

**Q.** A professor of legal ethics has recently written that the word *may* is permissive. He used as an example the current rule that a lawyer who could prevent the death of an innocent person by revealing confidential information “may” do so. My question: Does *may* (meaning “is able to”) differ from shall (meaning “must”)?

**A.** Yes it does—in ordinary English. The auxiliary verb *shall* has two meanings, neither of which is *may*. One meaning is, as an interrogative, to question future action (even one’s own action); for example, “Shall I stay home or go out?” Although *shall* can also express simple future time in ordinary speech, *will* is almost always substituted instead: “I think I’ll (*I will*) stay at home.”

Many courts, however, have preferred to define *shall* as what it means in the Ten Commandments: as in “Thou shalt not commit adultery.” “*Shall*,” said Justice Benjamin Cardozo, speaking for a unanimous court, “is the language of command.” Courts have often agreed that *shall* is inconsistent with the concept of possibility or discretion.

The auxiliary verb *may* conveys a number of ideas: “ability, competency, liberty, permission, possibility, probability, or contingency,” (*Black’s Law Dictionary*, 6th ed., 1991). When *may* is stated as a negative (“may not”) it can even express the lack of permission, while *cannot* expresses the lack of ability. A reader e-mailed that as a child she had learned the difference between *may* and *can* when she would ask her mother, “Can I go outside to play?” and her mother would answer, “Yes you can, but you may not.”

As to *shall*, although the legal ethics professor—whose definition was cited in the reader’s question—correctly stated that, in legal writing *shall* describes imperative or mandatory action and has the compulsory sense of obligation, that rule is sometimes breached. So if you consult court opinions for clarification, you may become even more confused.

Some courts have construed that *shall* may be merely permissive if no right or benefit to anyone depends on

its being taken as imperative and if no public or private right is impaired. *Wisdom v. Board of Supervisors of Polk County*, 236 Iowa 779, 19 N.W.2d 602, 607, 608. And in *People v. Adams*, 99 CAL. RPTR, 122, 124, the court said that, although “absent unusual circumstances” *shall* imports compulsory action, in penal law “the construction which is more favorable to the offender will be adopted.”

As for *may*, courts have held that, although it usually implies permission or discretion, as opposed to an imperative, *may* can be construed as mandatory if that meaning is necessary to carry out legislative intent or when the rights of the public or third persons are involved. *Bochantin v. Petroff*, 555 N.E. 23 1066, 1069 (Ill. App. Div. 1990).

On the other hand, the legal ethics professor used *may* in its discretionary sense, saying that “a lawyer who could prevent the death of an innocent person by revealing confidential information *may* [might] do so. Or, presumably, that lawyer may head to the golf course.”

A Florida court construing a statute that contained both words—*shall* and *may*—in a single paragraph provides a good illustration of how confusing court decisions can be in defining the two auxiliary verbs. Here is the relevant part of that statute:

[I]f a public utility files a notice of general increases in rates and charges], the commission *may* either ... enter upon a hearing to determine whether the proposed rates are just ... and said hearing *shall* be held ... within one hundred eighty days. (Emphasis added.)

One could reasonably assume that

*may* in the paragraph quoted is permissive, and *shall* is mandatory. Yet the Florida court that wrote the decision held that both *may* and *shall* were permissive, explaining, “It has been held that although the word ‘shall’ normally has a mandatory connotation, it may in proper cases, be construed as permissive only. *Lomelo v. Mayo*, 204 So.2d 550, 552 (Fla. App. Div. 1967).”

Shades of Humpty Dumpty land, where words mean what we want them to mean:

“When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

#### From the Mailbag

Referring to the February “Language for Lawyers” column on the subject of “verbal diarrhea,” James R. Kirby II, an attorney from Sacramento, Calif., wrote, “A favorite of mine—from a published opinion no less—wrote, ‘It having been determined that ...’—which is Windbaggian for ‘since’ or ‘because.’”

And, regarding the May column on redundancy, Henry Cohen, the book review editor of *The Federal Lawyer*, wrote, “I am grateful to have learned that, because the verb *shrug* itself means ‘to raise one’s shoulders in doubt or disdain,’ the expression ‘shrug your shoulders’ is redundant.”

It’s true that the Middle English verb *sbruggen* did mean “shrug one’s shoulders.” I should have added, however, that the phrase is so deeply embedded in usage that it has now become idiomatic. **TFL**

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