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Shall - Take No. 2

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Citations:

Bluebook 21st ed.
Howard Darmstadter, Shall - Will - Who Makes the Rules, 7 Bus. L. TODAY 8 (1998).

ALWD 6th ed.
Darmstadter, H. ., Shall - will - who makes the rules, 7(5) Bus. L. Today 8 (1998).

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Darmstadter, Howard. "Shall - Will - Who Makes the Rules." Business Law Today, vol. 7, no. 5, May-June 1998, p. 8-11. HeinOnline.

OSCOLA 4th ed.
Howard Darmstadter, 'Shall - Will - Who Makes the Rules' (1998) 7 Bus L Today 8

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Legal- ease

Shall? Will? Who makes the rules?

By Howard Darmstadter

Lawyers who would no more leave out a plump bit of boilerplate from an agreement than go to work without their socks may still allow themselves to do without these clauses in a letter agreement. Letter agreements also lend themselves to two particular sorts of informality: referring to the parties as *we* and *you* and replacing *shall* by *will*.

Using *we* and *you* is championed by the plain language school of drafting, especially for consumer contracts. In a printed consumer contract, there can be no doubt that *you* refers to the con-

sumer reading the contract. The reader of a letter agreement, however, can easily lose his bearings. Deep in the interior of a 10-page letter agreement, "we" may be no more helpful a reference than "the party of the first part."

Still, referring to the parties as *we* and *you*, if it can be done without confusion, produces less stilted text. You might therefore consider beginning your letter agreement with:

This letter will confirm the agreement between Midas Bank, N.A. ("we" or "Bank") and Micawber Manufacturing Company ("you" or "Micawber").

Now you can use *we* and *you* when there is no possibility of confusion, *Micawber* and *Bank* elsewhere. For example, a provision as to when "we may charge your account" is unlikely to confuse *Bank* or *Micawber*.

Judiciously referring to the parties as *we* and *you* may make a document flow a little easier. You don't have to

take my word for it. The SEC's proposed "plain language" rule release (33-7380) notes that:

Although not a part of our proposed rules, another effective tool for producing plain English documents is to use personal pronouns. Personal pronouns immediately engage your readers' attention. A familiar writing style where "we" or "I" refers to management or the company, and "you" refers to the investor, involves your reader and increases comprehension.

You got a problem with *we*? See my regulator.

How about using *will* rather than *shall*? Surprisingly, the *will* vs. *shall* question is linked to the decision to use *we* and *you*.

The *Oxford English Dictionary* and Fowler's *Modern English Usage* (third edition) are of the view that in British English, *shall* in the second and third person (*you*, *he*, *she*, *it*, *they*) expresses the speaker's determination or insistence while *will* expresses mere futurity. In the first person (*I*, *we*), it's the reverse, with *shall* expressing the simple future and *will* indicating determination. Fowler illustrates the distinction with a nifty quote from P.G. Wodehouse:

"I will follow you to the ends of the earth," replied Susan, passionately. "It will not be necessary, said George. I am only going to the coal-cellar. I shall spend the next half-hour or so there."

Things get a bit more complicated (or simpler?) in the colonies. Fowler notes that, in the standard English of countries outside England, the absence of *shall* and the omnipresence of *will* and *will* are very marked, e.g., United States.

