



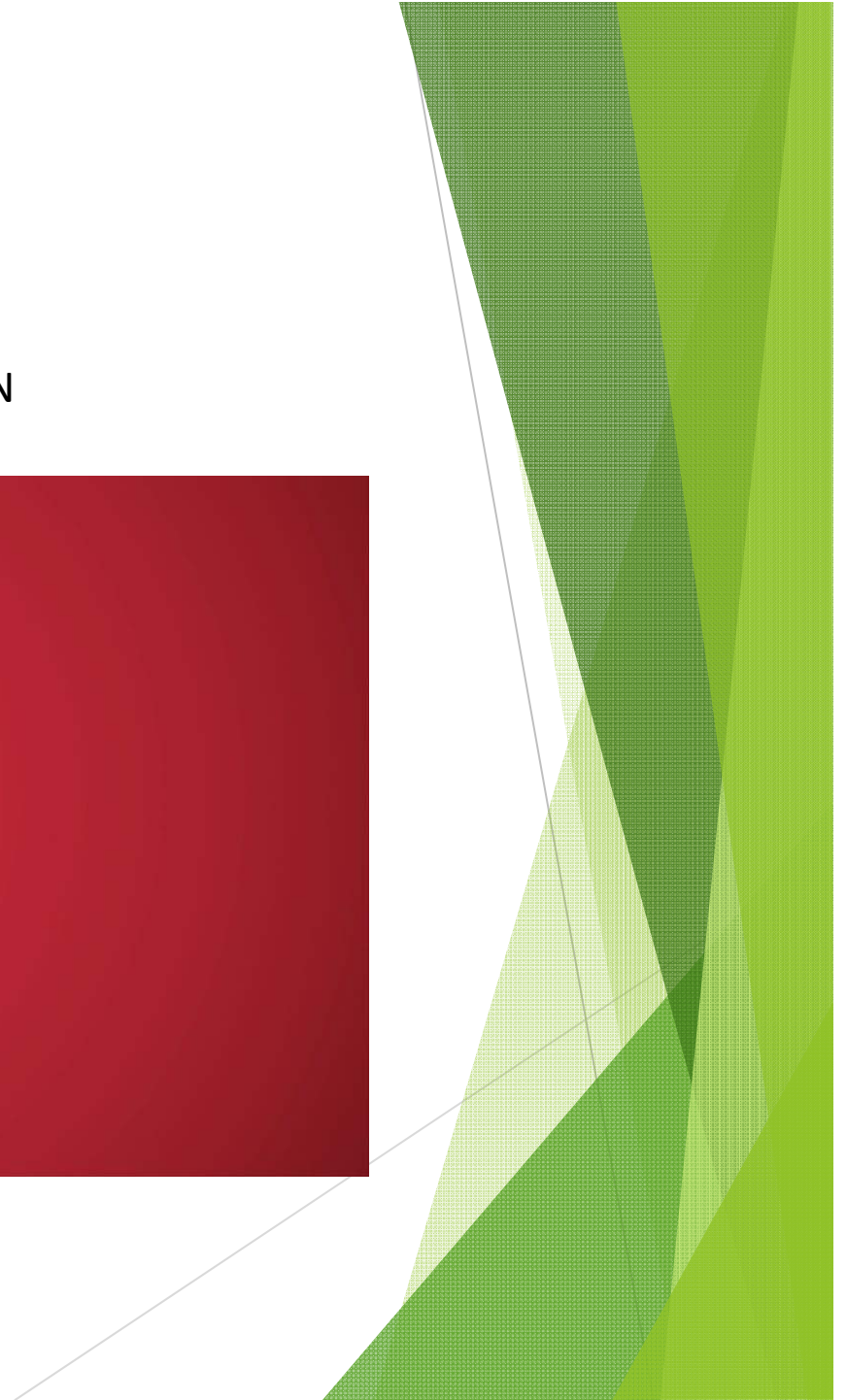
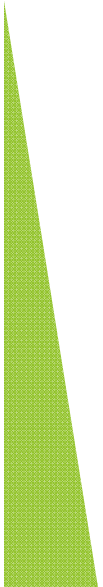
LEGAL WRITING

APTA Legal Affairs Seminar

2017

Steven Miller

VIDEO SHOWN DURING SESSION



Good Writing is Good Lawyering

What do you think is the most important goal of legal writing?

