TO: THE BAR AND THE BENCH OF VIRGINIA

FROM: Advisory Committee on Rules of Court
Judicial Council of Virginia

April 12, 2019

M E M O R A N D U M

The Advisory Committee on Rules of Court resolved at its March 2019 meeting to make available for public comment a set of possible revisions to the Rules of Court addressing the ambiguous nature of the word "shall" in Rule wording. The examples now being published for comment by the Bench, the Bar, and the public illustrate the edits that could achieve the goal of eliminating almost all uses of the ambiguous word "shall." The revisions replace uses of that term with its actual meaning, which can be any one of several concepts: such as *must*, *may*, *will*, *should*, *is*, or *is entitled to*.

The Advisory Committee has studied a large collection of commentary on this issue, and numerous examples of rule-drafting guidelines from other jurisdictions that implement the policy of avoiding the ambiguous use of "shall," collected by the Boyd Graves Conference in studying this issue. They note that legal commentators and scholars have long recognized that the word *shall* is inherently ambiguous. It could mean something mandatory and obligatory (*must, is required to, is entitled to*), or something permissive (*may*, *should*). It could mean a statement of future action (*will*). Or it could mean simply the present tense (*is*).

The overwhelming majority of commentators and legal scholars recommend that Rules drafters avoid uses of *shall*. The word has been described as "the biggest troublemaker," "slippery," and the creator of "booby traps"; "the most misused word in the legal vocabulary"; and "flimsy." See Richard C. Wydick, *Plain English for Lawyers* 63-64 (5th ed. 2005) and Joseph Kimble, *The Many Misuses of Shall*, 3 Scribes J. Leg. Writing 61, 70 (1992).

Bryan Garner has provided in his leading book, *Legal Writing in Plain English* 125-26 (2d ed. 2013), the following overview:

> In just about every jurisdiction, courts have held that *shall* can mean not just *must* and *may*, but also *will* and *is*. Even in the U.S. Supreme Court, the holdings on *shall* are major cause for concern. The Court has:
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> • held that a legislative amendment from *shall* to *may* had no substantive effect;
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> • held that if the government bears the duty, "the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest";

• held that *shall* means "must" for existing rights, but that it need not be construed as mandatory when a new right is created;

• treated *shall* as a "precatory suggestion";

• acknowledged that "[t]hough 'shall' generally means 'must,' legal writers sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may'";

• held that, 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."

The federal rules drafters – over the past 12 years – have rewritten each set of federal procedural rules (civil, criminal, bankruptcy, appellate, evidence) to remove "shall" and substitute a more direct statement of how the Rule is intended to operate. The revised federal rules have generated no controversy and no interpretive confusion on these issues.

The Advisory Committee on Rules of Court invites comments on the draft revisions to the Virginia Rules being published herewith.

Send comments by to July 12, 2019 to:

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