here are some examples:

(In some of the following examples, there is more than one *shall* in a sentence. The *shall* in **bold** within the example is the one being considered.)

a. *shall* in definitions

"As used in this compact, the term "executive head" **shall mean** the governor." (18.71)

The appropriate substitution for *shall mean* is *means*.

b. *shall* in entitlements

"Each state delegation **shall be entitled** to three votes in the commission." (1.21)

The appropriate substitution for *shall be entitled* is *entitled*.

c. *shall* in statements true by operation of law

"The presence of members from a majority of the party states **shall constitute** a quorum for the transaction of business at any meeting of the commission. (1.21)

"...and if so paid, no penalty **shall attach**." (279.01)

The simplest substitution is to use the present tense: change *shall constitute* to *constitutes* and *shall attach* to *attaches*.

d. *shall* in subordinate clauses

"If it **shall be determined** by final judgment or decree...(93.335)

"When the performance of an act is prohibited by statute, and no penalty for the violation of the same **shall be imposed** in any statute....."(645.241)

In these cases, *shall be* should be replaced with *is*.

"No registration plates or certificate shall be issued by the motor vehicle registrar for a motor vehicle unless and until the applicant therefor **shall attach** a properly executed motor vehicle purchaser's certificate to the application for license registration." (297B.97)

In this case *shall attach* should be replaced with *attaches*.

e. *Shall* in active-voice prohibitions beginning with "No"

"No person **shall** knowingly **break** the seal on any car of grain subject to state inspection prior to delivery thereof..." (17B.20)

Current drafting practice is divided on the question of the best alternative to "no person shall."  
The statutes now contain

131 instances of "no person may"  
29 instances of "a person shall not" and  
3 instances of "a person must not" and  
272 instances of "a person may not.")

For any project to replace these *shalls* a uniform approach would be best, so we would need to decide on a method.

f. *shall* in passive-voice prohibitions beginning with "No"

"...{n)o person **shall be excused** from testifying or from producing any papers or documents on the ground that doing so may tend to criminate the person..."(609.09)

"No temporary restraining order **shall be issued** without a prior show cause notice of hearing..." (617.296)

In this case, the simplest substitution is to replace *shall* with *may*, so that the results are "no person may be excused." and "no order may be issued." There are other methods; they change word order and so are slightly more involved.

g. *shall* in ballot questions and similar forms

"**Shall** the state building code be adopted in ..... county?"(16B.72)

These instances of *shall* could perhaps be left alone. The use of *shall* at the start of a question is very common in normal English speech. Indeed it is the one use of *shall* that remains common. Examples include questions like "Shall I close the door?"

A possible replacement of this form of *shall* is *should*. At present there is at least one example in statutes of a ballot question with "should" (103B.545).

A genuinely plain drafting style for the ballot question above might be "Do you want the building code to be adopted in ....county?"

h. *shall* in the active voice with an inanimate subject

"An order **shall issue** upon a determination by the court that reasonable cause exists to believe..."(144.4182)

The simplest substitution is to change *shall issue* to *issues*. To help readers understand this archaic sentence, the best choice might be to change *shall issue* to *must be issued*.

i. *shall* in phrases that actually grant permission

In the course of revising the campaign practices law in for Minnesota Statutes 2000, we encountered the sentence "The board **shall** take any action it considers useful in overseeing investments." Replacing *shall* with *must* produced an odd result: It ordered the board to do what it wanted to do. The statement made more sense when recast with *may*, as a permission.

In other instances, *shall* is used with other verbs that make it clear the goal is to grant authority:

"The commissioner **shall have power to** establish grades on all produce...(27.07)

"The commissioner **shall have authority to** fill the vacancy from the membership of the credit union." (52.20)

"any court imposing sentence **shall be authorized** upon recommendation of the commissioner of transportation **to** prohibit the pilot so convicted from operating an aircraft within the state for a period of not exceeding one year." (84.50)

"The commissioner, on finding a particular facility to be hazardous to life or property, **shall be empowered to** require the person operating such facility to take steps necessary to remove such hazards." (299F.57)

In all these instances, the phrases in bold type are best replaced with *may*. Replacing *shall have* with *has* and *shall be* with *is* would be sufficient, but if the real goal is to make statutes more readable, why not go farther and shorten the sentences?

j. Other wordy expressions

A number of expressions including *shall* are notorious for their wordiness and are warned against by such drafting experts as the late Reed Dickerson. Here are examples of some of them from Minnesota Statutes, with strikeouts and underscoring to show how they should be changed if the real goal is to simplify the statutes:

