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### Writer's Block: The "Ins and Outs" of Good Legal Writing, Part One

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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year, in a sporadic series of columns, your resident columnist will offer a few legal writing "ins," banishing some outdated writing techniques and extolling the benefits of clearer, more effective writing.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.

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## President's Page

Continued from page 5

I will focus the balance of this report on judicial vacancies in the Commonwealth and what the VBA plans to do about this problem as contemplated by our first strategic goal, *Advocacy and Legislative Reform*.

### Judicial Vacancies

Earlier this month Guy Tower, our Executive Director, and I sent a communication to our membership about the challenges presented by judicial vacancies. We reported that the Virginia General Assembly enacted a freeze in March of this year on filling vacancies in Circuit and District Court judgeships arising between February 15, 2010 and June 30, 2012. This was part of a cost-cutting plan to trim \$4.2 billion in state spending in order to balance the biennial budget of \$70 billion.

Specifically, 18 judgeships were left vacant, and possibly 32 more will become vacant by the end of fiscal 2012 due to mandatory and voluntary retirements. The *Richmond Times Dispatch* reported on June 2, 2010 that the vacancies will result in a projected savings of only \$11.26 million in judges' salaries and benefits through June 30, 2012. Information that I recently have obtained places the savings even lower at \$10.5 million. As a result of the vacancies, some Circuits and Districts already have seen the number of cases per judge rise sharply with more unfilled vacancies expected from mandatory retirements and other unforeseen reasons.

Unfilled vacancies in Circuit Court judgeships in the 5th, 9th, 15th, 27th and 30th Circuits and General District Court judgeships in the 2nd, 6th, 19th, 20th and 25th Districts have driven case-per-judge levels well above state averages. For example, a single vacancy in the *30th Circuit* is projected by the end of 2010 to produce a case load of *3,523 cases per judge*, which is an increase of 49.5% above the 2009 Circuit average, and almost twice the *state average of 1,837 cases per judge*. Similarly, a single General District court vacancy in the *20th District* is projected to result in a 33.3% increase from the 2009 General District average to *39,708 cases per judge*, which is 47% above the *state average of 26,929 cases*. An unfilled vacancy on the Juvenile & Domestic Relations District Court in the *11th District* has left the one remaining J&DR judge in the District with a projected caseload more than *double the statewide average*.

A June 5, 2010 article in the *Richmond Times Dispatch* reported that our judicial branch would provide \$437,520 in funding beginning July 1, 2010 to pay replacement judges in 18 District and Circuit court systems affected by the hiring freeze. This amounts to about 182 days of funding per month to pay retired or substitute judges to temporarily fill the gap where the vacancies exist. However, recently available information indicates that a total of nearly \$500,000 has been redirected from other judicial needs to pay the cost of providing judges on a temporary basis where the vacancies exist. This stop-gap measure proves the point that an unmet need for sitting judges currently exists.

The VBA and other statewide bar organizations are concerned that the unprecedented actions of the General Assembly present risks to the administration of justice and the rule of law in the Commonwealth. Other bar leaders including Irving Blank, President of the Virginia State Bar, Dennis Quinn, President of the Virginia Association of Defense Attorneys, and Jack Harris, Executive Director of the Virginia Trial Lawyers Association likewise have advised their members of the need for legislative action to address the problems created by these vacancies.