1. Logical
2. Clear
3. Precise
4. Awe-Inspiring
5. Strong
6. Persuasive

Overview

- ▶ Wordiness
- ▶ Legalese
- ▶ Nominalization
- ▶ Passive Voice
- ▶ Shall



Wordiness

What's wrong with wordiness?

1. Imprecise-unclear
2. Unpersuasive
3. Allows for ambiguity
4. Diminishes the power and logic of the argument
5. Wastes paper

Wordiness

- ▶ Imprecise-unclear
- ▶ Unpersuasive
- ▶ Allows for ambiguity
- ▶ Diminishes the power and logic of the argument
- ▶ Wastes paper
- ▶ There are exceptions. But I prefer to teach the rule, not the exception. How often have you thought “this would be improved by adding some more words?”

Wordiness

The parties were in complete agreement with respect to the amount of rent due and also as regards the due date. [21 words]

How many words can you cut from this sentence?

1. 3
2. 7
3. 10

Wordiness

- ▶ The parties were in complete agreement with respect to the amount of rent due and also as regards the due date. [21 words]
- ▶ The parties agreed to both the amount of the rent and the due date. [14 words]

Wordiness

Arbitration as a means of settling disputes was at first viewed by the courts with much disfavor, but today is being used increasingly as a substitute for litigation for the adjudication of disputes arising out of contracts. [37 words]

How many words can you cut from this sentence?

1. 3
2. 5
3. 12
4. 20

Wordiness

- ▶ Arbitration as a means of settling disputes was at first viewed by the courts with much disfavor, but today is being used increasingly as a substitute for litigation for the adjudication of disputes arising out of contracts. [37 words]
- ▶ Courts at first disfavored arbitration. But today, contract disputes are increasingly resolved through arbitration instead of litigation. [17 words]

Wordiness

- ▶ The court examined a number of cases and stated that there appeared to be only a limited number of instances in which there would exist a duty to disclose the illegal conduct of persons who, through political campaigns, seek election to a public office.
- ▶ Better: The court ~~examined a number of cases and stated that there appeared to be~~ found only a limited number of instances ~~in which there would exist~~ where there was a duty to disclose the illegal conduct of candidates ~~persons who, through political campaigns, seek election to a public office.~~
- ▶ Best?: Courts rarely find a duty to disclose a candidate's illegal conduct.

