

Stay Active! (Part Two)

The courts chime in—the price of passivity

There is no shortage of case opinions lamenting the problems that flow from writing in the passive voice and failing to explicitly identify the actor. For example, in one recent case, a group of disgruntled investors alleged that they “were falsely told” that sports celebrities were substantial investors in a business venture.¹ The court observed that this allegation was stated in “the passive voice . . . , failing to identify exactly who made the alleged misrepresentations.”² Because of this and other flaws, the court affirmed dismissal of the investors’ fraud claim, concluding that they failed to plead it with sufficient particularity.³

Another court found fatal deficiencies in a RICO complaint’s mail- and wire-fraud allegations, which stated that a disputed infomercial “was transmitted by electronic means . . . in violation of” the federal mail-fraud statute.⁴ The court noted that this allegation was “stated in the passive voice” and that “[n]o particular defendant [was] said to have committed this alleged crime.”⁵ The plaintiffs’ failure to explicitly attribute wrongful acts to certain defendants “doom[ed] the complaint as to those defendants.”⁶

In yet another recent case, a recalcitrant buyer claimed that the signed mortgage documents it was required to give the seller

“were forwarded” to the seller’s attorneys.⁷ The court minced no words in criticizing the buyer’s coy use of the passive voice to make this claim in a way that failed to identify *who* supposedly forwarded those documents:

*The assertion by [the buyer’s] then-attorney that two counterparts of the Mortgage Extension Agreement “were forwarded” to [the seller’s] attorneys did not sustain their burden of establishing that they did not default. This attorney’s use of the passive voice, a grammatical device that conceals as much as it reveals, betrays an unwillingness to identify who actually “forwarded” the Mortgage Extension Agreement.*⁸

Other cases have been undermined by material evidence or court orders that were written in the passive voice and failed to identify the actor. For example, the Seventh Circuit questioned the sufficiency of evidence supporting a prisoner’s conviction for possessing a sharpened weapon where the prison guard’s report was “written largely in passive voice and never identifie[d] which inmates either received the razors or returned the razors without blades.”⁹ Likewise, a juvenile court’s written findings of fact were not an adequate basis for terminating parental rights when “the juvenile court’s use of the passive voice obscure[d] its conclusion regarding the identity of the abuser or abusers.”¹⁰

Legislators can also give courts fits when they lapse into the passive voice and omit the actor. The United States Supreme Court has observed that “[w]hen Congress writes a statute in the passive voice, it often fails to indi-

cate who must take a required action. This silence can make the meaning of a statute somewhat difficult to ascertain.”¹¹ State legislators, too, have forced courts to engage in time-consuming and imprecise statutory construction that could have been avoided had the drafters written in the active voice and identified the actor.¹²

Ancillary benefits

Once you edit your passive-voice sentences into the active voice, you’ll start to notice a number of ancillary benefits that your reader will appreciate. Active-voice sentences tend to be shorter. It usually takes extra words to write in the passive voice. And good, strong verbs are lost:

Passive: The argument was made by the hotel’s attorneys that the Commerce Clause could not be extended so far.

Active: The hotel’s attorneys argued that the Commerce Clause could not be extended so far.

Notice how writing in the active voice naturally fosters using strong verbs instead of wordy derivative nouns. “Argued” is much better than “the argument was made by.” Your reader will prefer this five-for-one trade every time.

Exceptions

Like any general rule, there are exceptions to the active-voice preference.

If you don’t know who the actor is, then you might leave a sentence in the passive voice:

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The building was vandalized late last night. [Assume that the writer didn't know who the vandal was.]

Likewise, you might leave a sentence in the passive voice with an implicit actor if your reader doesn't care who the actor was. For instance, if your reader won't care who served Mr. Smith, then this will work just fine:

Mr. Smith was served on March 12, 2004.

Another common exception: when you start a sentence with "old" information from the previous sentence to make a strong logical link between the two, the passive voice is sometimes necessary:

The agency adopted a regulation containing a number of new procedures. But those procedures were ignored by some officers.

In that example, the first sentence is active, the second passive.

Finally, some practitioners intentionally use the passive voice to acknowledge a damaging fact but downplay it a bit. Suppose you represented a buyer that didn't pay for goods on time, and there was no dispute about that. You'd have to acknowledge that fact to maintain your credibility, but you might want to soften it a bit. With the active voice, it would sound a bit harsh:

Active: ABC Corp failed to pay for the goods by the contract's due date.

Ouch! It might feel a bit more palatable if you intentionally lapse into the dreaded passive voice with an implicit agent:

Passive: The goods weren't paid for by the contract's due date.

It's still uncomfortable, and it's certainly no model of good writing, but at least your client's tardy payment doesn't feel quite so vivid.

Back to the beginning

Okay, now you're an expert. So let's re-write that awful sentence that started this article. Here it is again:

It is essential that editing from passive to active voice be learned by writers, whether lawyers or nonlawyers.

First, let's re-create our main clause. Let's make it active voice by moving the actor and

the action to the front, with the actor *doing* the action:

Writers must learn to edit from passive to active voice.

Next, let's consider whether we want any more information in this sentence. It reads pretty well this way, so we could leave it alone. But in the original, there was an incidental phrase connecting this idea to legal writers. If you wanted to keep that phrase, it would probably work best at the beginning. Remember, there's nothing wrong with starting a sentence with an introductory clause or phrase and then following it with a good, active-voice main clause:

Whether lawyers or nonlawyers, writers must learn to edit from passive to active voice.

Or you could vary that slightly:

Writers, whether lawyers or nonlawyers, must learn to edit from the passive to active voice.

Stay active. Your reader will thank you, and you'll avoid the ambiguities that often result from lapsing into the passive voice. ♦

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tice, most recently with Collins, Einhorn, Farrell & Ulanoff, P.C., in Southfield, where he concentrated on civil appeals. He currently chairs the Appellate Practice Section of the State Bar.

FOOTNOTES

1. *Coroles v Sabey*, 79 P3d 974, 981 (Utah App 2003).
2. Id.
3. Id.
4. *Zito v Leasecomm Corp*, No. 02 Civ. 8074 (GEL), 2003 WL 22251352, at *10 (SD NY Sept 30, 2003).
5. Id.
6. Id.
7. *J & A Vending, Inc v JAM Vending, Inc*, 757 NYS2d 52, 55 (2003).
8. Id.
9. *Castro v Hastings*, 74 Fed. Appx. 607, 609 (CA 7, 2003).
10. *In re MJB*, 140 SW3d 643, 656 (Tenn App 2004). The court affirmed termination on other grounds.
11. *United States v Wilson*, 503 US 329, 334-35 (1992).
12. See, e.g., *DaimlerChrysler Serv No Amer, LLC v State Tax Assessor*, 817 A2d 862, 865 (Me 2003) (noting that "[w]hen a statute is drafted in the passive voice, it can be difficult to determine whom the Legislature intended as the actor"); see also *Arlington Educ Ass'n v Arlington School Dist No. 3*, 34 P3d 1197, 1200 (Or App 2001) (noting that the text of Oregon's judicial-notice statute "suggests that someone must be unable to reasonably question the accuracy of the sources" but "because the statute is written in the passive voice, it does not specify who that someone is").

[Note: The footnote appearing in Part 1 of this article in the May 2005 issue of the *Michigan Bar Journal* mistakenly referred to Volume 34 of the Pacific Reporter instead of Volume 40. The correct cite is *Exxon Corp v Alaska*, 40 P3d 786, 794 (Alaska 2001). The author regrets any confusion caused by this error.]