

## USING **SHOULD** TO ASK FOR AND GIVE **ADVICE**

**Should** is a modal auxiliary. Therefore, in form, it:

- has no tense
- does **not** take **s** in the third-person singular
- is followed by a **simple verb** (NOT an infinitive)
- does **not** use **do** forms in the negative or interrogative
- uses **inversion** of the subject and the auxiliary in the interrogative (e.g., Should I get his permission?)

### Function

One of the major functions of *should* is to **express advice** regarding an action. You can give this advice directly to the listener, as in the following examples:

Tim: I hate to argue.  
Tony: You **should be** a researcher. You don't have to talk to people.

Tim: I hate to argue.  
Tony: You **shouldn't be** a trial lawyer.

You can also give advice about a third person, as in these examples:

Pete: Tom can't handle his heavy caseload.  
Sue: He **should hire** another associate.

Pete: Tom can't handle his heavy caseload.  
Sue: He **shouldn't take on** so many clients.

### Lawyers

**Should** has **no legal weight**.

### **What do I mean?**

You cannot use **should** to describe the command or authority of the law. Instead use –

- **Must** to describe **required or obligatory** conduct – all legal duties to act.
  - Individuals **must file** their federal income tax returns by April 15 of each year in the United States.
  - This is the law.
- **Must not** to describe **prohibited or forbidden** conduct – all legal duties to refrain from acting.
  - You **must not drive** a car after you have been drinking.<sup>1</sup>

---

<sup>1</sup> When we use the expression, “he’s been drinking,” we mean, “he’s been drinking alcoholic beverages.” There is a blood limit on the amount of alcohol you may consume before you drive. If you are stopped by the police on the belief that you are “driving drunk,” they will test your blood, and they have the legal right to do so.

- This is the law.

**Statutes** typically use **shall** to describe legal duties. This is only for written, legal language. It is **not** appropriate to speak this way to *anyone* – including your client.

- All (civil) defendants **shall file** a written answer to each allegation of a civil complaint within 30 days of receipt.
- Each defendant **shall file** the response <sup>2</sup> with the court and **shall serve** each plaintiff party with a complete response as well.

The above filings reflect the legal concept of *notice*. To the court; to the other party. They are law. As law, they command a specific type of conduct.

If *speaking* to your client, or to another lawyer, never say “shall.” You *represent* the law as a lawyer. You are not the law. Therefore, if your client or your colleague needs to know the next step when they are served with a civil complaint, you would speak to them about the law in the following way:

- We **have to file** a written answer to each allegation of a civil complaint within 30 days of receipt. (explanation to your client of his legal duty)
- You **have to file** a written answer to each allegation of a civil complaint within 30 days of receipt. (explanation to another attorney)
- Each defendant **has to file** the response with the court and **must serve** each plaintiff party with a complete response as well.

**Note** that *have to / has to* and *must* mean the same thing in the affirmative. They express duty, obligation or necessity to act.

In the negative (*do not have to / does not have to*) and (*must not*) they do not have the same meaning **at all**. This is very important for lawyers to know.

### Something confusing –

Statutes often use either **shall not** or **may not** to describe prohibited action or forbidden conduct.

**No matter what you learned in the past** about how to use “*may not*” – **in the law** – **may not** means the **exact same** thing as **shall not**. They have equal meanings in written statutory language. They both tell you that an **action** is **prohibited by law**.<sup>3</sup>

---

<sup>2</sup> The written answers to each allegation. The alleged violations will be numbered on the complaint. To each violation alleged by plaintiff, the defendant must respond, under oath and affirmation, one of the following three: “admit;” “deny;” or “DKI” which means *deny knowledge based on information or belief*.

<sup>3</sup> This is why we all need to pay such close attention to legal language. Language is the lawyer’s tool. When we use words, the law is our context.

## So Lawyers Do Not Use Should ?

### **Incorrect.**

Lawyers use *should* all the time. Business lawyers probably use *should* 90% of the time when speaking to their clients. Clients come to us for **advice** about the best way to structure business transactions. They do not ask us how to manufacture products or how to design software.

Of course, if we're advising a client about actual laws or regulations, we cannot use "should." In those instances it is our duty to let our client know that his actions are subject to the rule of law. When telling a client about legal requirements, we use **must** or **have to**.

Following is an example of a typical set of statements made by a lawyer to her client. Note how the **advice** is structured, grammatically, and how the **requirements/legal duties** are structured. This is part of a conversation with an American client, a retailer who plans to import large quantities of toys from a Chinese manufacturer.

"None of those items come in duty-free, so **you'll have to pay** duty on them. The rate isn't bad, however. None of these items are over 5%. You **have to pay** the duty within ten days of entry. If you would like to defer the duty, however, you **should think about** entering them into a bonded warehouse. There are some set-up costs related to bonded warehouse entry. Given the volume of your imports, however, these costs pay for themselves. Under the bonded warehouse provisions, you **don't have to pay** duty until the goods leave the warehouse. They can be physically in U.S. territory, but not yet dutiable. It's a great advantage for your cash flow. You **have to make** an annual report to Customs, but the requirements are not severe, and we can easily do that for you. We **should have** a meeting with your accountants, and put it all together for purposes of inventory. Kill two birds with one stone. You'll see a significant savings the very first year."

## EXERCISES

**Directions:** Give your client advice about the following situations.

1. Advise your client to find a joint venture partner to manage some of the risk.
  
2. Advise your client that it is very important to get a fairness opinion from an investment banker even though it is not legally required.
  
3. Tell your partners that you don't think it's a good idea for your law firm to merge with another firm at this time.
  
4. Talk to your client and explain that it is better to settle this dispute out of court.
  
5. Advise your client to transfer his intangibles to an off-shore subsidiary.

## EXERCISES

**Directions:** Give your client advice about the following situations.

1. Advise your client to find a joint venture partner to manage some of the risk.

**You should find a joint venture partner to manage some of the risk.  
You should find a joint venture partner. You shouldn't take on that level of risk by yourself.**

2. Advise your client that it is very important to get a fairness opinion from an investment banker even though it is not legally required.

**You should really get a fairness opinion from an investment banker even though you don't have to under the law.**

3. Tell your partners that you don't think it's a good idea for your law firm to merge with another firm at this time.

**We shouldn't merge at this time.**

4. Talk to your client and explain that it is better to settle this dispute out of court.

**You should settle this case. You shouldn't litigate it. [It's not worth it.]**

5. Advise your client to transfer his intangibles to an off-shore subsidiary.

**You should transfer your intangibles to an off-share subsidiary.**