



California Corporate & Securities Law

When Shall/Will/Must/May We Meet Again?

By Keith Paul Bishop on November 29, 2011

Lawyers are very fond of using the word “shall” in articles of incorporation, bylaws and agreements. Using “shall” instead of “will” seems to add a certain level of formality (or perhaps pretension). It may also be intended to convey the meaning that something must happen and not simply that it may happen in the future.

Indeed, there is an etymological basis for a distinction between “shall” and “will”. Both are Old English words: “shall” is derived from *sceal* meaning to owe while “will” is derived from “willan” meaning to desire or wish.

Although “shall” is a perfectly fine word, I’m trying to eschew using it in legal documents. In my view, it has the potential for ambiguity. As a test, take a set of bylaws and then try to substitute “will”, “may” or “must” for “shall”. For example, a bylaw might provide that board meetings *shall* be called by the Chairman of the Board, the President or any Vice President. This doesn’t mean that these individuals *must* call special meetings – only that these are the persons that *may* do so. Another bylaw may provide that expenses incurred in defending a proceedings *shall* be advanced. Here, the intent is likely to be that the corporation must do so.

The California Corporations Code doesn’t leave the meaning of “shall” to chance. Section 15 provides: “‘Shall’ is mandatory and ‘may’ is permissive.” Thus, Section 307(a)(1) provides that board meetings *may* (not *shall*) be called by the chairman, president etc.

Nevada’s legislature has prescribed an even more elaborate set of rules. Under the *Nevada Revised Statutes*, unless a particular statute expressly provides otherwise or required by context, the following rules apply:

- “May” confers a right, privilege or power.
- “is entitled” confers a private right;
- “May not” or “no * * * may” abridges or removes a right, privilege or power.

Please contact Keith Paul Bishop at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>

- “Must” expresses a requirement when: (1) the subject is a thing, whether the verb is active or passive; or (2) the subject is a natural person and (a) the verb is in the passive voice; or (b) only a condition precedent and not a duty is imposed;
- “Shall” imposes a duty to act;
- “Shall be deemed” or “shall be considered” creates a legal fiction; and
- “Shall not” imposes a prohibition against acting.

NRS 0.025(1). For a further explanation of these rules, see Section 2.4 of [Bishop & Zucker on Nevada Corporations and Limited Liability Companies](#).

It turns out that the confusion over the proper use of “shall” and “will” is longstanding. I recently came across [Grammatica Linguae Anglicae](#) which was published in 1653 during England’s short-lived Commonwealth. This book is unusual in many ways. It is a book on English grammar, but incongruously it is written in Latin. The author, John Wallis, moreover, was a mathematician and cryptographer, not an English professor. Below is the original text with my translation:

Quoniam autem extraneis satis est cognitu difficile, quando hoc vel illud dicendum est (non enim promiscue dicimus *shall* et *will*); neque tamen alii quos vidi ullas tradidere regulas quibus dirigantur: has ego tradere necessarium duxi; quas qui observaverit hac in re aberrabit.

Since it is hard enough for strangers to know, when this or that must be said (for we say “shall” and “will” indiscriminately); Since I have not seen others to put forth any rules: I have thought it necessary to deliver these [rules]; he who will have observed these rules, will not err.

In primis personis *shall* simpliciter praedicentis est; *will* quasi promittentis aut minantis.

In the first person, “shall” is simply speaking of the future; “will” is as if promising or threatening.

Uram, ures, uret; uremus, uretis, urent: *I shall burn, you will (thou wilt), he will, we shall, ye will, they will, burn*; nempe hoc futurum praedico: vel *I will, you shall (thou shalt), he shall; we will, ye shall, they shall, burn*; nempe, hoc futurum spondeo, vel faxo ut fit.

[When I say] “I shall burn, you will (thou wilt), he will, we shall, ye will, they will, burn”; I simply predict the future. On the other hand [when I say], “I will, you shall (thou shalt), he shall, we will, ye shall, they shall, burn” I promise the future or I make it so that it will be.

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com

<http://www.calcorporatelaw.com/>