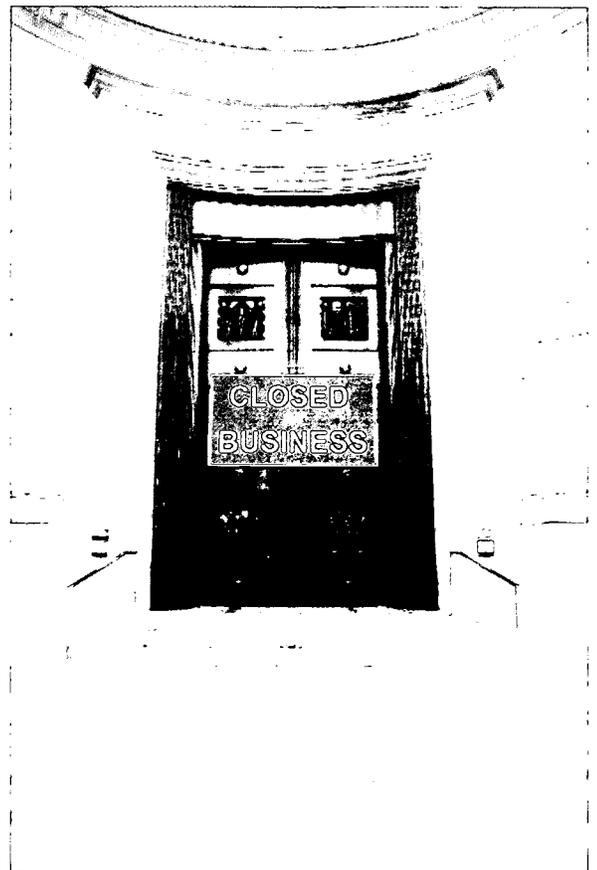
In order to help legislators to focus on the problems created by the vacancies, our President-Elect Pia Trigliani has agreed to serve as Chair of a newly formed *"Special Committee to Evaluate Judicial Vacancies"*. This special committee is comprised of representatives of our substantive law sections and others with significant experience with our courts to help evaluate the problem and to craft a potential solution. Pia's committee, Guy Tower and the Association's retained legislative representatives will take the steps necessary to communicate with the legislature about the impact the vacancies have had on the administration of justice.

We are all well aware that substantial budget cuts have been made in most if not every area of state government. Thus it is not known whether it is possible to persuade the General Assembly to appropriate sufficient funds to reverse completely the judicial budget reductions enacted earlier this year. However, we believe that

minimally a limited restoration of judgeships targeted at the most significant problem areas might be adopted with strong support from the VBA and other bar groups.

The great British Prime Minister William Gladstone is credited with using the now well-worn phrase, *"justice delayed is justice denied"* as the climax of an important 1868 speech about the Irish question. Your VBA leadership believes that this is precisely what is happening in some courtrooms in the Commonwealth today. The two photographs accompanying this President's Page are intended to reflect what the end result could be in localities throughout the Commonwealth if the legislature does not take decisive action to correct the obvious imbalance in case loads in our courts.

Irving Blank, President of the Virginia State Bar, was quoted in *Virginia Lawyers Weekly* on June 18, 2010 as stating that the funding cut is "a direct affront to public protection; we're denying access to the courts." As to the judiciary, the Hon. James F. D'Alton, Chief Judge of the 11th Circuit, was interviewed about the problems created by judicial vacancies. He indicated that the two remaining judges in the 11th Circuit will do their best, "but it's not going to be perfect. And it's going to frankly create some



delay, and I think the public is going to be the one least served by it." Richmond Times Dispatch, May 2, 2010.

The Supreme Court's statistical information demonstrates the overall scope of the problem, but Guy and I have invited our membership to share real world stories about how the freeze is being felt most acutely by you - the practicing lawyers of Virginia - and your clients in terms of delays in scheduling trials, having motions heard and the like. I again urge you to supply us with stories of justice delayed or endangered as a result of

the judicial vacancies. This information will help our newly formed special committee to formulate a plan to convince legislators that at the least a targeted fix is necessary to address problems caused by the freeze on filling judicial vacancies. We already have heard from many of our members and I encourage you to provide information to us directly at lawyers-forfillingjudgeships@vba.org.

#### Conclusion

The Association's engagement in the debate about judicial vacancies will serve as a signature issue as we begin

implementing our new strategic plan, especially in relation to our first goal - Advocacy and Legislative Reform. More broadly, your leadership is enthusiastic about all of the plan's goals and objectives. As we move forward with the plan over the next three years, let us keep in mind the words of Oliver Wendell Holmes, "*The great thing in this world is not so much where we stand, as in what direction we are moving.*" We look forward to working with you as this plan is implemented and appreciate your anticipated support.

---

# VBA's First Veterans Day Initiative a Huge Success!

The first ever VBA Veterans Day Initiative proved to be a success with over \$24,000 raised (as of December 19) for the William & Mary Legal Veterans Benefit Clinic.