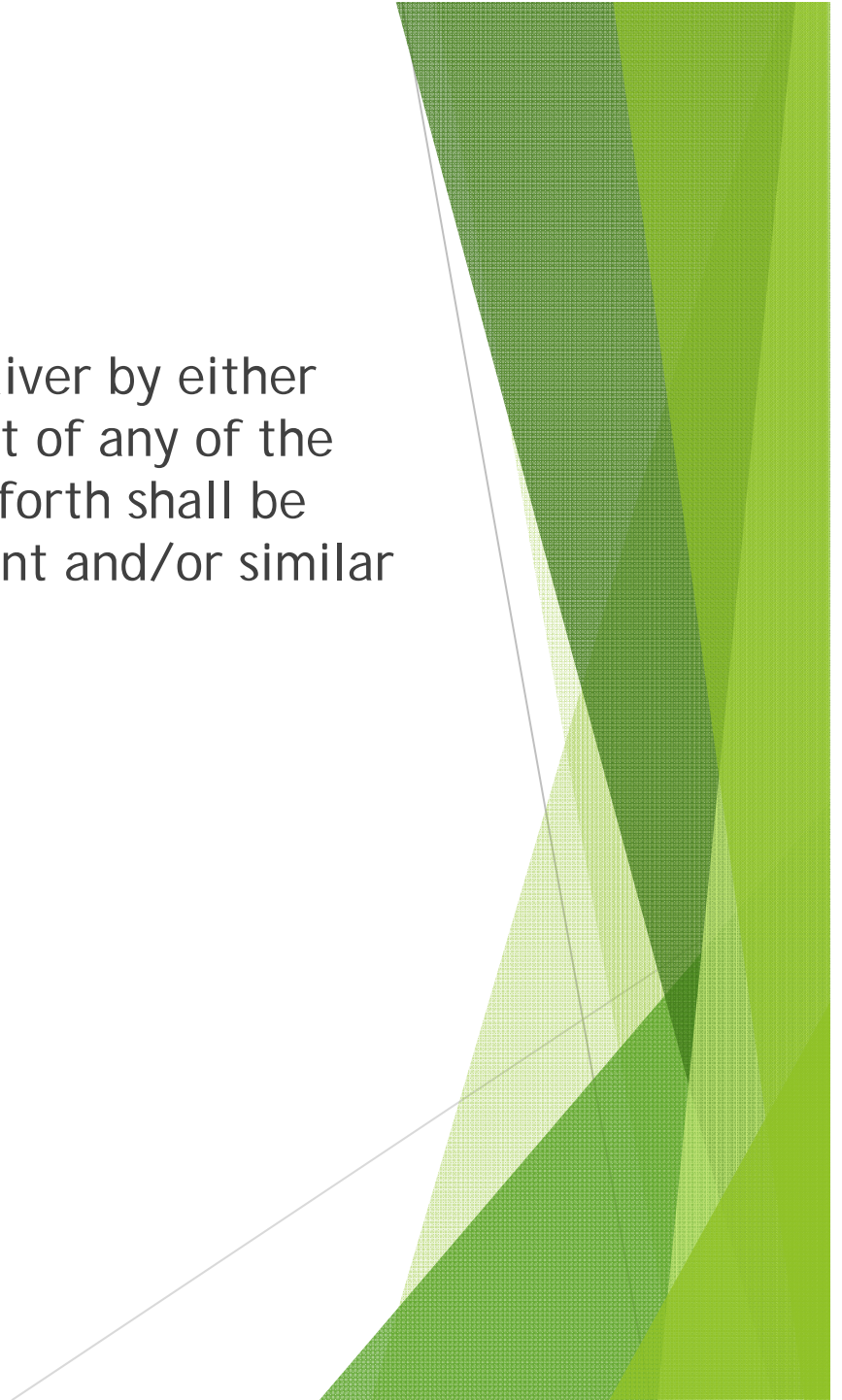
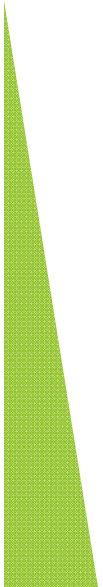
Legalese

Thomas M. Reavley, U.S. Circuit Judge



Legalese

Provided that it is agreed that no waiver by either party hereto of any breach or default of any of the covenants or agreements herein set forth shall be deemed a waiver as to any subsequent and/or similar breach or default.



Legalese

Provided that it is agreed that no waiver by either party hereto of any breach or default of any of the covenants or agreements herein set forth shall be deemed a waiver as to any subsequent and/or similar breach or default.

If either party fails to require the other to perform any term of this agreement, that failure does not prevent the party from later enforcing that term. If either party waives the other's breach of a term, that waiver is not treated as waiving a later breach of the term.

Other Language to Avoid (or at least think about before using)

- ▶ “Provided that” — can mean except, if, or also.
- ▶ “Such” is more ambiguous than this, that, these, those, or the.
 - ▶ “Such language” — means the language just mentioned, or language of that type?

Nominalization

- ▶ What is Nominalization?
 - ▶ Making a big deal out of a minor point
 - ▶ Turning a verb into a noun
 - ▶ Using gender specific terms — i.e., “he” — exclusively
 - ▶ Using Latin word instead of English equivalent

Nominalization

- ▶ Turning a base verb into a noun
- ▶ Remember, the two most basic units of a sentence are the **subject** and the **verb**
 - ▶ *Subject* → *Verb*
 - ▶ *Character* → *Action*

Elephants argue over small concerns, just like humans.

Arguments over small concerns are something elephants have, as well as humans.

- ▶ *Subject* → *Verb*: easy to follow
- ▶ *Subject* → *nominalizations* → *Verb*: hard to follow

Nominalization

- ▶ Nominalizations often hide the actor (like passive voice) and often require wordiness.
- ▶ *The discussion of the group was about how to surprise Anna with a birthday party without her knowing.*
- ▶ *The group discussed how to plan Anna's surprise party.*
- ▶ *Section 1038 has pertinence to any contract that makes provision for attorney fees.*
- ▶ *Section 1038 pertains to....*
- ▶ *The prediction of the director was for a 3 percent increase in the budget.*
- ▶ *The director predicted a 3 percent increase in the budget.*

Passive Voice

- ▶ What's wrong with it?
 - ▶ Puts emphasis on recipient or product of an action. Cart before the horse
 - ▶ Active voice is more concise — usually less words in active voice
 - ▶ Passive voice is weaker
 - ▶ Passive voice is ambiguous — omits actor
 - ▶ There's nothing wrong with the passive voice when used properly

Passive Voice

- ▶ A copy of every invoice must be sent to the Contracts office for entry and filing, and a summary of the invoice must be distributed to the Director of Finance three days thereafter.
- ▶ Who sends the copy? Who writes the summary? Who distributes the summary?