*it shall be lawful*

~~"It shall be lawful for~~ Any number of persons, not less than 25, residing in adjoining townships of this state who ~~shall~~ collectively own property worth at least \$50,000 ~~to~~ may-form themselves into a corporation for mutual insurance...(67A.01)

*it shall be unlawful*

In all cases where the compensation of an officer of the state is fixed by law at a specified sum, ~~it shall be unlawful for any~~ such officer or employee ~~to~~ may not receive additional compensation for the performance of official services out of the contingent fund of the officer or the department... (15.0596)

*it shall be the duty (or the responsibility)*

~~It shall be the duty of~~ Every person owning, occupying or having charge of any premises on which such bushes of the rust-producing varieties are grown, or at any time found growing, ~~to~~ must forthwith destroy such bushes. (18.331)

What we learn from the examples in a to j above is that a "proposal to change *shall* to *must* in Minnesota Statutes" needs to be amended or reinterpreted in order to be workable. If the true goal is eliminating *shall* while preserving the meaning of the statutes, many instances of *shall* need to be replaced with something other than *must*.

**Attachment 5**  
**Proposed Draft Language for Revisor's Manual, 2002**

Pages 273 and 274 of the Minnesota Revisor's Manual (1997 Edition), section 10.9 is deleted and replaced with:

## **"10.9 Shall, Must, and other Verbs of Command**

### **(a) Duties**

*Active voice:* To impose a duty to act, drafters have a choice between two auxiliary verbs: *shall* or *must*. Here are two examples:

The commissioner shall evaluate the report.

The commissioner must evaluate the report.

Either way, the sentence should be in the active voice, and the subject of the sentence should be a human being or a legal entity on whom a duty can be imposed.

*Passive voice:* No matter which verb is used, imposing duties with the passive voice is risky because the sentence might not make clear who has the duty to act. However, if the context makes clear who has to do it, a drafter can impose a duty in the passive voice with *must*:

The application must be processed when the comment period has elapsed.

(This assumes that a previous sentence makes it clear who has the duty to process the application.)

Drafters should avoid using *shall* in the passive. See *Statements of Law*, under this topic.

*Determining duties:* Not every sentence that has a human subject takes a *shall*. When drafters use *shall* to impose duties, they should be certain that what they are creating is really a duty. Consider the sentence, "The board shall take any action it considers useful in overseeing investments." Does it really make sense to order the board to do what it wants to do? The statement makes more sense if it is drafted with *may*, as a permission. To test for this type of problem, try substituting *must* or *has the duty to* and see if the sentence still makes sense.

*Statements of Law* and *Requirements or conditions* (under this topic) are other types of sentences with human subjects that do not take *shall*.

### **(b) Prohibitions**

*Shall not or must not:* To impose a duty not to act--a prohibition--the drafter has the same two choices: *shall* or *must*, combined with *not*:

A person must not operate a motor vehicle in violation of motor vehicle noise rules adopted by the pollution control agency.



The commissioner shall not impose an additional fee for late applications.

*Passive voice:* Drafters should avoid using *shall not* in the passive voice. See *Statements of Law*, under this topic.

If context makes it clear who has the duty not to act, or who is subject to the prohibition, drafters can impose prohibitions in the passive voice with *must*:

Vented freestanding room heaters must not be installed in bedrooms or sleeping quarters....

(This assumes that it does not matter who is acting; no one is allowed to install such a heater in a bedroom.)

*May not:* Prohibitions can also be drafted with *may not*, but passive *may not* needs special care. See *Permissions*, under this topic.

### **(c) Permissions**

*May:* To permit an action, or to give someone discretionary authority, drafters should use *may*. Longer forms like *is authorized to* are not needed.

The commissioner may order the property seized.

Like *shall* and *must*, *may* in the passive voice is risky. To make clear who has the permission or authority, it is better to write in the active voice and to say that some person may seize the property than to say that it "may be seized."

Also, a passive *may* is susceptible to misreading. For example, consider the sentence, "An application submitted after the June 30 deadline *may be rejected*." Is this sentence just alerting the reader that a late application might not be approved, or is it specifically permitting the reviewer to reject it?

*May not:* To say an action is not permitted, drafters have at least two choices. They can express a negative permission by using *may not* or they can express a prohibition by using *must not*.

Essential employees may not strike.

An employee must not strike unless written notice of intent to strike is served on the employer and the commissioner.