Kicked-off by a breakfast ceremony at McGuireWoods, law firms across the state stepped up to the plate by holding fundraisers, jeans day, etc. to raise much-needed money for the cause.

Under the leadership of 2009 VBA president John Epps of Hunton & Williams, with assistance by former VBA president Jim Meath of Williams Mullen and VBA members Bob Barrett of Degremont Technologies, NA and Matt Kapinos of McGuire Woods, the month highlighted a year's long project to raise money for the clinic and to create a list of lawyers willing to provide pro bono or reduced-fee legal services to servicemembers who have returned from overseas. To date more than 175 members of the Virginia legal community are participating.

"I am very proud of our community for coming together for such a worthy cause." Notes VBA president Steve Busch, "We are encouraged by this year's accomplishment and hope to have this program continue to grow for years to come."



L to R: Bob Barrett, Hugh Fain, John Epps, Jim Meath, Steve Busch, Guy Tower, Matt Kapinos and Henry Willett at the Virginia Veterans Legal Services Month kick-off event.



**Congratulations Fall New Admittiee iPod Shuffle Winners!**

Marynelle Wilson  
Katherine Slecker  
Christina Hardwick  
David Robinson  
Eric Grodon

# 121<sup>st</sup> Annual Meeting of The Virginia Bar Association

January 20-22, 2011 • Williamsburg Lodge and Conference Center, Colonial Williamsburg, Virginia

## Our Winter Weekend Schedule

### Thursday, January 20, 2011

- 9:00 AM - 1:00 PM **Virginia CLE Committee Meeting**
- 10:00 AM - 4:30 PM **VBA Board of Governors Meeting and Luncheon** (For 2010 Board members.)
- 1:00 PM - 5:00 PM **Virginia Law Foundation Committee and Board Meetings**
- 2:00 PM - 6:00 PM **Registration and Information Desk Open**  
*Courtesy of Kaufman & Canoles, PC*
- 5:00 PM - 6:00 PM **Friends of Bill W.** (Open meeting.)
- 5:45 PM - 6:15 PM **Virginia Law Foundation New Fellows Orientation**
- 6:30 PM - 7:30 PM **Welcome Reception**  
*Courtesy of SunTrust Bank*
- 7:30 PM - 9:30 PM **Virginia Law Foundation Fellows Dinner and Induction Ceremony**

### Friday, January 21, 2011

- 8:00 AM - 6:00 PM **Registration and Information Desk Open**  
*Courtesy of Kaufman & Canoles, PC*
- 8:15 AM - 9:15 AM **Continental Breakfast**  
*Courtesy of Virginia Business Magazine*
- 8:15 AM - 5:00 PM **Exhibits**
- 8:15 AM - 9:15 AM **Section/Committee Business Meetings**
- 8:30 AM - 9:30 AM **Past Presidents Council Breakfast**
- 9:30 AM - 12:30 PM **CLE Programs: Concurrent Sessions**  
*(See separate listing.)*
- 10:00 AM - 11:30 AM **Spouse/Guest Program: A Culinary Demonstration and Tasting**  
*(Separate registration and fee required.)*
- 10:00 AM - 12:00 N **YLD Law School Liaison Recruiting Roundtable**
- 12:00 N - 4:30 PM **Virginia Association of Defense Attorneys Board Luncheon Meeting**
- 12:30 PM - 2:00 PM **Legacy Series Luncheon Program**  
"An American Turning Point: The Civil War in Virginia (It's Not Your Grandfather's Civil War)."  
*A presentation by the Virginia Historical Society on behalf of the VBA Committee on Special Issues of National and State Importance.*  
*Courtesy of Hunton & Williams LLP*  
*(Register separately—additional fee for lunch.)*
- 12:30 PM - 1:30 PM **YLD Executive Committee/Council Luncheon and Passing of the Gavel**
- 1:30 PM - 2:30 PM **Special CLE Presentation for Young Lawyers** (1 Credit)  
"Tips From the Bench for Young Lawyers."  
*The Honorable Jane Marum Roush, Fairfax Circuit Court*
- 2:15 PM - 3:15 PM **Retirement Journey Series**  
"Where to Invest in 2011: What's In Store for the U.S. Economy?"  
*Alan Gayle, Senior Investment Strategist and Director of Asset Allocation at RidgeWorth Investments, SunTrust Bank's investment management subsidiary.*