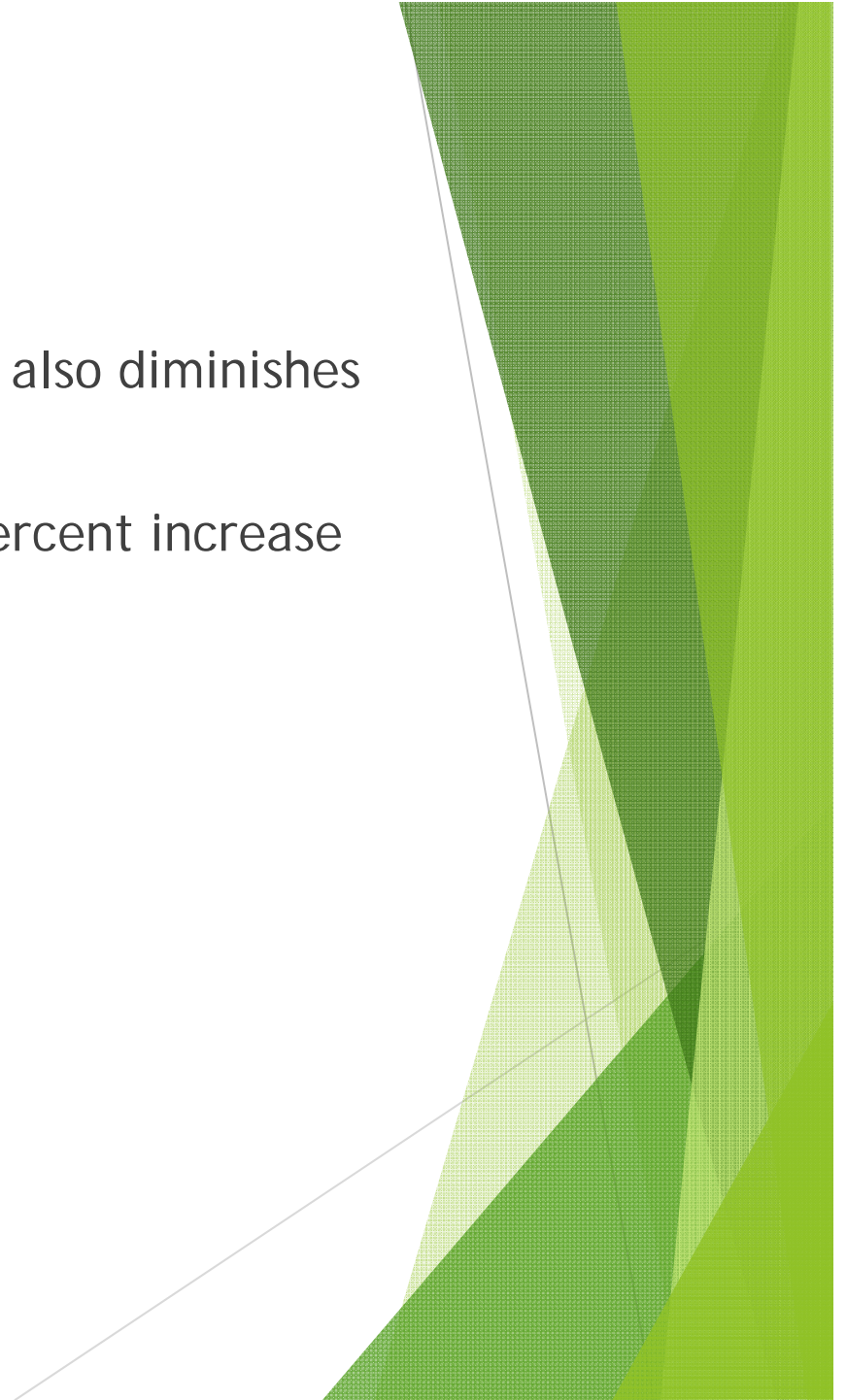
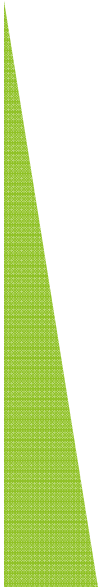
Passive Voice

