

The Legal Writer

Writing with Clarity

Finding and Fixing the Passive Voice

By Megan McAlpin

At some point we were all told, "Do not use the passive voice." And yet, sometimes the passive voice is appropriate or even necessary (as in the first sentence of this article). Because the passive often negatively affects the clarity of writing, it is important to be able to identify the passive voice in your writing and to make decisions about when to use it.

Who's Passive?

Many attorneys have built successful careers without knowing the difference between active and passive voice. The "passive voice" conjures up images of wimps losing at trial, so one instinct is to adopt a more assertive or aggressive tone. But even aggressive writing can be passive. "It is demanded that you respond to this letter with absolutely no delay or this warning will be followed by dire consequences!" So we interrupt this article for a brief grammar lesson.

In the active voice, the subject of the sentence is performing the action. For example: "The defendant robbed the bank." The defendant is the subject, and he performed the action — he robbed the bank. In the passive voice, the subject of the sentence is receiving the action. For example: "The bank was robbed by the defendant." In this example, the bank has become the subject, and it received the action — it was robbed.

Some people will be able to identify the passive voice once they understand this conceptual difference between the passive voice and the active voice. Others may find a simple trick helpful. In the passive voice, the verb is always at least two words.

Passive: The Two-Word Verb

Consider the examples above. In the first example (The defendant *robbed* the bank.), the verb is one word: robbed. In the second example (The bank *was robbed* by the defendant.), the verb is two words: was robbed. This two-word minimum is a defining characteristic of the passive voice. The first word is a form of the verb *be* (be, am, is, are, was, were, being, been) and the second word is a verb ending in -d, -ed, -n, -en, or -t. (True grammar geeks know that this verb is a past participle, but that's not required information.)

The following sentences are all examples of the passive voice:

The defendant *was found* guilty.

The case *was remanded* to the trial court.

The deliberations *are run* by the jury foreman.

Depositions *are taken* before trial.

Too much time *had been spent* reviewing the trial transcript.

Finding and Fixing Passives

Given that a sentence in the passive will always have a form of the verb *be* in it, the first step in spotting the passive in your own writing is to look for the *be* verb. (Use your word processor's "find" function to search for be, am, is, are, was, were, being and been.) Once you have found a sentence that contains a *be* verb, look to see whether it is followed by a verb ending in -d, -ed, -n, -en or -t. If it is, check to see whether the subject of the sentence is doing the action or is being acted upon.

CAVEAT: Not every sentence with a *be* verb is in the passive voice. For example: "The defendant was running away from the bank with a bag of money." Here the subject is *the defendant* and he *was running* away from the bank, so this sentence is in the active voice. (Grammar geeks will again note that the verb *was* in the example is not followed by a past participle.)

After identifying a passive sentence, shake it up so that the subject is doing the action. For example, you may find that you have written the following: "All pay raises must be approved by the board of directors." You'll know immediately that this is passive when you see *be* followed by a verb ending in -ed (approved). Now ask yourself: Who must approve the pay raise? Since the board of directors must approve the raise, you can transform your sentence from the passive to the active as follows: "The board of directors must approve all pay raises."

What's Wrong with the Passive Anyway?

While the occasional use of the passive voice may be appropriate, there are at least two primary reasons to avoid using it.

First, the passive voice often affects the clarity of your writing. This is especially true when the real actor is omitted altogether. For example, consider the following: "All pay raises must be approved." At first glance, this sentence may seem clear, but what if your client wants to know how to get a pay raise? You wouldn't be able to tell her how to get that raise without more information. Because the passive voice will leave your reader with questions, it's not effective in legal writing.

Second, one of the primary functions of legal writing is assigning responsibility. We seek to do it at all stages of litigation (was the defendant the one who robbed the bank?), and it is our primary responsibility in transactions (who must approve pay raises?). In using the passive voice, we do our clients and ourselves a disservice by failing to assign responsibility, which inevitably leads to problems.

Is the Passive Voice Ever Appropriate?

The trouble-maker passive voice is actually a good tool to have in your grammar toolbox. There are at least three situations when you could consider using the passive voice.

First, the passive voice can be effective when the person performing the action is relatively unimportant. For example, a prosecutor may describe a situation in which the police arrested a defendant by saying: "The defendant was arrested near the scene of the crime." The passive voice does not affect the clarity of that sentence because it is a fairly reasonable assumption that the police made the arrest. The key in this example is that the defendant — the very person the prosecutor is trying to prove guilty — was arrested in a pretty damaging location.

The passive voice can also be effective when you don't know who performed the action. For example, a defense attorney may describe the bank robbery by saying: "The bank was robbed." If that defense attorney's client has assured her that he did not rob the bank and does not know who did, then using the passive voice would be appropriate.

Finally, the passive voice can be effective if you want to emphasize the action rather than the actor. For example: "The defendant was convicted of first degree burglary." Here the passive voice focuses your reader on the charge of first degree burglary and the ultimate conviction rather than on the judge or jury that convicted him.

While the passive voice may be an effective tool in limited circumstances, using it should always be a conscious decision. Does your reader need to know which police agency arrested the defendant? Will your reader be left wondering whether the judge convicted the defendant or whether it was a jury that found him guilty? If using the passive voice will leave the reader with questions, then you should simply use the active voice instead.

SOURCES:

Diana Hacker, *The Bedford Handbook* (7th ed. 2005).

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