

**Recommendation xx: MPD shall ensure, either through policy or training, that when SOPs say shall, it means must or mandatory. [CRT 19]**

**Discussion:** At many points, MPD SOPs use the word “shall.” However, “shall” is becoming an increasingly ambiguous term. Wisconsin courts have long held that, “[g]enerally, in construing statutes, ‘may’ is construed as permissive and ‘shall’ is construed as mandatory ....”<sup>1</sup> But Wisconsin courts have recognized that this is not always so, adding that this “general” rule applies “unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature.”<sup>2</sup> Increasingly, legal and writing authorities are recognizing the inherently ambiguous nature of the term. As the Advisory Committee on Rules of Court for the Judicial Council of Virginia notes, “[T]he overwhelming majority of commentators and legal scholars recommend that Rules drafters avoid uses of shall.”<sup>3</sup>

A Federal Aviation Administration memo explains the ambiguity cogently:

What’s the only word that means mandatory? Here’s what law and policy say about “shall, will, may and must.” We call “must” and “must not” words of obligation. “Must” is the only word that imposes a legal obligation on your readers to tell them something is mandatory. Also, “must not” are the only words you can use to say something is prohibited. Who says so and why? Nearly every jurisdiction has held that the word “shall” is confusing because it can also mean “may, will or must.” Legal reference books like the Federal Rules of Civil Procedure no longer use the word “shall.” Even the Supreme Court ruled that when the word “shall” appears in statutes, it means “may” [Cairo and Fulton Railroad Company v. Hecht (1877): “the word ‘shall,’ when used in statutes, is to be construed as ‘may,’ unless a contrary intention is manifest”]. Bryan Garner, the legal writing scholar and editor of Black’s Law Dictionary wrote that “In most legal instruments, shall violates the presumption of consistency ... which is why shall is among the most heavily litigated words in the English language.” ... Until recently, law schools taught attorneys that “shall” means “must.” That’s why many attorneys and executives think “shall” means “must.” It’s not their fault. The Federal Plain Writing Act and the Federal Plain Language Guidelines only appeared in 2010.<sup>4</sup>

The CRT proposed that “shall” be changed to “must” in section 2 of the In-Car Video System SOP, to impose a clear obligation on officers to record the types of events enumerated in the SOP (traffic stops, emergency vehicle operations, etc.). MPD noted in response: “The word ‘shall’ is used in numerous places within MPD’s Code of Conduct and Standard Operating Procedures, and in City of Madison Administrative Procedure Memoranda (APM). In all circumstances where it is used it communicates a mandatory, required task or function. This understanding is shared by all relevant parties, including the Madison Professional Police Officers Association (MPPPOA) and the Police and Fire Commission (PFC).

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<sup>1</sup> City of Wauwatosa v. Milwaukee County, 22 Wis. 2d 184, 191, 125 N.W.2d 386 389 (1963).

<sup>2</sup> *Id.*

<sup>3</sup> Advisory Committee on Rules of Court, Judicial Council of Virginia (2019) *Memorandum*. Retrieved from [http://www.courts.state.va.us/courts/scv/call\\_for\\_comment/draft\\_shall\\_rules\\_revisions.pdf](http://www.courts.state.va.us/courts/scv/call_for_comment/draft_shall_rules_revisions.pdf)

<sup>4</sup> Federal Aviation Administration (2013) *What's the only word that means mandatory? Here's what law and policy say about "shall, will, may and must."* Retrieved from [https://www.faa.gov/about/initiatives/plain\\_language/articles/mandatory/](https://www.faa.gov/about/initiatives/plain_language/articles/mandatory/)

Officers have been sanctioned many times for violating SOPs based on the understanding that 'shall' creates an obligation or required duty; this includes the In-Car Video SOP."

Since the word "shall" is used frequently throughout MPD policy, MPD did not favor substitution of "must." However, the Ad Hoc Committee believes that it is important that the intended meaning of "shall" in MPD policy be rendered fully unambiguous in an explicit manner (rather than merely relying on implicit understanding and convention), to eliminate the possibility of misinterpretation by officers or uncertainty if the term were litigated. The Committee thus recommends that MPD ensure, through policy or training, that the term "shall" in MPD policy means must or mandatory. MPD is amenable to this recommendation.