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## **Legal Writing Triage: Self-Edit to Solve the Most Common Style Problems**

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## Legal Writing Triage: Self-Edit to Solve the Most Common Style Problems

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# Legal Writing Triage: Self-Edit to Solve the Most Common Style Problems

by Robert S. Anderson

In the field of legal writing, certain truisms maintain their currency no matter how often they are repeated. I heard one recently in a talk that Colorado Court of Appeals Judge John Daniel Dailey gave to my first-year law students: “There is no such thing as good writing; only good rewriting.”<sup>1</sup>

Few would disagree with the sentiment that revision is key to good writing, but the rub comes in trying to make self-editing work in practice. Obstacles to good self-editing include a lack of time. It would be wonderful if we always left ourselves plenty of time to polish a brief or to mull over an important letter. However, in practice, we steal time from editing to give to the next pressing matter that demands our attention.

In addition to the general lack of time, our editing often suffers from an inability to quickly and easily edit what is wrong with the writing. Generally, we can recognize when our writing is unclear or bloated. However, it is one thing to know that your writing is sick and needs a cure, and something else entirely to know how to perform the necessary surgery.

Continuing with the medical analogy, your self-editing should take the form of triage.<sup>2</sup> Diagnose and fix the most important problems first. To help your triage efforts, this article will address one of the most common style problems in legal writing: subject-verb issues that produce confusing or overlong sentences. It will then prescribe a simple approach to curing the problem in quick, step-by-step fashion.

## Diagnosing the Passive Voice Malady

When it comes to self-editing, we need an approach that will permit us to address the most glaring problems with clarity and conciseness in a time-efficient manner. In the first-year legal research and writing course I teach, I review and comment on papers that manifest all types of writing style problems. Problems with the flow of the writing often can be fixed by correcting individual sentences that have incorrect subject-verb order and agreement problems. Of these concerns, overuse of passive voice stands out as the most frequent. At the same time, overuse of passive voice may be simply remedied. Therefore, if you do only one thing to self-edit, I suggest looking at the placement of subjects and verbs in individ-

ual sentences, with a particular eye toward favoring active voice over passive voice.

### Active Voice Versus Passive Voice

When using active voice, the writer follows a subject-verb-object structure that communicates the action of the sentence simply: “Marco mailed the letter.” Passive voice reverses this order, putting the object of the action first and the actor last: “The letter was mailed by Marco.” See Appendix 1, “Examples of Passive Voice and Active Voice,” for more side-by-side examples of passive and active construction.

Passive voice is not grammatically incorrect—but it can frustrate the reader. The reader seeks meaning in each sentence. At the most basic level, the reader wants to understand who is doing what to whom. Passive construction requires the reader to mentally reorder the sequence to understand it. For example, consider the following sentence:

➤ As the result of a slow commute that was caused by bad weather, Bob’s arrival to work was delayed.

“Bob’s arrival to work” communicates the main action of the sentence, but the passive construction withholds that information until the very end. The passive construction forces the reader to digest the clause at the beginning of the sentence without understanding why it is important. Note that the phrase before the comma—“As the result of a slow commute that was caused by bad weather”—does not express a complete thought.

If you transpose the passive construction to active construction, the sentence becomes easier to understand:

➤ Bob arrived late for work because bad weather slowed his commute.

Note that the active voice makes for a livelier sentence because it uses more vivid verbs (“arrived” and “slowed”).<sup>3</sup> Note also that putting the sentence in active voice shortens the sentence. Although a lower word count alone does not necessarily equate to good writing, passive construction often requires the use of extra prepositions and other words that do not add meaning. For example, compare the two sentences below. Each conveys the same meaning, but the first sentence uses the passive voice, while the second uses active voice:

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Associate Professor K.K. DuVivier is on sabbatical during 2007–08. She has been writing this column continually since 1991 and will resume doing so in fall 2008. In her absence, Robert S. Anderson and Tanya Bartholomew will be writing the Scrivener articles.

#### About the Author:

Robert S. Anderson is an assistant professor of legal writing who teaches in the Lawyering Process program at the University of Denver Sturm College of Law—(303) 871-6257, [randerson@law.du.edu](mailto:randerson@law.du.edu).

- Because of the fact that there were misstatements of fact in the appellate brief submitted by the defendant, the attorney was sanctioned by the court. (25 words)
- The court sanctioned the defendant's attorney because his appellate brief misstated the facts. (13 words)

### Truncated Passive Voice

In cases of "truncated" passive voice, the sentence does not merely subordinate the subject; it eliminates the subject. The truncated passive voice identifies the action but not the person or thing that performed it. For example:

- The car's exterior was washed, but the interior was not vacuumed.