Drafters should be aware, though, that passive *may not*, like passive *may*, can be misread by readers not accustomed to the conventions of legal drafting or not acquainted with the principles of statutory interpretation. For example, consider the sentence, "If an aid application is not received by the June 30 deadline, it may not be approved for the fall quarter."

Drafters know that in laws or rules the only appropriate uses of verbs are to require or prohibit acts, grant or deny permissions, or establish standards or requirements, and they know that mere statements of possibility have no place in law. However, not all readers know these limitations. Since in general English *may* can mean possibility as well as permission, a student who wants to apply for aid might understand the example sentence as a mere warning that a late application might not get timely money. Even though the aid-granting agency will probably understand what the drafter meant--that the agency is not permitted to give money to a late applicant--at least part of the audience could be misinformed.

To avoid such misreadings of *may not be*, drafters can do one of two things. They can replace *may not be* with *must not be*, or they can put the negative element in the main verb:

If an aid application is not received by the June 30 deadline, it must not be approved for the fall quarter.

If an aid application is not received by the June 30 deadline, it must be rejected for the fall quarter.

To avoid any misreading that involves the *may* of possibility, some drafters refrain entirely from using *may not*, either in the passive or the active voice, and substitute *must not*.

#### **(d) Statements of Law**

To say what the law is--that is, to make a statement that is true by operation of law--drafters should use *is* or *are*, not *shall be*. For example, a drafter should write that a person *is eligible* for a grant under certain conditions, not that the person *shall be eligible*. Negative statements work the same way: a drafter should write that a person *is not eligible* for a grant under certain conditions, not that the person *shall not be eligible*. The practice of using *shall* to state a legal result is discussed by drafting authorities as an error called the "false imperative."

*Shall be* and *shall not be* in any context are potentially ambiguous. Consider the following sentence: "A member of the investment board shall be a member of the guaranty association." Does *shall be* in this sentence mean *is* or does it mean *must be*? In other words, does this sentence constitute a requirement that a member of the investment board first be a member of the guaranty association, or is it a declaration that a board member automatically becomes a guaranty association member?

Because *shall* with *be* can be read two ways, and because the passive voice always involves the use of a form of *be*, drafters should avoid using *shall*, or *shall not*, in the passive voice.

#### **(e) Requirements or conditions**

*Must*: To create requirements or conditions--statements about what people or things must be rather than what they must do--drafters should use *must*, not *shall*:

To be eligible for nomination, a person must be at least 21 years old.

A motor vehicle must be equipped with a horn.

*Must* is preferred because requirements or conditions usually need a form of *be*, and *shall* combined with *be* is often ambiguous. See *Statements of Law*, under this topic.

*Must not*: A requirement or condition can also be stated negatively, and in that case the drafter should write *must not*:

The nominee must not have been a registered lobbyist at any time within three years before nomination.

*Need not or is not required to*: To show that something is not required, drafters should use *need not* or *is not required to*:

If fewer than seven people object to the rule, a hearing need not be held.

If fewer than seven people object to the rule, a hearing is not required.

#### **(f) Definitions**

To define a term, drafters should use *means*, not *shall mean*.

"Farm tractor" means a tractor designed and used primarily as a farm implement...

In the introduction to a series of definitions, drafters should say that the terms "have the meanings given them" rather than "shall have the meanings given them."

#### **(g) Rights and entitlements**

To create a right, drafters should use *is entitled to*, not *shall be entitled to*; to negate a right, *is not entitled to*.

The member is entitled to be compensated for expenses attributable to service on the board.

(This assumes that it is also clear from some other sentence who has the duty to compensate the member.)

#### **(h) Conditional clauses**

In conditions, drafters should not use *shall* at all. Formulas like "If it shall have been established" can become "If it has been established..." or better, "If (someone with the duty) has established..."

#### **(i) Other verbs**

Drafters are often tempted to use other verbs, such as *can*, *should*, or *will*. The best advice is to avoid alternatives and stick to the models given above. Some drafting authorities do discuss *should* (Dickerson, for example) and *will* (state rule-drafting manuals), but little agreement exists among the authorities. It is not certain how readers will understand the alternative verbs or how courts will construe them.

#### **(j) Summary recommendations**

What follows is a short rule that drafters can apply to help them use *shall* and *must* consistently with our recommendations.

Either *shall* or *must* may be used if all of the following conditions are satisfied:

- (1) The statement imposes a duty or prohibition.
- (2) The subject of the sentence is a human being or legal entity.
- (3) The duty or prohibition is imposed in the active voice.

If all conditions are not met, use *must* to impose a duty, prohibition, obligation, requirement, status, or condition."