

New Jersey Law Journal

VOL. CLXXIX—NO. 10—INDEX 952

MARCH 7, 2005

ESTABLISHED 1878

Tell a More Powerful Story in the Active Voice

Use active verbs to convey a sense of fault or failure

By **Kenneth F. Oettle**

A classic piece of writing advice is to use the active rather than the passive voice. Few lawyers know what “voice” means, but most know the difference between active and passive.

“John filed an action” is active.
“An action was filed by John” is passive.

The active voice is direct and assertive. It gets more quickly to the verb, and it conveys a sense of control, of doing rather than being done to. It also suggests you have confidence in your point.

Suppose you represent XYZ Corp. in a proxy contest with Takeover Co., which has nominated a slate of directors and is looking to take control of the XYZ Corp. board. You ask the court to enjoin Takeover Co. from disseminating proxy materials that contain misleading statements about the company’s directors. Takeover Co. previously made the same statements in press releases.

Assuming you don’t have to write in a particular way for transitional purposes, would you use Version A or Version B?

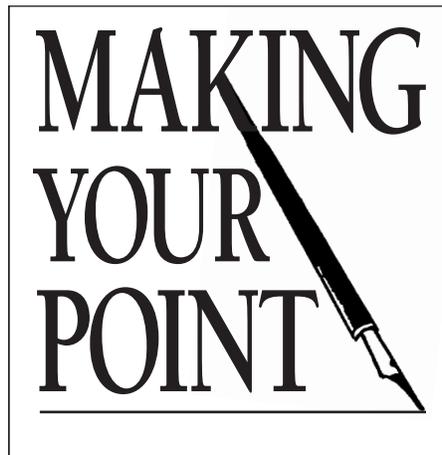
Version A: The misleading state-

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ments were previously disseminated by Takeover Co. in press releases.

Version B: Takeover Co. previously disseminated the misleading statements in press releases.

You would use version B, in which Takeover Co. is the actor. The active voice (“Takeover Co. . . . disseminated”) makes the wrongdoing more immediate.



In the passive construction, Version A, you don’t have as clear a target. The bad actor, Takeover Co., is buried in the middle of the sentence.

The active voice encourages the reader to visualize the persons who control Takeover Co. as drafting and then distributing misleading statements. In contrast, the mental image one can develop of “misleading statements” is nebulous. In passive voice, the story has less grip partly because it has less shape.

A Second Example

You appeal a trial court’s refusal to

enjoin a former employee of your client from contacting the client’s customers. Would you use Version A or Version B?

Version A: The trial court declined to bar Smith from calling the Company’s long-term customers on behalf of his new employer.

Version B: Smith was not barred by the trial court from calling the Company’s long-term customers on behalf of his new employer.

Use Version A. Focus on the court, not on Smith. If the court not only made a mistake but, in your view, did so with attitude, you may wish to cultivate that connotation by stating that the court “refused” to grant the requested relief. But be careful. If the trial court is well respected at the appellate level, “declined” may be the more prudent word.

A Third Example

You represent a company whose retired CFO gave notice of her intent to exercise stock options four days after the options expired. When the company refused to honor the request, the CFO sued. Would you use Version A or Version B in a Statement of Facts?

Version A: The expiration date passed before Ms. Jones exercised her options.

Version B: Ms. Jones failed to exercise her options before they expired.

You would use Version B because it

highlights Ms. Jones' failure to exercise her options in time. Because she failed, she deserves to lose. It was her fault. She did it to herself.

If you say only that the expiration date passed, you leave a loophole. Maybe the options didn't actually expire. Maybe Ms. Jones has an excuse, and maybe the law will afford her a remedy. After all, she missed by less than a week. She has equity in that fact and in the public policy that the law abhors a forfeiture. Pre-empt those equities by placing responsibility on Ms. Jones for having missed her deadline.

A Final Example

You represent a housing authority that lost a jury verdict to a plaintiff who tripped and fell in a dimly lit parking lot. Plaintiff's lawyer argued strenuously in his closing that a broken light bulb above a door some 70 feet from the accident site established the authority's negligent failure to illuminate the parking lot. Plaintiff did not call a lighting expert at trial. On appeal, would you use Version A or Version B?

Version A: There was no testimony, lay or expert, that the broken

bulb was intended to illuminate the parking lot.

Version B: Plaintiff offered no testimony, lay or expert, that the broken bulb was intended to illuminate the parking lot.

Version B is better because it places the blame for the absence of testimony directly on plaintiff. Version A's amorphous "There was no testimony" ascribes no responsibility, leaving open the possibility that the absence of testimony wasn't plaintiff's fault.

Above all, you wish to ascribe fault. Do so assertively, using the active voice.

Puzzler

How would you tighten and sharpen the following sentence?

There is no ethics rule that is specifically applicable to the issue of whether a judge should recuse himself where counsel for one of the parties is a former law partner of the judge.

To determine what to prune, select the elements you wish to save:

- lack of specific ethics rule
- a verb associated with the missing ethics rule (e.g., "is")
- the judge
- recusal
- counsel
- former law partner

You can't remove any of these elements without losing meaning, but everything else is fair game. Eliminate "There is...that" as excess. Eliminate "for one of the parties" as implicit and reduce "the issue of whether a judge should recuse himself" to "recusal." Change the passive "is applicable" to the active "addresses" or "requires."

The revised version (if you seek recusal):

No specific ethics rule addresses recusal where counsel is a former law partner of the judge. [Presumably, you will invoke a catchall ethics rule. You will have to invoke something.]

Alternate version (if you oppose recusal):

No ethics rule requires recusal where counsel is a former law partner of the judge. ■