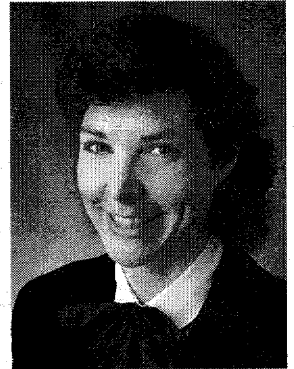


# The Scrivener: Modern Legal Writing



## Problems With the Passive Voice



by K.K. DuVivier

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Some of us recall when our grammar teachers admonished against using the passive voice. However, voice is a stylistic choice, not a rule of grammar. This column explains why the active voice generally is preferred. The next column will discuss when the passive voice may be the better choice (to be published in the May issue of *The Colorado Lawyer*). Once we understand the passive, we can make more informed decisions about its use.

In standard English construction, the actor is in the subject position of a sentence; the action is in the verb; and the result is in the object position. Described in another way, the subject "is doing the action described by the verb."<sup>1</sup>

<i>Subject</i>	<i>Verb</i>	<i>Object</i>
<i>Example 1:</i> The union	announced	a strike.
<i>Actor</i>	<i>Action</i>	<i>Result</i>

In contrast to the active, the passive voice shifts the result into the subject location. The verb consists of a form of the verb "to be" (e.g., be, is, are, was, were) along with the participle of the action verb. In the passive, the subject "is having the action of the verb done to it."<sup>2</sup>

<i>Subject</i>	<i>Passive Verb</i>
<i>Example 2:</i> A strike	was announced.
<i>Result</i>	<i>Action</i>

If the actor still is included in the passive-voice sentence, it is moved into a phrase introduced with the word "by."

<i>Subject</i>	<i>Passive Verb</i>	<i>Prepositional Phrase</i>
<i>Example 3:</i> A strike	was announced	by the union.
<i>Result</i>	<i>Action</i>	<i>Actor</i>

### DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through *The Scrivener* column. Send your questions to: K.K. DuVivier, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401.

Our style is more vigorous and direct when we use the active voice. First, the active voice is more concise. A passive sentence always requires at least two words more than the active sentence conveying the same information: (1) the form of the verb "to be" and (2) the preposition "by." Thus, the active-voice sentence in Example 1 has five words, and the passive-voice sentence in Example 2 has seven.

Second, the active voice permits readers to understand more readily the meaning of a sentence. It is easiest to visualize an action in the context of an actor. Because we read from left to right, having the actor in the subject position means that usually it is the first key word readers encounter. Therefore, we can visualize "the subject doing the verb to the object as quickly as the words are read."<sup>3</sup> In contrast, readers of a passive-voice sentence must read on to the end to find the actor, and then visualize the action.

Finally, the active voice is preferable because it eliminates the ambiguity created by the passive. When the prepositional phrase identifying the actor is eliminated, the action is blurred because it is done by "unseen hands."<sup>4</sup> If we convert the verb to a noun or nominalization,<sup>5</sup> we compound the ambiguity. Note how Example 4 below removes both the actor and action set out in Example 1.

<i>Example 4:</i> The announcement	was made.
<i>Nominalization</i>	<i>Passive Verb</i>

This passive voice with nominalization construction frequently infects contract language with the disease of ambiguity. Yet, with most contracts, the parties would prefer to work out ambiguities in the negotiation stage, rather than have the courts do it for them down the road in litigation. Compare the following two examples from a lease clause. Note how the active-voice version clarifies who is responsible for which actions.

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*Example 5:* Upon determination [nominalization] (Determination by whom—the lessor, the lessee, or an objective person?) that the lessor is in violation [nominalization] of any covenant of this lease, the lessee may be considered [passive voice] (Considered by whom?) in breach and may be notified [passive voice] in writing. If the breach reasonably can be corrected [passive voice] (Corrected by whom and does “reasonably” make this an objective standard?), compliance [nominalization] shall be commenced [passive voice] within sixty days.

*Example 6:* If the lessor determines that the lessee has violated any covenant of this lease, the lessor may consider the lessee in breach and may notify the lessee in writing. If the lessee reasonably can correct the breach, the lessee shall commence to comply within sixty days.

Therefore, as a general matter of style, our grammar teacher's advice to avoid unnecessary passive verbs is sound. A simple way to strengthen and clarify our work is to search for the passive voice and to rout it from our writing.

#### NOTES

1. Oates, Enquist and Kunsch, *The Legal Writing Handbook* 591 (Boston: Little, Brown & Co., 1993).
2. *Id.* at 592.
3. *Id.* at 593.
4. *Id.* at 594. This sentence is full of passive verbs—“is eliminated,” “is blurred” and “is done”—and thus is a good example of “unseen hands.”
5. For additional information on nominalizations, see generally DuVivier, “Power Verbs,” 22 *The Colorado Lawyer* 2369 (Nov. 1993).

### First J.D. CLE Luncheon Features Roundtable with District Court Judges

The First Judicial District (“J.D.”) will present a luncheon roundtable discussion with the District Court judges, to be held March 14 at noon at the Denver Marriott West in Golden. An application for CLE credit has been made for the luncheon.

The event will give members a chance to get better acquainted with the judges in the First J.D. The response from the bench has been excellent, and several enthusiastic judges are planning to attend. They have been given their choice of topics; signs will be posted on each table listing the judge and the topic for that table. Get there early for a good seat!

The cost for the luncheon is \$11 per person. Please make reservations before noon on March 10 by calling the First J.D. at (303) 279-5568.

If there is an area of law you would like to know more about, the luncheon committee welcomes your input as a member of the committee or with suggestions for upcoming luncheon programs. If you have suggestions, contact Maureen O'Brien at (303) 238-0648.

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