



When to Use Passive Voice

BY MARK COHEN

I dislike passive voice. As Dr. Seuss might have written, "I dislike it in a brief, I dislike it when I seek relief. I dislike it when I plead, I dislike it in a deed."¹

Active and Passive Voice

Passive voice is verbose and weak, and it allows writers to omit the actor's identity. Lawyers should aggressively edit for it, and almost always eliminate it. If you need a refresher, in the active voice the sentence's subject does something. In the passive voice something is done to the subject. *The court denied the motion* is active voice. *The motion was denied by the court* is passive voice. (*The motion was denied* is truncated passive voice because it omits the actor.)

Benefits of Active Voice

Legal writing experts encourage lawyers to use

the active voice.² One reason is the active voice usually requires fewer words. *The court denied the motion* contains five words. *The motion was denied by the court* contains seven words. Eliminating unnecessary words makes writing crisper. Additionally, many courts now impose page or word limits,³ so removing unnecessary words is a useful skill.

The active voice is also more effective because it conveys conviction and confidence. Writing in the passive voice is a subconscious tell. It suggests the author is less than certain. In fact, appellate lawyers that avoid passive voice are more likely to prevail on appeal.⁴

The active voice offers another advantage. It better reflects the chronology of events. In the example above, the court acted first; the motion did not decide itself.

The active voice also makes the reader's job easier because the reader expects the subject of

the sentence to perform the action of the verb. People usually talk in the active voice.

For lawyers drafting pleadings and documents containing factual allegations, the active voice offers still another advantage: writing in the active voice compels the writer to identify the actor, thus reducing the likelihood that a court will find a pleading defective. For instance, in *Coroles v. Sabey*, investors filed a complaint alleging they were "falsely told" certain famous athletes had invested in a venture.⁵ The defendants moved to dismiss and argued plaintiffs had not pleaded their fraud claims with the required specificity.⁶ In upholding the trial court's dismissal, the appellate court observed:

First, the section of the complaint that purports to describe the "material misrepresentations" that Defendants made to Plaintiffs falls short of doing so with particularity. For the most part, Plaintiffs use the passive voice in this section, failing to identify exactly who made the alleged misrepresentations. . . . Certainly one requirement for pleading fraud with particularity is to identify the offender.⁷

Other courts reached the same conclusion. In *Zito v. Leasecomm Corp.*, the court dismissed (as to some defendants) a RICO complaint alleging that an infomercial "was transmitted by electronic means."⁸ Noting the allegation was in the passive voice, the court observed:

No particular defendant is said to have committed this alleged crime. The failure to attribute *any* predicate acts, let alone a pattern of them, to several of the defendants not only dooms the complaint as to those defendants, but further complicates the task of assigning any particular alleged mailing or wire transmission to any particular scheme to defraud.⁹

When Passive Voice is Better

Despite the advantages the active voice offers, many experts are quick to add that passive voice is sometimes preferable. Bryan Garner suggests passive voice may be appropriate when the recipient of the action is more important than the actor (e.g., *the defendant was convicted*), when the actor is unknown (e.g., *the building was vandalized*), or when it sounds better (e.g., *our client's bail has been revoked*).¹⁰ Prof.

The fact that the actor is unimportant or unknown is not, by itself, necessarily a good reason to use the passive voice. Instead, I ask what construction requires the fewest words.

Cooney suggests using the passive voice when the actor is irrelevant (e.g., *Mr. Smith was served on March 12, 2004*).¹¹

I offer a refinement. The fact that the actor is unimportant or unknown is not, by itself, necessarily a good reason to use the passive voice. Instead, I ask what construction requires the fewest words. You could write, *the court convicted the defendant*, but that adds an extra word. You could write, *someone vandalized the building*, but that assumes only one vandal, so

you would have to write, *one or more people vandalized the building*, which adds words.

I assert the only other appropriate use of passive voice is to hide the blame (e.g., *mistakes were made* or *timely notice was not provided*) or de-emphasize wrongdoing (e.g., *the amount owed by the defendant was not paid by the due date*). Similarly, it may be wise to use passive voice to avoid an accusatory tone when alleging a judge made an error. For instance, in a motion for reconsideration you might write, *the hearsay evidence was admitted over plaintiff's objection*.

Conclusion

In legal writing, the active voice offers many advantages and is almost always preferable.

There are two circumstances where the passive voice may work better: (1) when the actor is unknown, unimportant, or some other good reason exists, *and* passive voice requires fewer words; and (2) when you wish to hide blame or de-emphasize wrongdoing. CL



Mark Cohen has practiced law for 35 years. He earned his law degree at the University of Colorado and an LLM at the University of Arkansas, where he also taught legal writing.

His practice emphasizes business and real estate litigation, and corporate veil issues. He also enjoys helping lawyers and organizations improve legal documents by translating them from legalese into plain English—mark@cohenslaw.com.