- ▶ Sometimes it's good to use passive voice — when you want to put stress on the action and not the actor.
 - ▶ The deadline was missed by only 3 days (good if your client missed the deadline and you want to shift emphasis away from the actor).
 - ▶ A 3 percent increase in the budget was predicted.

Passive Voice

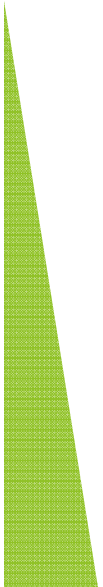
Like the passive voice, nominalization also diminishes the importance of the actor:

“The prediction was for a three percent increase in the budget.”



Final Rant

Shall



Final Rant

Last Quiz

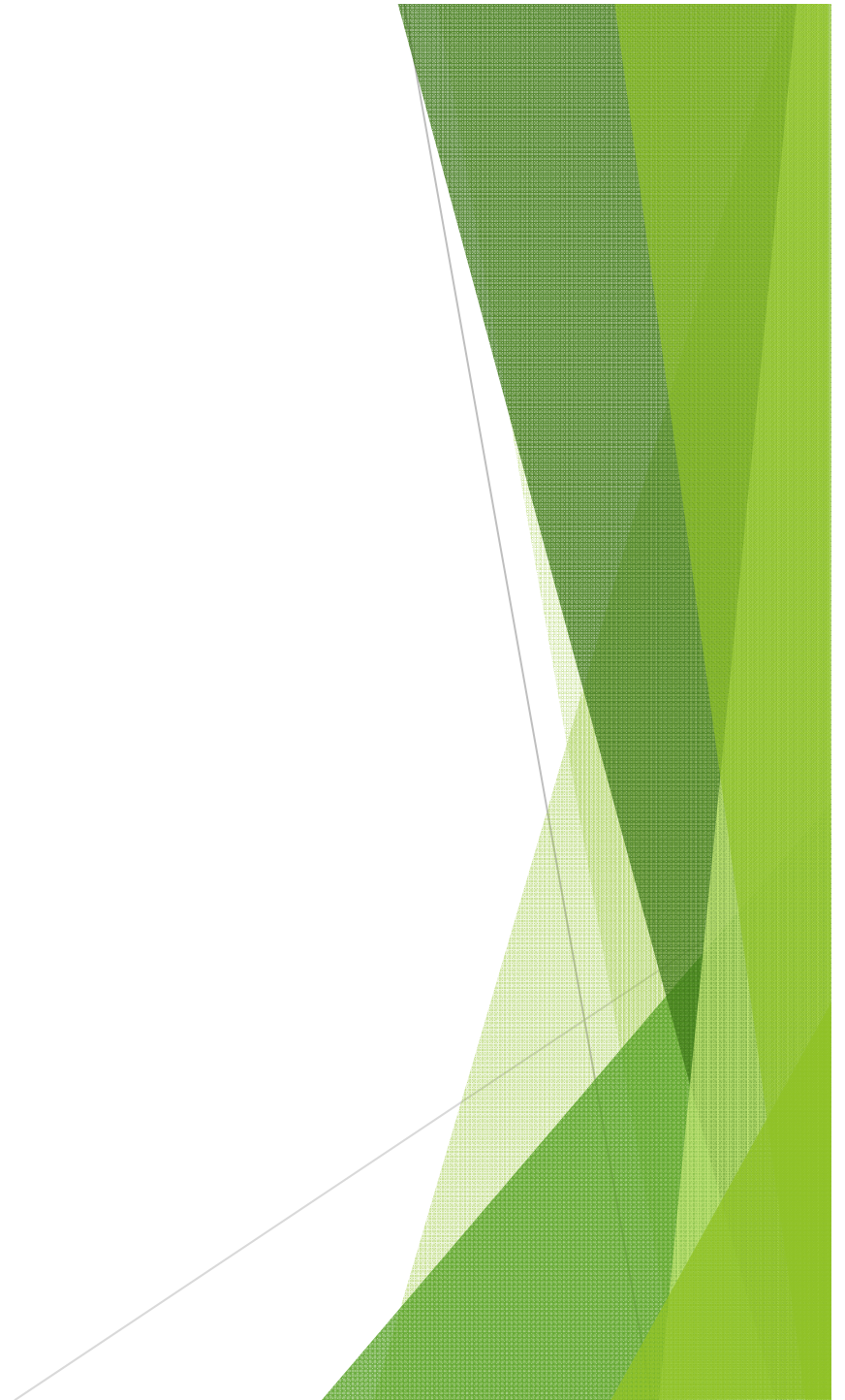
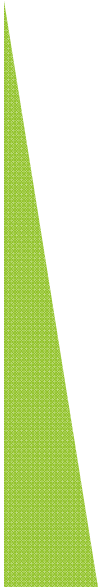
Shall means must