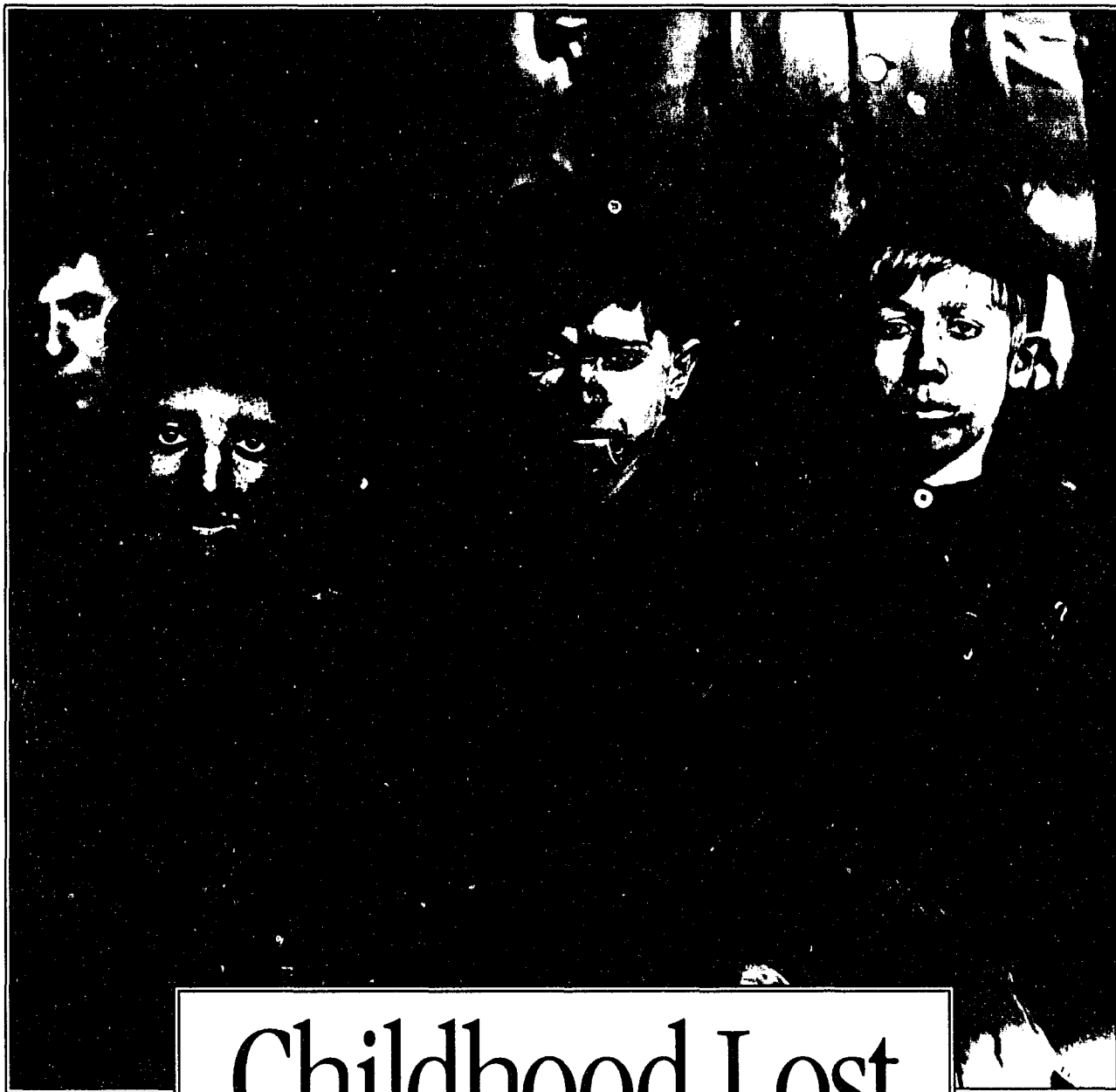
Even in England, some argue that the use of *shall* in the first person to

continued on page 10

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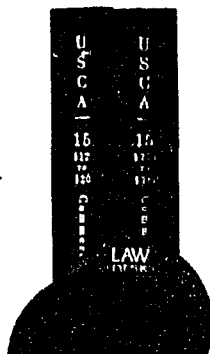
"Translate this easy-to-read statement into legalese, Wilson, so the consumer will have to hire a lawyer to translate it."



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indicate mere futurity is old-fashioned and widely ignored.

Neither the OED nor Fowler comments on the legal import of *shall* vs. *will*. It's understandable, however, that a lawyer might use the more determined "you shall" to impress on the parties that a legal obligation is involved. But it's hardly necessary: Micawber isn't legally bound to do something because the document says "Micawber shall" rather than "Micawber will." Micawber is bound because the document says that "the parties

agree that" Micawber shall or will perform its humble tasks.

If you're using *you will* in a letter agreement, do you complement it with *we shall* or *we will*? Fowler and the OED say it should be *we shall*, others regard *we shall* as out of line with modern trends in American-as-she-is-spoke.

