

Removal of the word "shall" from the federal rules of evidence
Alan Fredregill

09-EV-004

rules_comments
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Cc:
"Alan Fredregill"

To: Administrative Office of the U.S. Courts, James C. Duff, Director, Peter G. McCabe, Secretary

Re: Deletion of the word "shall" from Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure, Submitted for Public Comment, A Summary for Bench and Bar (August 2009).

Dear Committee:

Today I received the "Summary for Bench and Bar" of the "Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure." I noted with interest the Committee's rationale for its removal of the word "shall" from the Proposed Amendments to the Federal Rules of Evidence.

I think that is a mistake. The Committee's explanation stated:

The Committee made special efforts to reject any proposed style amendment that might result in a substantive change to the rule. The Committee considered a change substantive if: . . . (4) it changes a "sacred phrase" -- a phrase that has become so familiar in practice that its alteration would be disruptive. . . . For example, the word "shall" is removed from the rules because it can mean "may," "must," or "should", and it is not generally used in contemporary written English.

I submit to you that the word "shall" is a "sacred" word. In my home state of Iowa, and I suspect many others, it is defined in the *Iowa Code*.

Iowa Code Section 4.1(30): *Shall, must and may*. Unless otherwise specifically provided by the general assembly, whenever the following words are used in a statute enacted after July 1, 1971, their meaning and application shall be:

- a. The word "shall" imposes a duty.
- b. The word "must" states a requirement.
- c. The word "may" confers a power.

I suspected that other states' usage was similar. To determine if the use of the word "shall" was so widespread and "familiar in practice that its alteration would be disruptive," I performed a very quick Westlaw search using the definition of "shall" found in the *Iowa Code*.

My search yielded 10,000 results, and that was the truncated result. Obviously, there are thousands more. In about 20 minutes of reviewing those results I made it through fewer than 200 citations, but those 200 citations alone revealed that 20 states and the federal government use the word "shall" extensively in laws and court rules.

From my very brief research I have no fear in predicting that perusal of the full Westlaw search result would have shown that **all 50 states use the word "shall"** so extensively that it is "sacred." I believe the omission of the word "shall" from the federal rules of evidence will produce the disruptive result the editors sought to avoid.

Here's the quick list I compiled:

Federal law

1 - Iowa

2 - Mississippi

- 3 - Georgia
- 4 - Massachusetts
- 5 - Pennsylvania
- 6 - California
- 7 - Colorado
- 8 - Texas
- 9 - New Jersey
- 10 - Florida
- 11 - Kentucky
- 12 - Nebraska
- 13 - New Hampshire
- 14 - Alaska
- 15 - Kansas
- 16 - Tennessee
- 17 - Maryland
- 18 - Montana
- 19 - Louisiana
- 20 - Hawaii



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