NOTES

1. The author analyzed *Green Eggs and Ham* and found not a single passive voice sentence.
2. See, e.g., Wydick, *Plain English for Lawyers* (5th ed. Carolina Academic Press 2005); Garner, *Legal Writing in Plain English* (2d ed. University of Chicago Press 2013).
3. See, e.g., CRCP 121, § 1-15(1), which imposes a 15-page limit for most motions, and C.A.R. 28, which imposes word limits on briefs.
4. Campbell, "Writing that Wins: An Empirical Study of Appellate Briefs," 46 Colo. Law. 85 (Mar. 2017).
5. Coroles v. Sabey, 79 P.3d 974, 981 (Utah App. 2003).
6. Rule 9(c) of the Utah Rules of Civil Procedure requires that a party "state with particularity the circumstances constituting fraud or mistake." That language is identical the requirement in FRCP 9(b).
7. Coroles, 79 P.3d at 981.
8. Zito v. Leasecomm Corp., No. 02 Civ. 8074 (GEL), 2003 WL 22251352 at *10 (S.D.N.Y. Sept. 30, 2003).
9. Id. at 10 (emphasis in original).
10. Garner, *Garner on Language and Writing* 53 (American Bar Association 2009).
11. Cooney, "Stay Active (Part 2)," *Mich. Bar J.* (June 2005).

EIDE LIKE
I'D LIKE CREDIBLE AND OBJECTIVE EXPERTISE

Have confidence in Eide Bailly's experienced and certified professionals. We can assist with economic damage calculations, forensic accounting and fraud investigations, computer forensics and eDiscovery management.



What inspires you, inspires us.
303.586.8504 | eidebailly.com/forensics

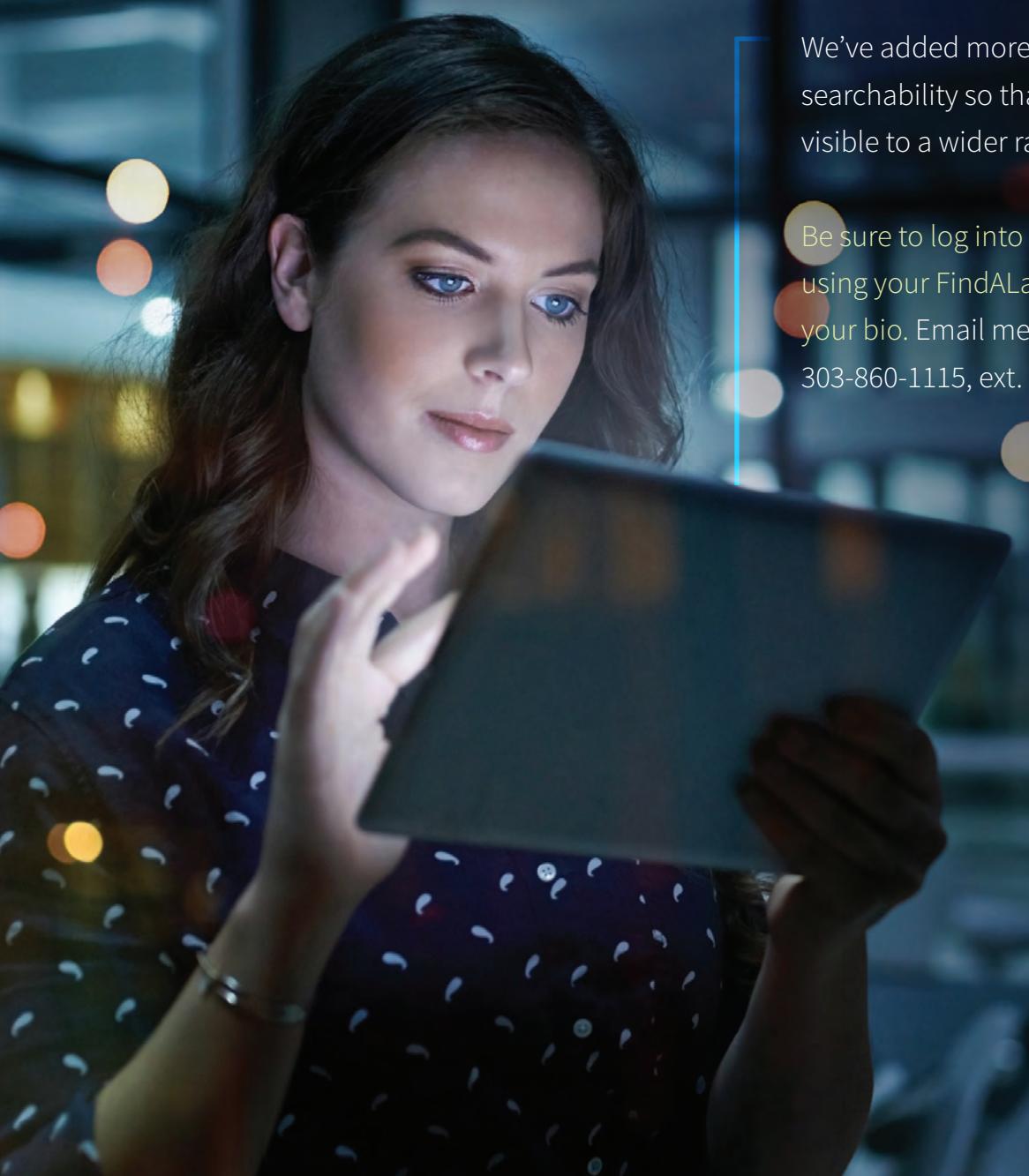
CBA Find A Lawyer *is now*

Licensed LawyerTM



We've added more categories and eased searchability so that your practice is more visible to a wider range of clients.

Be sure to log into **LicensedLawyer.org/CO** using your FindALawyer password to update your bio. Email membership@cobar.org or call 303-860-1115, ext. 1 for questions and support.



CBA[®]
Est. in 1897
Colorado Bar Association