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### Why Punctuation Matters: Part Three

David Spratt

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# WRITER'S BLOCK

## THE "INS AND OUTS" OF GOOD LEGAL WRITING: PART ONE

BY DAVID H. SPRATT



Every year right around the holidays, national and local newspapers publish an "in and out" list that tells their bated-breath readers what exciting trends will be popular and what old trends have become passé and decrepit. This year, in a sporadic series of columns, your resident columnist will offer a few legal writing "ins," banishing some outdated writing techniques and extolling the benefits of clearer, more effective writing.

**In: Appropriately Using Passive Voice**  
**Out: Avoiding Passive Voice at All Costs**

The difference between active and passive voice is a mystery to many people (if, at this very moment, a dim, yet not fully decipherable, bell is ringing in the back of your mind, you are probably one of those people). Do only attorneys who practice sports or energy law use active voice? Is passive voice the voice we use at the end of a long day at the office, tired and unable to muster much enthusiasm?

Despite their somewhat misleading names, active voice and passive voice really have nothing to do with "voice" and everything to do with sentence structure. In the active voice, the subject of the sentence does the acting; in the passive voice, the subject of the sentence is acted upon. In most sentences, the subject performs the action denoted by the verb; most sentences are written in the active voice:

**Professor Spratt [subject] is writing [verb] this column [object].**

Active voice has nothing to do with tense; if the subject of the sentence is performing some action, has performed some action, or will perform some action (or in any way "acts upon" the verb), then the sentence is written in active voice:

**Professor Spratt will write this column.**  
**Professor Spratt wrote this column.**

Passive voice, on the other hand, emphasizes the object of the action, making it look like the subject has been acted upon or is the recipient of a particular action. Although not a definitive rule, the presence of an auxiliary verb (like "was," "is being," "will be," or another variant of the verb "to be") followed by another verb and then the word "by" is a clue that you have written a sentence in passive voice.

**This column is being written by Professor Spratt.**  
**This column will be written by Professor Spratt.**

No one disputes that using the active voice is always shorter and clearer (and quite often more interesting). What is disputed by some writers and scholars is when, if ever, the passive voice should be used. Although some say that the passive voice should be avoided at all costs, this blanket sentiment ignores the unmistakable fact that passive voice is sometimes inevitable and other times a highly persuasive and useful writing technique.

Passive voice is appropriate (and perhaps more effective) in at least three situations:

1) Passive voice is appropriate when the writer wants to downplay the subject's role in performing a certain action (or even leave out the subject altogether).

Several years ago, one of my former students was backing out of a Starbucks parking lot when her car "accidentally came into contact" with a nun. Fortunately, the nun was not hurt: Thank God! After the police arrived, my student had to complete an accident report. Wanting to downplay her role (and having apparently listened to me in class), she wrote:

**The nun was hit.**

You will hear politicians use this technique frequently. For example, Ronald Reagan, when referring to the Iran-Contra scandal in his 1987 State of the Union Address stated: "Mistakes were made," thereby attempting to minimize the role of his Administration.

As advocates, the passive voice allows us to briefly deflect attention from the sometimes less-than-stellar actions of our clients by focusing attention on the action, rather than the actor. This persuasive writing technique should not be overlooked and can be effectively used (but not overused) in fact statements in motion memoranda, appellate briefs, and other persuasive documents.

2) Passive voice is appropriate when the action is more important than the person who performs the action.

In my last column, I briefly mentioned my love of Virginia wine (starting to see a trend here, aren't we?). Not surprisingly, I belong to wine clubs at several Virginia wineries, and wine is shipped to me each quarter. Although the persons who ship the wine are always very friendly and perform a great service (at least to me), the identity of the person shipping the wine is unimportant:

**The next wine club shipment will be made on  
September 18, 2008.**

3) Sometimes the actor is unknown.

In such instances, depending on what sounds best in your particular document, it is equally appropriate to write:

**The sign was vandalized [passive voice].**  
**Someone vandalized the sign [active voice].**

So, despite massive "writer's block," I finally finished this column. As a concluding example, let's wildly hypothesize that the column was less than perfect, not one you particularly enjoyed. If so, please choose one of the following examples. The first example will hopefully divert the reader's attention from the subject before she finishes reading the sentence, and the second example will leave out the subject entirely:

**The column was written by Professor Spratt.**  
**The column was written.**

As always, I welcome and even encourage questions, comments, or suggestions (note the deliberate use of active voice here?). Happy New Year!

David H. Spratt is a professor at The American University, Washington College of Law, where he teaches Legal Rhetoric, Introduction to Advocacy, and Family Law Practice and Drafting. Professor Spratt practiced family law for 10 years and is a former chair of the VBA Domestic Relations Section.