Which brings us to one of Life's Larger Questions: To what extent should we feel constrained to follow the OED, Fowler or any other authority on style or grammar? For some, *shall* conveys a sense of legal obliga-

tion whether it's *we shall* or *you shall*. Could it be that the OED's rules for *shall/will* are a bit of pure prescription?

For lawyers, the answer is easy. We thrive on prescriptions, rules and authorities. A Lexis search discloses 445 citations to the OED and 23 citations to Fowler in the federal courts since 1944. If you try to persuade a court that *we shall* is more emphatic than *we will*, you are likely to lose.

What about two other stylistic bugaboos: splitting infinitives and confusing *which* and *that*?

Shall — take No. 2

By Debra R. Cohen

Agreements formalize obligations. To be effective, the obligations must be unambiguous. Here are three rules to help you draft clear language of obligation.

One: Be consistent in your word choice.

Two: Draft in the present tense.

Three: Draft in the active voice.

The rules are simple; but implementing them takes practice. Begin by reserving a single word to indicate language of obligation. Drafters generally adopt the statutory convention where *shall* indicates obligation. Then use it consistently. There is an easy test to help you determine when to use language of obligation. If you can substitute "has an obligation to" for *shall*, then language of obligation is appropriate. If not, choose another word.

Beware of two common pitfalls. First, drafters often use *shall* to indicate future action as well as obligation. This violates rules One and Two. With rare exceptions, contracts are continuing documents and speak in the present tense.

Cohen is an associate professor at West Virginia University College of Law, in Morgantown.

While the past tense is sometimes used to indicate action that has already occurred, the future tense is seldom necessary in an agreement. As I reserve *shall* to indicate obligation, following rule One, I choose *will* for the rare instance where the future tense is appropriate.

Second, drafters often use the passive voice in statements of obligation. This violates rule Three. Passive language creates ambiguity because it does not indicate who is required to do what. Following rule Three, I draft obligations in the active voice, attributing every action to a party.

The following four sentences are from a promissory note:

(1) Interest on this note *shall* accrue on any unpaid principal balance...

(2) Interest *shall* be computed on the basis of a year of 360 days and actual days elapsed.

(3) Payment of interest on the unpaid balance hereof *shall* be made in arrears on

(4) All payments of principal and interest *shall* be made without setoff, deduction or counterclaim.

Are these statements of fact or obligation? If they are statements of

fact, the use of *shall* violates rule One — consistency. If they are statements of obligation, *shall* is appropriate but the statements violate rule Three. Written in the passive voice, the statements do not indicate who is obligated to act. Finally, in accordance with rule Two, these sentences should be redrafted in the present tense.

Assume that sentences (1) and (2) are statements of fact, and sentences (3) and (4) are statements of obligation. Better drafting of these sentences would be:

(1) Interest on the note accrues on any unpaid principal balance...

(2) Interest is computed on the basis of a year of 360 days and actual days elapsed.

(3) Maker *shall* pay interest on the unpaid balance in arrears on

(4) Maker *shall* pay all principal and interest without setoff, deduction or counterclaim.

These rules may not result in eloquent writing, but eloquence is not your goal. Your goal is to create an unambiguous agreement. When you use language of obligation correctly, you take an important step in that direction.

On splitting infinitives, Fowler is tolerant: split infinitives are not desirable in themselves but are preferable to real ambiguity or patent artificiality. Thus, he might applaud "to boldly go where no man has gone before" for being less awkward than "boldly to go," less wimpy than "to go boldly."

Fowler's distinction between "which" and "that," a distinction with which I lacked acquaintance for my first 40 years, is another matter. Fowler states that, ... *if writers would agreed to regard that as the defining relative pronoun, and which as the nondefining, there would be much gain both in lucidity and ease.*

Thus, "the play that I saw yesterday," but "Hamlet, which [not that] I saw yesterday."

Fowler adds, however, that

Some there are who follow this principle now; but it would be idle to pretend that it is the practice either of most or of the best writers.

Fowler is right that many famous writers (Jane Austen and P.G. Wodehouse being the latest I have noticed) are not scrupulous about the distinction, if they recognize it at all. Should we observe it?