The sentence tells the reader what was done to the car but not who did it. Active voice identifies the subject:

- Marsha's teenage son washed the car's exterior but did not vacuum the interior.

Depending on the context, the use of truncated passive voice can rob the sentence of critical meaning, as in this excerpt from a real estate contract:

- Any material defect must be disclosed.

The sentence identifies the obligation but not which party bears it. Active voice clarifies the provision:

- The seller must disclose any material defect.

### When Passive Voice is Not the Problem

Favoring active voice generally will make sentences shorter, punchier, and easier to comprehend. However, favoring active voice does not mean that one should never use passive voice.<sup>4</sup> To the contrary, passive voice sometimes will communicate the meaning of the sentence better than active voice.

Passive voice may be appropriately used in two broad circumstances. First, you may use passive voice to de-emphasize the subject. The classic example in legal writing occurs when an attorney seeks to obscure a client's bad acts. For example, in the instance

where the client embezzled funds from a former employer, a thoughtful writer may use passive voice to state the fact in a way that de-emphasizes the client's role:

- A former employer's funds were embezzled by the defendant.

Second, you may use passive voice when subordinating the subject of the sentence to promote better flow. For example, passive voice may provide an effective transition between two sentences by linking their subjects:

- The dog quickly dug a hole. The hole was just as quickly filled with the eight bones the dog had found.

A writer should only use passive voice intentionally, and should carefully weigh the benefit to be gained from using passive voice against the cost that the reader may bear in clarity and ease of comprehension.<sup>5</sup> See Appendix 2, "Tactical Use of Passive Voice," for a more detailed explanation of when passive voice may appropriately be used.

### Curing the Passive Voice Malady

Happily, the overuse of passive voice may be easily spotted and remedied by reviewing your sentences for the location and order of the main subject and verb. At the same time, you can spot and fix other problems with subject-verb order or agreement that impede reader comprehension. See Appendix 3, "Subject-Verb Triage," for a step-by-step approach to diagnosing subject-verb order issues, including the overuse of passive voice.

### Conclusion

Time is a thief. However, even when time tries to rob you of the opportunity to thoroughly edit your work, review your sentences for the overuse of passive voice and other subject-verb problems. Even a quick editing review for these problems will help you preserve clarity and conciseness in your writing.

### Notes

1. From author's notes of Colorado Court of Appeals Judge John Daniel Dailey's presentation to University of Denver Sturm College of Law students in the Lawyering Process program (March 28, 2007).

2. My concept of self-editing triage borrows from Lanham's analogy of self-editor as paramedic. "I've called my basic procedure for revision the Paramedic Method because it provides emergency therapy, a first-aid kit, not the art of medicine." Lanham, *Revising Prose* vi (2d ed., Macmillan Publishing, 1987). I commend Lanham's Paramedic Method as another simple, step-by-step approach to diagnosing and fixing common subject-verb problems.

3. See Enquist and Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 76-77 (2d ed., Aspen Publishers, 2005) (noting three primary benefits in preferring active voice: (1) active voice makes the sentence more concise; (2) active voice uses a more vigorous verb; and (3) active voice allows information to be processed more readily).

4. In a chapter of his text entitled "Prefer the Active Voice," Wydick states: "Notice that the title of this chapter says *prefer* the active voice. It *doesn't* say never use the passive voice." (emphasis in original) Wydick, *Plain English for Lawyers* 31 (5th ed., Carolina Academic Press, 2005).

5. "The student has been told often enough that he should not write subject-verb-object sentences exclusively because they are monotonous. They are worse than that; they are hypnotic. But deviations from that order ought to be functional. . . ." Brandt *et al.*, *The Craft of Writing* 65 (Prentice-Hall, 1969). ■

*Appendices begin on page 87.*

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Appendix 1

Examples of Passive Voice and Active Voice

Passive voice is appropriate in certain circumstances; however, passive voice often makes writing less concise and more difficult to understand.<sup>1</sup> Review the examples below to see how active voice can produce more forceful writing and promote clarity.

Passive Voice	Active Voice
The document was placed into the round file by Jennifer.	Jennifer placed the document into the round file.
A criminal complaint against the defendant on the charge of disturbing the peace was brought by the district attorney who decided to file it.	The district attorney filed a criminal complaint against the defendant on the charge of disturbing the peace.
The pass is taken by Carmelo. A pivot, a shot, and a score is made by him.	Carmelo takes the pass. He pivots, shoots, and scores.
That a nation where they will not be judged by the color of their skin but by the content of their character is the place that will one day be lived in by my four little children is a dream had by me.	I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.
A dream is had today by me.	I have a dream today. <sup>2</sup>

1. "The active voice is usually more direct and vigorous than the passive." Strunk and White, *The Elements of Style* 33 (Penguin Press, 2005).