Shall means has a duty

Shall means should

Shall means may

Shall means is



Shall

- ▶ We all learned that “shall is mandatory” — not necessarily wrong, but inaccurate and incomplete.
- ▶ “In just about every jurisdiction, courts have held that ‘shall’ can mean not just ‘must’ and ‘may,’ but also ‘will’ and ‘is.’”

—Bryan Garner, *Legal Writing in Plain English*

Shall

- ▶ Three main reasons why using “shall” is always a bad idea:
 - ▶ First, nobody uses “shall” in ordinary speech. It has a gloss of legalism that is unnecessary and counterproductive.
 - ▶ Second, it is mostly misused and inherently ambiguous — could mean may, will, must — especially when combined with passive voice it takes on a deadly ambiguity.
 - ▶ Third, because it is always unclear, it has been corrupted by misuse and breeds litigation — there are hundreds of cases interpreting “shall.”

Litigation of Shall

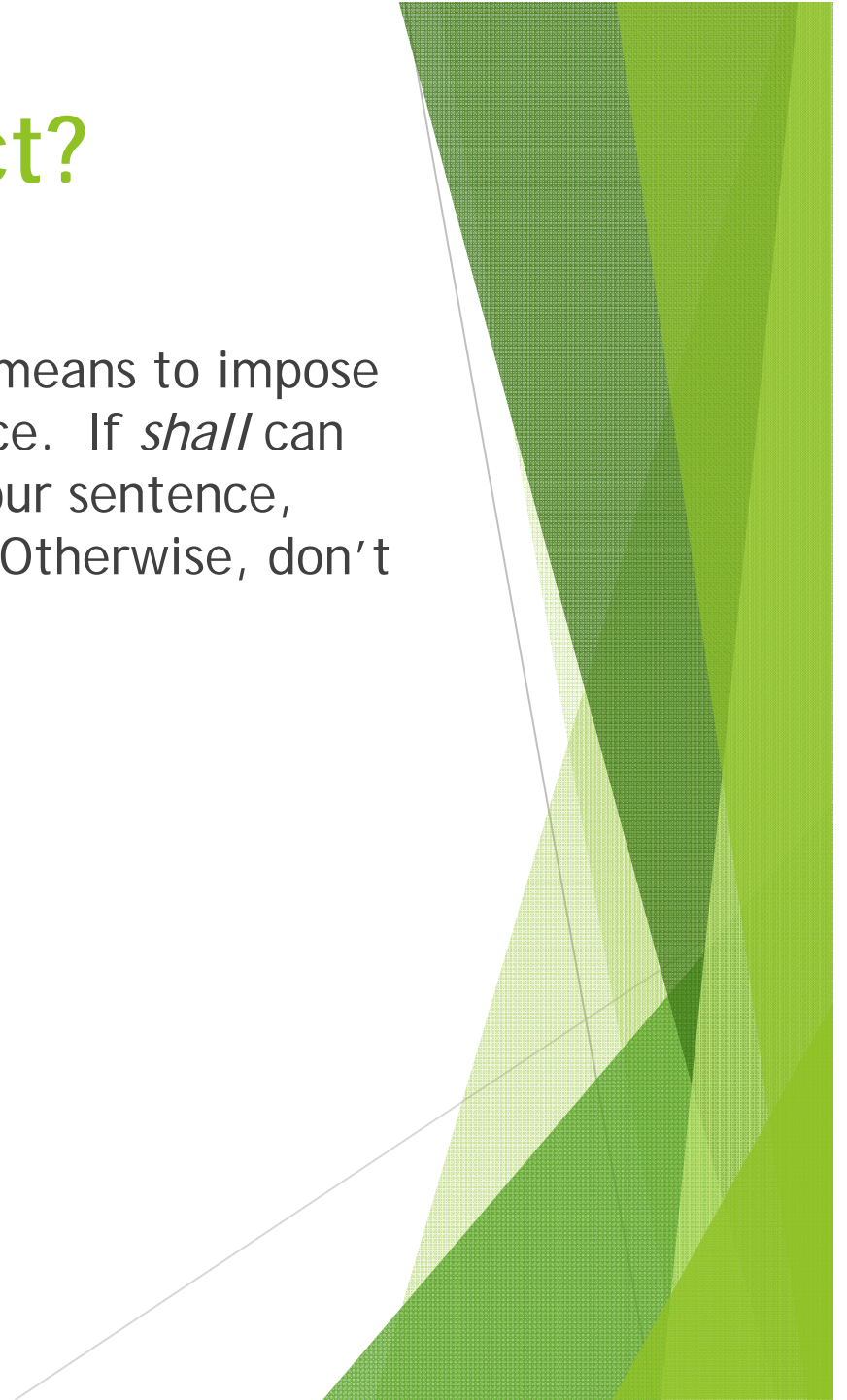
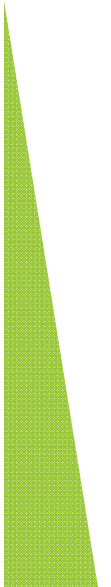
- ▶ *“Though ‘shall’ generally means must, legal writers sometimes use, or misuse, shall to mean should, will or even may.
Lamagno 515 US 424, n9*
- ▶ *If government bears the duty, the word ‘shall’ when used in statutes is to be construed as may unless a contrary intention is manifest.
Hecht 95 us 168 170*
- ▶ *“Shall” means “must” for existing rights, but it need not be construed as mandatory when a new right is created.
Foley 94 US 103*

