AXA XL Insurance

What shall we do about "shall"?

Design Professional

Must we refrain from using "shall" in our contracts? Some legal scholars and government agencies are moving in that direction.

Words often change meaning over time. Take, for example, the word "shall." Law schools long taught that in a legal context, the word "shall" is synonymous with "must" and that they're both words of obligation meaning "mandatory." However, "shall" has been losing favor in some legal circles, an interesting development for design professionals and others who work with contracts.

"Shall" is still commonly used in laws, codes and regulations. Most of the contracts that architects and engineers encounter—including the standard form agreements published by the American Institute of Architects (AIA), the Engineers Joint Contract Documents Committee (EJCDC), and ConsensusDOCS—use "shall" to express a requirement or obligation. To the engineer and client that execute the EJCDC E-500, the clause, "The Engineer shall provide, or cause to be provided, the services set forth herein and in Exhibit A," makes the engineer's obligation clear.

But some legal scholars consider "shall" outdated and ambiguous. They say the word is frequently used incorrectly (most often by lawyers) and, depending on how it's used, can have a variety of meanings.

No less than the U.S. Supreme Court has weighed in. Justice Ruth Bader Ginsburg wrote in a majority opinion, "though 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will' or even 'may.'"[1]

According to the University of Texas School of Law's Walter Schiess, "When 'shall' is used to describe a status, to describe future actions, or to seemingly impose an obligation on an inanimate object, it's being used incorrectly."[2]

For example, it's clear that "the Consultant *shall* provide" imposes an obligation. But how about "the parties *shall* request arbitration"? That has been interpreted by courts to mean "should," rather than "must." In the clause, "the Consultant *shall* be notified within 30 days," "shall" could be interpreted to mean "is entitled to," which may or may not mean there's an obligation.

If you think this is hairsplitting, consider this: the use of the word "shall" is increasingly the subject of lawsuits. Nearly every jurisdiction has held that the word "shall" is ambiguous. In the legal dictionary "Words and Phrases," more than 70 pages summarize hundreds of cases interpreting "shall." It may be one of the most misused words in the English language.

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Moving away from "shall"

In the U.S., the federal government is moving to "must" as the preferred way to express a requirement or obligation. In 2003, the Federal Aviation Agency issued an advisory regarding the use of "will" or "must" in place of "shall." The new *Federal Rules of Appellate Procedure* uses "must," not "shall" and the *Federal Rules of Civil Procedure* no longer uses "shall." (See the sidebar, "Resources.")

In Canada, at least three provinces (British Columbia, Alberta and Manitoba) have amended their Interpretation Acts to forbid the use of "shall."

But other government agencies and organizations disagree. In specifications and standards published by the U.S. Department of Defense (DoD), requirements that use "shall" remain mandatory. ("'Must' shall not be used to express mandatory provisions. Use the term 'shall.'") In DoD-speak, "will" declares intent or simple futurity, and "should" and "may" express non-mandatory provisions.

What shall we do?

While it's important to be aware of legal trends, A/Es can feel comfortable using professional association standard agreements. Those documents (as well as sample clauses in *AXA XL's Contract eGuide for Design Professionals*) use "shall" to mean "has a duty to." AIA and EJCDC agreements have been tested by the courts over time, and you can confidently rely on the meaning and interpretation of the documents' contract terms.

When you review an agreement drafted by a client or other party, see that the word is used correctly and consistently. In other words, don't randomly use "must" and "will" and "promises to" and "expressly agrees to." Choose one word (or term) of obligation and stick to it.

"To correctly use 'shall'," writes Bryan A. Garner, editor-in-chief of Black's Law Dictionary, "confine it to the meaning 'has a duty to' and use it to impose a duty on a capable actor."[3]

For example, the AIA B101™-2017 clause, "The Architect shall provide professional services as set forth in this Agreement," assigns a duty to the architect. If you're unsure, substitute "shall" with "has a duty to," and see if it still makes sense.

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You could take a proactive approach, too, by defining the word "shall" in a definitions section of your contracts, stating that the word is considered a mandatory obligation and synonymous with the phrase "has a duty to." (For more information, see the "Definitions" chapter in the *Contract eGuide.*)

Over time, the legal community may continue to move away from "shall." Our advice: whichever word you choose, do so deliberately, and use it correctly and consistently.

Resources:

The Federal Register Document Drafting Handbook.

Garner, Bryan A., *Black's Law Dictionary, 10th Edition, Abridged* and nearly two dozen other books on legal writing.

Plainlanguage.gov

Schiess, Wayne, *Legal Writing Nerd: Be One*, 2018, and several previous books on legal writing.

Contact

Design Professional team
US
+1 610 968 9413
designprofessionalUSA@axaxl.com
axaxl.com/dp

Canada
800 820 2721 x8682
designprofessionalCAN@axaxl.com
axaxl.com/dp-ca

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1 Gutierrez de Martinez v. Lamagno
2 Legalwriting.net, "shall" vs. "will," 2005
3 Bryan A. Garner, A Dictionary of Modern Legal Usage 940–941 (2d ed., Oxford U. Press 1995)