2. King, Jr., *I Have a Dream, Writings and Speeches that Changed the World* 107 (Washington ed., Harper Collins, 1992).

Appendix 2

Tactical Use of Passive Voice

Passive voice can be effective when used for a purpose, but the circumstances giving rise to effective use of passive voice are narrow. Review the table below to learn about these special circumstances.

Reasons to Use Passive Voice <sup>1</sup>	Examples
• to omit the person or thing performing the action because that person or thing is unknown or unimportant	The complaint was served on September 7.
• to obscure the identity of the person or thing performing the action, as when de-emphasizing a client's bad acts	The woman was shot in the left shoulder by the defendant.
• to emphasize the deed, rather than the doer	Only twice in the past eleven years was an inspection of the restaurant completed by the health department.
• to focus on something other than the subject, such as the object of the action	The gun that later would be used in the crime was made by a weapons manufacturer in Illinois.
• to make a strong transition between sentences by linking the subject at the end of one sentence to the beginning of the next	A consistent exercise plan was adhered to by the defendant. The defendant worked out three times a week for more than a year.
• to place emphasis at the end of the sentence rather than the beginning	The safe's combination was known by only two people: the bank's president and the defendant.

1. See Enquist and Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 76-77 (2d ed., Aspen Publishers, 2005); Wydick, *Plain English for Lawyers* 31-32 (5th ed., Carolina Academic Press, 2005) (discussing some of these conditions for the effective use of passive voice, and also noting that passive voice may be used when "a sense of detached abstraction" is appropriate).

Appendix 3

Subject-Verb Triage

Identifying the relationship of the subject to the verb in your sentences will aid you in identifying and correcting several common problems that stand in the way of clarity and conciseness. Perform this “subject-verb triage” by following these steps:

1. Underline the subject of each sentence.
2. Double underline the main verb of each sentence.
3. Evaluate the condition of sentences that do not follow “subject-verb” order using this chart:

Condition	Diagnosis	Cure
<p>The sentence lacks a main verb. Example: The hospital staff came to the party. <i>But not the doctor.</i></p>	<p>This is an incomplete sentence fragment.</p>	<p>Add a verb to the sentence to indicate the action that the subject is taking. Example: The hospital staff came to the party. <i>However, the doctor stayed home.</i></p>
<p>The verb precedes the subject. Example: The party was attended by the hospital staff.</p>	<p>The sentence most likely is in passive voice.</p>	<p>Rework the sentence into subject-verb-object order, unless there is a good reason to use passive voice. Example: The hospital staff came to the party.</p>
<p>The main verb is in the “to be” form (am, are, is, was, were, etc.). Example: It was a long wait for the bus to arrive.</p>	<p>The sentence may be in passive voice, or it may lack punch.</p>	<p>Consider substituting a verb that describes the action the subject is taking, unless there is a good reason to use passive voice. Example: The passengers waited a long time for the bus.</p>
<p>The sentence lacks a subject. Example: The garbage was not collected for five weeks.</p>	<p>The sentence most likely is in truncated passive voice.</p>	<p>Unless you have an articulable reason to obscure the actor in the sentence, add a subject at the beginning of the sentence. Example: The city did not collect the garbage for five weeks.</p>
<p>The subject is not the primary actor of the sentence. Example: The rousing sermon brought the congregation to tears when it was delivered by the pastor.</p>	<p>The sentence may be confusing or misleading to the reader.</p>	<p>Move the primary actor of the sentence to the beginning, making that the subject of the sentence. Example: The pastor delivered a rousing sermon that brought the congregation to tears.</p>
<p>The main verb does not describe the primary action being taken in the sentence. Example: There were five companies that had the qualifications to bid on the project.</p>	<p>The sentence may be confusing or misleading to the reader.</p>	<p>Consider a verb that better describes the primary action being taken. Example: Five companies were qualified to bid on the project.</p>
<p>The subject and the main verb are separated by at least four words or one punctuation mark. Example: The quarterback, though he was under pressure from two defenders and hobbled by a previous hit, fired the ball into the receiver’s hands.</p>	<p>The reader may have difficulty following the main point of the sentence.</p>	<p>Consider removing a clause that comes between the subject and the verb to another sentence, or moving the clause to the end of the sentence. Example: The quarterback fired the ball into the receiver’s hands while under pressure from two defenders and hobbled by a previous hit.</p>

# Re CBA President's Message and Defending Our Courts

Dear Editor:

I frequently have seen the current and past Bar presidents and other Bar members urge that we defend the judiciary; however, not once have I seen the Bar as an organization even comment on the possibility that some responsibility for the problem may lie with the attitude of some judges. Until we address and rediscover what the limits are on judicial authority, we almost certainly will see continued efforts by the public to rein in the judiciary, sometimes by methods that we as lawyers can probably agree present more problems than they solve.

