On the Papers

WHY THE PASSIVE VOICE SHOULD BE USED AND APPRECIATED—NOT AVOIDED

GEORGE D. GOPEN

The author is Professor Emeritus of the Practice of Rhetoric at Duke University.

Our English teachers taught us to avoid the passive. They said it was weaker and more cumbersome than the more energetic, more compact active voice. That was bad advice. Very bad advice. Lawyers cannot write sophisticated, powerful prose without a skillful use of the passive voice. I could offer you a theological proof: God would not have created the passive had it no use. Or perhaps you might prefer the Darwinian argument: The passive could not have survived unless it was fittest for something. But I prefer this circular reasoning: The passive is better than the active in all cases in which the passive does a better job than the active. It only remains for a writer to recognize those cases and to know how to handle them.

Since grammar is often left untaught, I had better demonstrate the distinction between active and passive. In the active voice, the grammatical subject of the sentence is the agent (the doer) of the action:

Jack loves Jill.

Jack, the subject, does the loving.

To change this to passive, first we make the object (Jill) into the subject. Then we replace the verb (love) with a form of the verb "to be"—in this case "is"—plus a verbal adjective made out of the previous verb—in this case, "loved":

Jill is loved by Jack.

In the passive, the subject is the one acted upon.

What does the passive accomplish for us? It moves the furniture around. It is the feng shui of grammar. Why is that important for us? Readers take most of their clues for interpretation not from word choice but from word placement—from structural location. Where a word appears controls most of what the reader will do with it. When the only way to get the right word into the right place is to use the passive, then we must be thankful for its existence.

Here are the four most important ways in which the passive allows us to communicate far better than the active.

1. Whose Story Is This?

"Jack loves Jill." According to most readers, this is Jack's story. "Jill is loved by Jack." According to most readers, this is Jill's story. Readers expect—even assume—that a clause is the story of whoever or whatever shows up first, as the grammatical subject.

When all we have is Jack, Jill, and their passion, this may not seem a weighty concern. But when legal sentences refer to more information than this, it is another matter altogether. Consider the following set of sentences:

a. Smith had notified Jones on the morning of April 7 concerning the lost shipment.
b. On the morning of April 7, Jones had been informed of the lost shipment by Smith.
c. The lost shipment had been disclosed by Smith to Jones on the morning of April 7.

All three are "correct" and informative sentences, but they "mean" differently. To choose between them, you must not use not your ear but rather your eye and your mind. If you are trying to inform us what Smith did, then your best choice here is (a). If it is Jones's story you wish to tell, choose (b). If the story is intended to focus for the moment on the lost shipment, (c) will do the job best. Getting the right "whose story" into the "whose story" position is essential for clear legal prose. If the only way to do that furniture moving is to use the passive, as in (b) and (c) above, then thank goodness we have the passive.

2. The Passive More Effectively Indicates Passivity

If we are writing the statement of facts for a plaintiff in a torts case, we probably should have a section in which the plaintiff is constantly up front as to whose story it is, with many of the verbs being passive. The plaintiff was "done unto" by the nasty defendant. But in the section that

Published in *Litigation*, Volume 40, Number 2, Winter 2014. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

describes all the terrible things the defendant did, the defendant should constantly be up front, with active verbs showing all the nasty deeds the defendant actively did.

3. Get the Correct Information into the Stress Position

The single most important structural location in a sentence is the stress position, defined as any moment in which the grammatical structure of the sentence comes to a full halt. This happens at every period, but it also happens at any properly used colon or semicolon. Those are the moments when readers tend to summon extra emphasis. Putting the most important information elsewhere than in a stress position is the single most prevalent problem in legal writing today. If the passive is the only or the easiest or the best way to get the important words to the end of the sentence or just before a colon or semicolon, then thank goodness for the passive.

For an example, here is a set of facts:

- Jones made false representations to Smith about a piece of property in which Smith had a substantial interest.

- As a result of those false representations, Smith ceded his interest in the property.

Let us say we have been telling Smith's story for several sentences: Smith did this—Smith did that—and Smith did this other thing. Now is the appropriate moment for us to tell about his giving up his interest in the property; but more important to us than the ceding itself is our opportunity to point the finger at the villainous Jones. Which of these sentences would do the best job for us at this crucial moment?

1. By these false representations, Jones tricked Smith into ceding his interest in the property.
2. Because Smith believed Jones, he ceded his interest in the property.
3. These false representations by Jones led Smith to give up his interest in the property.
4. Smith was convinced to cede his interest in the property by the false representations of Jones.

All four of these sentences are "correct" English. They all sound fine. We cannot pick a winner by using the ear. Once again, we have to use the eye and the mind. The first three are in the active; the fourth is in the passive. If we want to continue the long-standing story of Smith and wind up pointing the finger of accusation at Jones, then sentence (4), despite its passive construction, will do by far the best job. Smith is once again in the "whose story" position, since this continues to be Smith's story; but the emphasis provided by the stress position turns the reader's attention, with energy, to the false representations of Jones. We could not have accomplished that without the passive. All the other sentences are good sentences, but they do not serve our present purpose as well.

4. Use the Passive to Get Rid of Agency

In English, there are two main ways of ridding a sentence of agency—of stating who did the action. One is nominalization—making the verb into a noun. Here is an active sentence:

1. We predicted a 4 percent rise in production.

"We" is the agent. To get rid of "us," make the verb "predicted" into a noun.

2. The prediction was for a 4 percent rise in production.

The agent has disappeared.

The only other way to rid a sentence of agency is to use the passive:

3. A 4 percent rise in production was predicted.

When you wish to get rid of agency, I urge you to avoid nominalization and use instead the passive. By using the passive, you retain the announcement of the action in the verb, which is where readers expect to find it. If you give sentence (2) to 12 readers, they will vary in their interpretations: Four are likely to judge it to be featuring the action of "predicting"; four are likely to say it is featuring the production "rising"; and four others might swear that it is stressing "producing." Give sentence (3) to the same 12 readers, and 11 or 12 will say it is emphasizing the "predicting." Sentence (3) will be by far the best if the next sentence focuses on the prediction: "That prediction turned out to be inaccurate. . . ."

Our English teachers have always taught us that to produce clear, forceful, communicative prose, we must constantly avoid the passive. It is perhaps the single worst idea we teach about the English language. It is impossible to write sophisticated legal prose about complex matters without skillfully employing the passive voice. With it, we can change the location of particular pieces of information so that they appear in the structural locations in which readers expect to find those pieces of information. Taken together, those locations control how readers go about reading. The action of a sentence is expected to be announced by the verb. The perspective of the action—whose story the sentence is meant to be—is expected to be revealed by whoever or whatever is the grammatical subject of the main clause. The most important piece of information—to be read with greater emphasis than all the other information—is expected to appear at the moment or moments of full grammatical closure, signaled by the presence of a colon, semicolon, or period. These are the concerns that control the interpretive process of most readers of English.

If the only way we can get the right information into the right places is to use the shape-changing passive voice, then thank goodness—or God, or Darwin—for the passive. ■

Published in *Litigation*, Volume 40, Number 2, Winter 2014. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.