I have come to recognize the distinction in my own and other's writings, so that "the play which I saw yesterday" leaves a mental tremor. I never correct it in other people's writing — life is short — but I don't feel comfortable with it. So the ultimate reason (for me) to follow Fowler's suggestion, as well as other grammatical and stylistic rules, is that I am trying to avoid those dissonances that (not which) might distract my reader. Readers may not care about the great cases *Shall v. Will* and *Which v. That* or start at a split infinitive. But they may. Following the rules is less likely to be noted than breaking them.

This is a logic that makes me uneasy. The penchant to follow grammatical and stylistic rules — to write and speak in a particular way — is a function of class and education. Why condemn people who haven't our


advantages? And if it's all right for them, why isn't it all right for us?

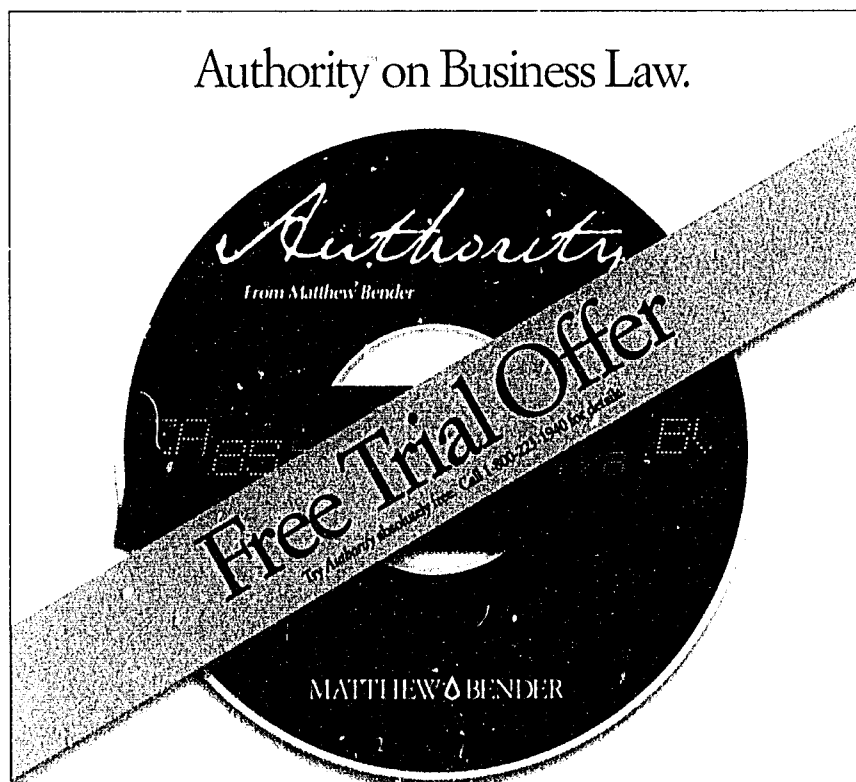
The quick, and probably correct, answer is that written communication requires conformity to the reader's expectations. Most of my readers are lawyers, many of whom may notice deviations from the sanctioned uses of *shall* and *will*, *which* and *that*. No sense being thought a booby, so I tend to obey the grammatical and stylistic conventions I know about, although I may break them if I think it will produce a useful effect.

How much more widely should this lesson apply? Not too widely, I hope. It's been years since I've fastened my collar button and tightened my tie, and I've taken to wearing crepe-soled shoes. These mild departures from the conventions of legal dress were adopted for comfort, not to communicate my persona. It's possible, however, that those

who deal with me might take my appearance as an indication that I am less competent than the carefully buffed corporate lawyers they are used to.

On the other hand, since I am occasionally unconventional in legal matters, my appearance may serve as a warning that things may proceed differently than with your regulation legal eagle. In any case, being an in-house lawyer, I don't have to worry about my clients' first impressions. When I was in a law firm, I dressed differently.

The lesson? People pick up what cues they can from language and dress. If you're striving for a particular effect, you may loosen your tie or split an infinitive. But you want to be in control of your effects. An unappreciated grammatical or stylistic *gaffe*, like an unnoticed gravy stain on your tie, may undo the effect you want. 



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