Litigation of Shall (Cont'd)

- ▶ *"Shall" is a precatory suggestion.*
Scott 436 US 146
- ▶ *"when a statute stated that the secretary of labor
"shall" act within a certain time and the
Secretary didn't do so, the mere use of the word
"shall" was not enough to remove the Secretary's
power to act.*
Montalvo-Murillo 495 US 718

When is Shall Correct?

Shall is correctly used only when it means to impose a duty on the subject of the sentence. If *shall* can be replaced with *has a duty to* in your sentence, you're probably using it correctly. Otherwise, don't use it.



Possible Misinterpretations of Shall

- ▶ A bill shall be ratified by a majority of the Senate.
— means must.
- ▶ Neither party shall assign this Agreement without the prior written consent. — means may
- ▶ Anyone bringing a claim shall, within 15 days after the filing of the action, file a request for mediation. — means should
- ▶ Agency shall pay Contractor \$100,000 upon Final Acceptance. — might be correct usage

Possible Misinterpretations of Shall

- ▶ Objections to the proposed contract award shall be received no later than thirty days after notification.
 - What does this mean?

Histrionics over Shall

- ▶ FRCP Rule 56. Summary Judgment
- ▶ Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.
- ▶ U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedure notes on 2010 amendment

Histrionics over Shall (Cont'd)

- ▶ “Shall” is restored to express the direction to grant summary judgment. The word “shall” in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace “shall” with “should” as part of the Style Project, acting under a convention that prohibited any use of “shall.” Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions — “must” or “should” — is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 * * * (1948)),” with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”). Eliminating “shall” created an unacceptable risk of changing the summary-judgment standard. Restoring “shall” avoids the unintended consequences of any other word.

What Shall We Do?

2 choices

1. Use “shall” only to mean “has a duty to” or “is required to”
or
2. Never use “shall”

What Shall We Do?

2 choices

1. Use “shall” only to mean “has a duty to” or “is required to”
or
2. Never use “shall”

Choice 1 is not a good one as there will always be confusion as to whether usage was intentional or not. Plus, no one misunderstands “will” or “may” or “must.”

Thanks!

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