- 3:30 PM - 4:45 PM **General Session** (1.5 CLE Credits)  
"Keeping the Lights On in Virginia (and the Rest of the Country): What Will It Take?"  
*A presentation by the Committee on Special Issues of National and State Importance featuring Thomas F. Farrell, II, Chairman and CEO of Dominion Resources, Inc.*
- 5:00 PM - 6:00 PM **Friends of Bill W.** (Open meeting.)
- 5:45 PM - 7:00 PM **VBA Portrait Gallery**  
*Complimentary photographs will be taken of VBA members and guests as they enter the reception.*  
*Courtesy of Wells Fargo Private Bank Legal Specialty Group*
- 6:00 PM - 7:00 PM **Reception** (black tie)  
*Courtesy of LexisNexis*
- 7:00 PM **Banquet and Dance** (black tie)  
*Banquet courtesy of The McCammon Group*  
*Visual Presentation*  
*Courtesy of McGuireWoods, LLP*  
*Decor Design*  
*Courtesy of MercerTrigiani*  
*After Dinner President's Reception*  
*Courtesy of McGuireWoods, LLP and MercerTrigiani*  
*After-dinner Entertainment*  
*Live Music courtesy of Equity Concepts, L.L.C. and U.S. Bank Corporate Trust Services*
- 10:30 PM - 12:30 AM **YLD "After-hours" Social**  
*Members of the YLD (Young Lawyers Division) and the OLD ("Old" Lawyers Division!) are invited to participate in after-hours cheer!*  
*Courtesy of Christian & Barton, LLP*

### Saturday, January 22, 2011

- 8:00 AM - 9:15 AM **Annual Breakfast and Business Meeting**  
*(Spouses and guests are welcome.)*  
*Courtesy of Minnesota Lawyers Mutual Insurance Co.*
- 8:30 AM - 1:30 PM **Registration and Information Desk Open**  
*Courtesy of Kaufman & Canoles, PC*
- 9:00 AM - 12:30 PM **Exhibits**
- 9:30 AM - 11:00 AM **General Session**  
"Whither the Billable Hour? How Lawyers Value and Charge for Their Services in the 'New Normal' Economy."  
*A presentation by the Law Practice Management Division.*
- 11:00 AM - 12:30 PM **CLE Programs: Concurrent Sessions**  
*(See separate listing.)*
- 11:00 AM - 12:30 PM **Managing Partners Roundtable**  
"Raising New Firm Leaders."  
*A presentation by the Law Practice Management Division.*
- 12:30 PM - 1:30 PM **Reception**  
*Courtesy of Colonial Williamsburg*
- 1:00 PM - 2:30 PM **VBA Board of Governors Luncheon**  
*(For 2011 Board members and spouses/guests.)*
- 2:30 PM - 4:00 PM **Orientation for New Members of the VBA Board of Governors**