CBA President David Lytle is concerned about attacks on the judiciary being attacks on the concept of separation of powers.<sup>1</sup> However, what about the judiciary also needing to keep in mind their role under separation of powers? I seem to recall a warn-

ing in a dissent or conference comment by one of the U.S. Supreme Court Justices—Justice Scalia, I believe—to the effect that the courts were heading toward deciding all of the “important” issues and leaving only “trivial” matters to the legislatures.

Historically, even with such important and far-reaching issues as racial discrimination, the courts knew the importance of waiting on constitutional and legislative changes, rather than creating constitutional “rights” out of thin air. Now, they find abortion “rights” in the “penumbra” of the Constitution;<sup>2</sup> and homosexual “rights” in the United States in part through the laws or court decisions of other countries;<sup>3</sup> or because in the view of a judge/justice it is “the right thing to do.”<sup>4</sup> In Colorado, we had the creative judiciary who found reasons to strike down Amendment 2 in the mid 1990s, in the absence of any U.S. Constitutional provision prohibiting discrimination against, or even mentioning, homosexuals<sup>5</sup> (I recommend reading Justice Scalia’s dissent); and two judges in Boulder who decided that the statutory term “father” in the birth certificate laws included a same-sex female partner.<sup>6</sup>

Ask yourself: If not limited by the separation of powers (that is, judges are not empowered to legislate) and the specific words of the Constitution and laws passed by a legislature or created by a ballot initiative, what are the limits on judicial authority today—only whether a judge feels it is the “the right thing to do”? What court-made legislation cannot be based on the new expansive interpretation of “due process”? Is the desire of some to change the face of the country through the courts worth losing the concept of separation of powers, and the loss of respect for law and the courts?

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*I, for one, have great respect for strong, independent, and self-limiting courts—courts that know the limits of their authority under the separation of powers, no matter what the personal position of a judge might be on any issue.*

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Do we just turn over all decision making to a new oligarchy of all-wise judges?

I, for one, have great respect for strong, independent, and self-limiting courts—courts that know the limits of their authority under the separation of powers, no matter what the personal position of a judge might be on any issue. I recognize that it is not unconstitutional for a court to be “wrong” in its decision in a particular case, *if* the matter is one in which the court legitimately has subject matter jurisdiction. However, I have little respect for judges who think they are imbued with a special wisdom for creating new constitutional provisions to correct the lesser motives of their co-equals in the legislatures. If that judicial attitude prevails, we might soon face a constitutional crisis, a situation where the executive branch simply refuses to

enforce, or the legislature to pay for enforcing, a clearly *ultra vires* court decision. That is a remedy contemplated in the *Federalist Papers*.<sup>7</sup> Once that Pandora’s box is opened, the current concerns of the Bar leadership about attacks on the independence of the courts will seem minor indeed.

I would welcome a response from members of the judiciary, hopefully with a *specific* statement of where they see the limits on their authority, and whether they understand that the animus toward the courts is not just based on disagreement with the outcome of a particular case (though I recognize that does motivate some people).

Kirk Brush  
Ft. Collins, Colorado

## Notes

1. See CBA President’s Message, “CBA Resources: Member Participation and Staff Make for a Vibrant Team,” 36 *The Colorado Lawyer* 5 (Aug. 2007).

2. *Roe v. Wade*, 410 U.S. 113 (1973).

3. *Lawrence v. Texas*, 539 U.S. 558 (2003).

4. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 973 (Mass. 2003) (Greany, J. concurring).

5. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (ruling on preliminary injunction), 882 P.2d 1335 (Colo. 1994) (merits decision), *aff’d sub nom. Romer v. Evans*, 517 U.S. 620 (1996).

6. See Stanton and Chapman, “Speakout Editorial,” *Rocky Mountain News* (March 25, 2002).

7. *Federalist Papers*, No. LXXXI (a discussion addressing the public’s fear of an overly powerful court). ■

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