

# DR. ROBERT A. VERRY

☆☆Chief of Police^☆☆

Licensed Private Detective, License No.9629

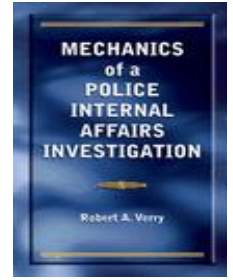
Certificated Freelance Paralegal

Post Office Box 47 | SBB | NJ | 08880-0047

732.302.9520

DrVerry@Verry-Shea.com | [www.VerryShea.com](http://www.VerryShea.com)

**CONCENTRATION**



Disciplinary Hearing Officer

Grievances | Unfair Practice

Internal Affairs | Harassment | Workplace Investigator

Robert is **not** a lawyer. If you need legal advice, please contact a lawyer. (^-Retired SBB-NJ)

Internal Affairs Professional Standards/Guidelines

Employee Misconduct | Employee Discipline

OPRA | Common Law (Internal Affairs/Police Records)

## **The Legal and Practical Importance of “Shall” vs. “May” in Police Policy and Reporting**

In the realm of policing, precision in language is not a mere formality—it is a cornerstone of legal compliance, operational integrity, and public accountability. Among the most critical language distinctions in law enforcement practice is the difference between the terms “shall” and “may.” These modal verbs embody the contrast between mandate and discretion, shaping everything from officer responsibilities to courtroom interpretations. Understanding and correctly applying these terms is vital for officers as they adhere to departmental policies, write police reports, and make on-the-ground decisions in high-stakes environments.

### **I. Defining the Distinction: Legal Obligations vs. Discretionary Authority**

Legal tradition and judicial precedent have firmly established that “shall” indicates a mandatory obligation, whereas “may” signifies discretionary power. This differentiation is not language nuance but a matter of legal consequence.

“Shall” creates a legal duty. When a police officer encounters a directive that uses the term “shall,” their obligation is non-negotiable. For example, if policy states an officer “shall notify a supervisor” after a use-of-force incident, failure to comply could result in disciplinary action, civil liability, or evidence suppression.

“May,” on the other hand, confers authority with discretion. It allows an officer to adapt their actions based on context and judgment. For instance, a policy that states an officer “may arrest” in certain circumstances allows them to consider alternative strategies, such as issuing a warning or referral to diversion programs.

This boundary line between what an officer must do and what they are allowed to do is central to lawful behavior, officer protection against liability, and procedural justice.

### **II. Policy Adherence: The Consequences of Misinterpretation**

Departmental policies are frequently composed with intentional distinctions between mandatory and discretionary procedures. Misreading those policies can have significant operational and legal ramifications:

Treating “shall” as “may” can lead to dereliction of duty. For instance, if an officer treats a mandatory search protocol as optional, any resulting evidence may be excluded for non-compliance with constitutional or departmental mandates.

Mistaking “may” for “shall” can overextend authority by eliminating officer discretion in fluid, real-world scenarios. A discretionary guideline misinterpreted as a strict rule could lead to unnecessary arrests, excessive use of force, or violations of civil rights.

Therefore, the ability to accurately comprehend and apply these terms directly influences the balance between enforcement and public trust.

### **III. Police Reports: Precision is Legal Protection**

The same language rigor required in understanding policy applies to drafting police reports. These documents are not mere narrative accounts; they serve as evidentiary records subject to judicial, administrative, and public scrutiny.

Incorrectly stating that an action “shall” be taken—when, in fact, policy allowed discretion—can falsely imply that an action was legally required, potentially exposing the department or officer to legal challenge.

Conversely, declaring that an officer “may” act when the procedure was mandated may suggest noncompliance with required procedure, weakening prosecutorial efforts and degrading the report’s credibility.

Courts, internal affairs units, and civilian oversight bodies all rely on these reports to assess the appropriateness of an officer’s judgments and actions. The misuse of “may” and “shall” can undermine that assessment and impact judicial outcomes.

### **IV. Judicial Interpretation: Supporting the Distinction**

Judicial rulings at both federal and state levels solidify the critical nature of this lexical divide.

In Lexecon Inc. v. Milberg Weiss, 523 U.S. 26 (1998), the U.S. Supreme Court declared the term “shall” to be impervious to judicial discretion, underscoring its status as enactment of legal duty.

In Jama v. ICE, 543 U.S. 335 (2005), the Court reaffirmed that “may” imparts discretion, noting that it “customarily connotes” a freedom of decision-making—especially important in executive or law enforcement contexts.

In State v. Gomes, 253 N.J. 6, 11 (2023), the Court notes that the Legislature's choice of the term “may” in N.J.S.A. 2C:52-20 [ ] versus “shall” in N.J.S.A. 2C:52-21 (which pertains to pretrial release and bail determinations) is consistent with a permissive, rather than mandatory[.]

Such rulings confirm that failure to adhere to the proper interpretation of these terms can lead to reversed convictions, dismissed charges, evidence suppression, clarify the Legislature’s choices, or successful civil suits for constitutional violations.

## **V. Evolution and Clarification in Legal Drafting**

The legal meanings of “shall” and “may” have evolved from early, generalized usage in medieval and post-Norman English law to finely tuned instruments of legislative precision. In modern law:

“Shall” has largely been replaced with “must” in plain language reforms for clarity and enforceability, while “may” is preserved strictly for optional actions.

Legal and drafting authorities emphasize the avoidance of ambiguous constructions like “shall have the power to,” which blur the distinction between obligation and discretion.

This evolution underscores a profound shift toward clear, unambiguous legal drafting, a trend officers and departments must follow to avoid litigation and ensure constitutional compliance.

## **VI. Practical Recommendations for Law Enforcement Officers**

Given the high stakes and legal expectations involved, police officers should adopt the following best practices:

1. Closely study departmental policies, paying attention to whether they use “shall” or “may.”
2. Seek clarification from supervisors or legal advisors if any part of a policy appears ambiguous.
3. Use precise language in written reports to accurately reflect whether actions were discretionary or obligatory.
4. Engage in training on legal terminology to ensure policies and procedures are interpreted according to judicial standards.
5. Advocate for policy audits to eliminate inconsistent or outdated language that may jeopardize officer conduct and department liability.

## **Conclusion**

The distinction between “shall” and “may” is not merely academic—it is a cornerstone of effective, lawful, and accountable policing. For officers, this difference governs the boundary between duty and discretion, compliance and liability, and professional conduct and misconduct. Through proper interpretation, application, and documentation of these terms, law enforcement professionals safeguard themselves, their departments, and the public they are duty-bound to serve. Legal clarity in language is not just good practice; it is a shield against uncertainty, litigation, and injustice.