# Educational Programming

Friday, January 21, 2011

- 9:30 AM - 11:00 AM (1.5 Credits) **Business Law Section**  
"Helping Your Small and Middle Market Business Clients Survive a Tough Economy."
- 9:30 AM - 11:00 AM (1.5 Credits) **Domestic Relations Section**  
"Pseudo Science vs. *Real Science* in Custody and Divorce Cases."
- 9:30 AM - 11:00 AM (1.5 Credits) **Environment, Natural Resources and Energy Law Section**  
"Protecting the Chesapeake Bay: A Challenge for Stakeholders."
- 9:30 AM - 11:00 AM (1.5 Credits) **Health Law Section • Administrative Law Section**  
"Understanding the Patient Protection and Affordable Care Act (Part 1): Impact of Federal Health Care Reform on U.S. Government Agencies and Programs." (See 11:00 A.M. schedule for Part 2.)
- 9:30 AM - 10:30 AM (1 Credit) **Transportation Law Section**  
"*Kawasaki Kisen Kaisha v. Regal Beloit Corp.*—the United States Supreme Court drops the other shoe to *Norfolk Southern v. Kirby*. Inland United States Cargo Liability for Shipper and Carrier in Connection with International Shipments."
- 9:30 AM - 11:00 AM (1.5 Credits) **Wills, Trusts & Estates Section**  
"Estate Planning in Uncertain Times: Complexities of 2011 and Beyond."
- 11:00 AM - 12:30 PM (1.5 Credits) **Administrative Law Section • Health Law Section**  
"Understanding the Patient Protection and Affordable Care Act (Part 2): Impact on Federal Health Care Reform on Commonwealth of Virginia Agencies and Programs." (See 9:30 A.M. schedule for Part 1.)
- 11:00 AM - 12:30 PM (1.5 Credits) **Elder Law Section**  
"Properly Designing a Personal Injury Settlement for Clients with Special Needs."
- 11:00 AM - 12:30 PM (1.5 Credits/1.5 Ethics) **Intellectual Property and Information Technology Law Section**  
"Avoiding Malpractice Risks and Ethics Complaints and Pitfalls in an IP Practice."
- 11:00 AM - 12:30 PM (1.5 Credits) **Labor Relations and Employment Law Section**  
"35 Things Every Lawyer Should Know About Labor and Employment Law."
- 11:00 AM - 12:30 PM (1.5 Credits) **Veterans Issues Task Force**  
"Representing Veterans: What Every Virginia Lawyer Needs to Know."
- 11:00 AM - 12:30 PM (1.5 Credits) **Virginia Alternative Dispute Resolution Joint Committee • Civil Litigation Section • The Virginia Collaborative Professionals (VCP)**  
"Can We Have a Conversation? Improved Communication Skills in Negotiation and Litigation."
- 12:30 PM - 2:00 PM (No Credit) **Legacy Series Luncheon Program: Committee on Special Issues of National and State Importance**  
"An American Turning Point: The Civil War in Virginia (It's Not Your Grandfather's Civil War)."  
*A presentation by the Virginia Historical Society.*  
*(Spouses and guests are encouraged to attend. Register separately—additional fee for lunch.)*
- 2:15 PM - 3:15 PM (No Credit) **Retirement Journey Series**  
"Where to Invest in 2011: What's In Store for the U.S. Economy?"  
*(Spouses and guests are encouraged to attend.)*
- 3:30 PM - 4:45 PM (1.5 Credits) **General Session: Committee on Special Issues of National and State Importance**  
"Keeping the Lights On in Virginia (and the Rest of the Country): What Will It Take?"  
*(Spouses and guests are encouraged to attend.)*

## Hotel Reservations

Room reservations can be made by phone, fax, mail or online. Please refer to the form provided. Hotel contact information: Group Reservations, Colonial Williamsburg Co., P. O. Box 1776, Williamsburg, Virginia 23187; Ph: (800) 261-9530; Fax: (757) 220-7729; Website: [www.cwf.org](http://www.cwf.org); VBA Online Reservation Code: <https://resweb.passkey.com/go/viral1a>

Saturday, January 22, 2011

- 9:30 AM - 11:00 AM (No Credit) **General Session: Law Practice Management Division**  
"Whither the Billable Hour? How Lawyers Value and Charge for Their Services in the 'New Normal' Economy."
- 11:00 AM - 12:30 PM (1.5 Credits) **Construction and Public Contracts Law Section**  
"Bankruptcy Issues in Construction Law."
- 11:00 AM - 12:30 PM (1.5 Credits) **Health Law Section**  
"HIPAA/HITECH Business Associate Contracting is Expanding: What Virginia Hospitals, Physicians, Attorneys, and Consultants Must Know Now About Amending, Negotiating, and Drafting Business Associate Agreements."
- 11:00 AM - 12:30 PM (No Credit) **Law Practice Management Division: Managing Partners Roundtable**  
"Raising New Firm Leaders."  
*A presentation by the Law Practice Management Division for law firm managers and others responsible for hiring and professional development.*
- 11:00 AM - 12:30 PM (1.5 Credits/1.5 Ethics) **Lawyers Helping Lawyers**  
"The Law Firm's Responsibility to the Impaired Attorney."
- 11:00 AM - 12:30 PM (1.5 Credits) **Real Estate Section**  
"Foreclosures and Other Hot Title Topics."