

New Jersey Law Journal

VOL. CLXXXIII – NO. 6 – INDEX 368

FEBRUARY 6, 2006

ESTABLISHED 1878

Don't Twist Your Prose into a Pretzel

Remedy awkwardly passive phrasing by changing the subject

By Kenneth F. Oettle

An awkward construction common in legal writing is the passive verb form followed by an infinitive, which is usually passive as well, as in:

The amounts paid to the firm for lobbying and the amounts the firm pays its lobbyists are required to be reported annually.

The verb is “are required,” and the infinitive is “to be reported.” The passive voice is created by combining a form of the verb “to be” with the past participle of another verb. For most verbs (“regular” verbs), the past participle is formed with the suffix “-ed.”¹

When verbs are in active “voice,” the subject of the sentence is doing something and takes an object (“Plaintiff filed a motion.”). In passive voice, the subject is being done to (“The motion was filed by plaintiff.”).

Amounts paid for lobbying are, in a sense, “required to be reported,” but the grammatical structure is hard for the reader to follow. Generally, the construction “are required” is followed by the infinitive of an active verb, as in “Lobbyists are required to file a notice

The author is a partner and co-chair of the writing and mentor programs at Sills Cummis Epstein & Gross. He invites questions and suggestions for future columns to koettle@sillscummis.com. “Making Your Point” appears every other week.

of representation.” The passive verb form “are required” followed by the passive “to be” construction does not immediately compute.

The easy fix is to substitute “must” for “are required to.”

The amounts paid to the firm for lobbying and the amounts the firm pays its lobbyists must be reported annually.



A Guide to Persuasive Writing

A Second Example

Suppose that a buyer and seller enter a contract for sale of a medical testing laboratory. While the deal is pending, the Commissioner of Health proposes to amend regulations to reduce what labs can charge for tests. The proposed regulations would be a materially adverse development for medical testing labs.

The seller does not tell the buyer about the proposed regulations, and the buyer relies on the seller’s warranty of no materially adverse changes to the business. When the buyer finds out

about the regulations, the buyer sues the seller for a price adjustment. The buyer’s brief opposing the seller’s motion for summary judgment states as follows:

After the Purchase Agreement was executed, and unbeknownst to Buyer, the regulations that govern billing and collection by medical labs were proposed to be amended.

“Were proposed to be amended” is awkward. Regulations are regularly “proposed,” but they aren’t “proposed to be amended.”

Writers get into these predicaments by following their noses. They write in the order in which thoughts occur. First they place an event in time with, “After the Purchase Agreement was executed,” and then they select “regulations” as their subject because the sentence seems to be about regulations. They don’t think ahead, and they don’t rethink the structure once created.

A formulation such as “proposed to be amended” results when the writer clings to the idea that the regulations have to be the subject of the sentence — the actor in the drama — because the regulations are important and because the writer thought of them first.

Here, the focus isn’t the regulations; it’s their amendment, which supports the following revision:

After the Purchase Agreement was executed, and unbeknownst to Buyer, amendments were proposed to the regulations governing billing and collection by medical labs.

This is an improvement. “Amendments were proposed” is more

accessible than “regulations...were proposed to be amended.” But you need another sentence to say that the amended regulations would reduce the amounts that labs can charge. Changing the verb from passive (amendments were proposed) to active (“the Commissioner of Health proposed amendments” — see below) would not only increase the vigor of the sentence, but it would tighten the paragraph by allowing the writer to set forth the nature of the proposed amendments where the amendments first appear:

After the Purchase Agreement was executed, and unbeknownst to Buyer, the Commissioner of Health proposed amendments to the regulations governing billing and collection by medical labs to reduce the amounts that labs could charge.

Little change was necessary to make the sentence serviceable rather than awkward, and little additional change was needed to make it sharper and give it more substance. For inveterate Puzzler solvers, here is an additional option: replace “the amounts that” with “what.”

Other Examples

The following sentence appeared in a brief seeking injunctive relief:

Defendant’s continuing discharge of toxic chemicals must be ordered to stop.

This passive formulation was created because the writer thought, “What is this sentence about? It’s about defendant’s continuing discharge of toxic chemicals, so I’ll begin with the discharge.” The writer was then stuck trying to find a verb to explain what must happen to the continuing discharge. The solution is to choose a new subject, such as the court:

The Court should order defendant to cease discharging toxic chemicals.

How would you fix the following?

The issue sought to be barred from relitigation by plaintiff is the validity of the contract.

Try these:

Plaintiff seeks to bar relitigation of the validity of the contract.

Plaintiff opposes relitigation of the contract’s validity.

Puzzler

How would you tighten and sharpen the following sentence?

The Municipal Utilities Authority (MUA) decided that wetlands approval can be divided into three steps which are each worth three points toward achieving priority on

the list for sewage treatment capacity — submission of an application, hearing process, and approval.

If the MUA divided, then implicitly it decided. No need for both. Save two more words by replacing “which are” (should have been “that are” anyway) with a comma. Also, drop “achieving” and “on the list” as implicit.

Place quotation marks around MUA or not. I prefer not. The reader will know that MUA is short for Municipal Utilities Authority. The marks are, ever so slightly, an editorial.

Reduce “submission of an application” to “application.” Submission is assumed. Similarly, drop “process” from “hearing process” because the hearing assumes a process. These deletions not only reduce words but create better rhythm.

The new version:

The Municipal Utilities Authority (MUA) divided wetlands approval into three steps, each worth three points toward priority for sewage treatment capacity — application, hearing, and approval. ■

Footnote:

1. Examples of past participles for irregular verbs include arisen, begun, brought, caught, done, driven, given, known, paid, seen, spoken, stolen, thrown and written.