

# The Scrivener: Modern Legal Writing



## A Wise Passiveness

by K.K. DuVivier

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*"[W]e can feed this mind of ours  
In a wise passiveness"*

"Expostulation & Reply" by William Wordsworth

As a general rule, our writing can be more forceful and concise if we search for the passive voice and eliminate it. However, the avoid-the-passive rule sometimes is taken to extremes. This article addresses five ways to use the passive voice as a positive communication tool.

### Five Ways to Use Passive Voice

First, the passive voice is a practical necessity when the writer doesn't know who performed the action of the sentence. In the following example, no one knows who shredded the documents, so there is no actor, and "documents" must serve in the subject location.

*Example:*

The documents were mysteriously shredded.

Second, the passive voice can emphasize some concepts and de-emphasize others. Use the passive voice when the result or deed is more important than the doer. The point of the following example is that the object—the widgets—undergo an inspection; knowing who does the inspection is relatively unimportant.

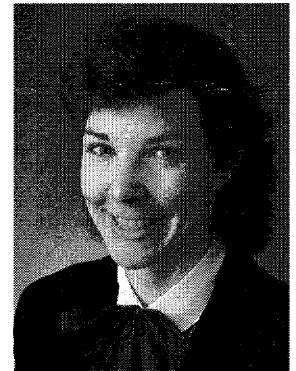
*Example:*

The widgets are inspected before leaving the factory.

Third, use the passive voice as a subtle persuasive technique. Because the passive voice eliminates the actor, our

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clients need not be associated with their negative actions. In contrast, opposing counsel will want to introduce the actor through the active voice to highlight a defendant's participation.

*Defense (use of passive voice):*

During the domestic dispute, Nicole was grabbed and was pushed out the front door.

*Prosecution (use of active voice):*

During the domestic dispute, O.J. grabbed Nicole and pushed her out the front door.

Fourth, the passive voice can change tone, softening the bite of criticism or commands. Notice how the passive voice example below is less confrontational than the active, yet still is forceful.

*Active voice:* You must make payment by June 16.

*Passive voice:* Payment must be made by June 16.

Fifth, use the passive voice to control word placement. The passive voice can strengthen the link between sentences by placing connecting ideas into closer proximity.<sup>1</sup> In the first example below, the passive voice is used in the first sentence to place connecting information at the end. The second sentence then starts with the connecting idea.

*Example:*

Under Colorado's Ski Safety Act, the duties of ski area operators are regulated by § 33-44-107. *Connecting idea Connecting idea* This section requires operators to mark on slopes all man-made structures that are not clearly visible.

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*K.K. DuVivier is an instructor of Legal Writing and Appellate Court Advocacy at the University of Colorado School of Law, Boulder.*

In the next example, word placement in the passive-voice construction facilitates the flow of information. The second sentence of the active-voice version shifts to a new topic—"the court." The second sentence of the passive-voice version connects directly with the subject of the first sentence and keeps the paragraph focused on the summary judgment rule.

*Active voice:*

*Focus on rule*

F.R.C.P. 56 controls summary judgment.

*New information*

The court applied this rule in the Cortex decision.

*Passive voice:*

*Focus on rule*

F.R.C.P. 56 controls summary judgment.

*Connecting idea*

This rule was applied in the Cortex decision.

## Conclusion

Beware of the passive voice; too often it creeps into our writing. Yet sophisticated writers need not avoid it entirely. Search for it, and whenever you encounter it, challenge its appropriateness. If it needlessly befogs, banish it. But if it can be converted to an ally, forward your purpose with a wise passiveness.

## NOTE

1. Oates, Enquist and Kunsch, *The Legal Writing Handbook* 595-96 (Boston: Little, Brown & Co., 1993). For use of the passive voice generally, see *id.* at 594-97.



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