

Stay Active! (Part 1)

It is essential that editing from passive to active voice be learned by writers, whether lawyers or nonlawyers... Wow! That was one *awful* sentence—a real clunker. Do you know why? Look at it again:

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

Let's dissect it a bit. Who is doing the action here? Who is learning? It's writers, right? Yet you don't see the actor—"writers"—until the end of the main clause of the sentence, after all the action words have come and gone. The sentence is just plain backwards. The actor is being done to, instead of *doing*.

You'll hear writing experts refer to this as writing in the "passive voice" or using a "passive verb." Whether you know the technical label or not, you want to avoid it because it tends to make your writing hard to read. You should also avoid it because, as many courts have observed, "[t]he passive voice can be ambiguous."¹ To avoid these pitfalls, lawyers should learn how to recognize passive voice and how to change it to active voice.

What is "active voice"?

Again, active voice means that the subject is "doing" the action in the verb instead of following the verb and being "done to." But let's keep it simple and think of active voice as the actor (or agent) doing the action.

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That's more vivid. We can look at the model of a typical sentence to illustrate this and to see the difference between active and passive voice:

Active =
Actor (Subject) Action (Verb) Object
The attorney argued the motion.

Passive =
Object Action (Verb) Actor (Subject)
The motion was argued by the attorney.

In practice, you probably won't identify passive voice immediately as you're reading a sentence. When it's present, you'll probably just read the sentence the first time and get the general feeling that it's bad. Once you know it's bad and you need to fix it, you can check for passive voice. You'll be surprised how often passive-voice phrasing turns out to be the culprit in your clunky sentences.

Some before-and-after comparisons

Here are some examples of passive-voice writing and edits to make it active:

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

In that sentence, the actors are the hotel's attorneys. The action is arguing. Move them so that the actors are doing the action right at the beginning of the sentence:

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

The importance of this edit becomes clearer with longer and more complex sentences:

The passive voice can be ambiguous. To avoid these pitfalls, lawyers should learn how to recognize passive voice and how to change it to active voice.

Passive: The privilege has been consistently extended to quasi-legislative proceedings by Michigan's appellate courts.

The actors are Michigan's appellate courts. Their action is extending. So move "Michigan's appellate courts" up to the front and make them do the action:

Active: Michigan's appellate courts have consistently extended the privilege to quasi-legislative proceedings.

Another example:

Passive: The treatment was provided to Mr. Smith for two weeks by the hospital's cardiac team.

Active: The hospital's cardiac team treated Mr. Smith for two weeks.

Which style would you rather read over the course of a 20-page brief?

Sometimes the "actor" doing the action will be an inanimate thing rather than a person:

Passive: Recovery is prohibited by the statute if the injured person has not given timely notice to the insurer.

The actor in the main clause of that sentence is the statute. Move it up front, and let it do its thing:

Active: The statute prohibits recovery if the injured person has not given timely notice to the insurer.

Transitions and introductory elements

Don't forget that the active-voice preference does not mean that you must literally put the actor at the very beginning of every sentence. You shouldn't hesitate to begin a

sentence with a helpful introductory clause or phrase, or a transition word, as long as you get that actor up front doing the action when you begin your main clause:

During the hearing, *the hotel's attorneys argued* that the Commerce Clause could not be extended so far.

After reading the parties' briefs and listening to their arguments, *the court issued* a written opinion denying the defendant's motion.

Therefore, *House Democrats supported* the proposed amendment.

Nevertheless, *House Democrats supported* the proposed amendment.

Staying active throughout a sentence

Also bear in mind that there may be multiple places in a sentence where you can make the passive-to-active edit. Let's look at an example, with the passive parts italicized:

The argument was made [note that the actor has been omitted entirely—who's making the argument here?] that the cause-in-fact element *could not be satisfied by the plaintiff* because her proofs amounted to pure speculation and conjecture.

Now let's make both passive parts active:

The defendant argued that the plaintiff could not satisfy the cause-in-fact element because her proofs amounted to pure speculation and conjecture.

The case of the missing actor

As seen in the previous example, one common byproduct of writing in the passive voice is omitting the actor altogether. When you write in the passive voice, this omission seems to happen very naturally. Here's another example:

Passive: Notice must be given to the EPA, the state agency, and the alleged violator at least 60 days before filing suit.

Who's the actor? In other words, who has the legal obligation to give notice? The implicit actor is the person who must give notice 60 days before suing, presumably a plaintiff who wants to sue under the Clean Air Act. The active voice—with an explicit actor—eliminates any possible ambiguity:

Active: *The plaintiff must give notice* to the EPA, the state agency, and the alleged violator at least 60 days before filing suit.

Why is it so important for lawyers to get into the habit of writing in the active voice and explicitly identifying the actor? Well, imagine if you drafted the following sentence in a commercial lease agreement for a big client:

All common areas must be maintained in good repair.

Hmmm *Who* must maintain them? The lessor? The lessee? Isn't that important? Crucial?

This flaw may seem obvious to you in this context (after all, you're reading an article on

avoiding the passive voice), but you'd be surprised how easy it is to lapse into the passive voice and omit the actor, especially if you dictate your documents.

And the consequences can be serious, as we'll see next month. ♦

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FOOTNOTE

1. See, e.g., *Exxon Corp v Alaska*, 34 P3d 786, 794 (Alaska 2001) and the cases cited within that opinion.