

ORAL ARGUMENT REQUESTED

No. 01-13-00482-CV

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
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CHRISTOPHER A. PRINE
Clerk

**In the
COURT OF APPEALS
for the
FIRST DISTRICT OF TEXAS**

ATI Enterprises, Inc.,

Plaintiff-Appellant,

v.

Weingarten Realty Investors,

Defendant-Appellee.

**Appeal from the 189th District Court
Harris County, Texas**
Honorable Bill Burke, Judge Presiding

BRIEF FOR APPELLANT

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IDENTITY OF PARTIES AND COUNSEL

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Defendant-Appellee:	Weingarten Realty Investors
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REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument. This default judgment case presents an important and practical question about a 2012 amendment to Tex. R. Civ. P. 107.

STATEMENT OF THE CASE

Nature of the Case:	Weingarten sued ATI for unpaid lease obligations.
Trial Court:	Honorable Bill Burke, 189 th Judicial District Court, Harris County, Texas
Course of Proceedings and Trial Court's Disposition:	The trial court entered a default judgment for Weingarten for \$2,281,553.78 in actual damages, as well as expert and attorneys' fees.

ABBREVIATIONS AND RECORD REFERENCES

Abbreviations

“ATI” refers to Appellant ATI Enterprises, Inc.

“Weingarten” refers to Appellee Weingarten Realty Investors.

Record References

“CR” refers to the Clerk’s Record.

No Reporter’s Record was made of the default judgment hearing.

JURISDICTIONAL STATEMENT

This is a restricted appeal, taken on June 7, 2013, from a default judgment entered on March 18, 2013. Tex. R. App. P. 30. (CR 233, 236). Appellant ATI is a party affected by the trial court's judgment but did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of. (CR 236-37) Appellant did not timely file either a post judgment motion, request for findings of fact and conclusions of law, or notice of appeal (CR 237).

ISSUE PRESENTED

As recently amended, Texas Rule of Civil Procedure 107(b)(9) says a return of service must include “the name of the person who served or attempted to serve the process.” This return, signed by a private process server, says that the citation and petition “came to hand” on October 15, 2012 and then “were delivered” October 17, 2012. It does not say by whom they “were delivered.” Does this return, written in passive voice, affirmatively show strict compliance with Rule 107(b)(9)?

STATEMENT OF FACTS

Weingarten sued ATI on October 4, 2012. (CR 4) A private process server served citation on October 17, 2012. The relevant part of the return of service reads as follows:

BEFORE ME, the undersigned authority, on this day appeared, **CAREY LINDSEY**, personally before me and stated under oath as follows:

My name is **CAREY LINDSEY**. I am over the age of eighteen (18), I am not a party to this case, and have no interest in its outcome. I am a private process server authorized by and through the Supreme Court of Texas, am in all ways competent to make this affidavit, and this affidavit is based on personal knowledge. The facts stated herein are true and correct.

ON Monday, October 15, 2012 AT 04:53 PM - CITATION CORPORATE, ORIGINAL PETITION, EXHIBIT A-B CAME TO HAND.

ON Wednesday, October 17, 2012 AT 01:45 PM - THE ABOVE NAMED DOCUMENTS WERE DELIVERED TO: ATI ENTERPRISES INC (DBA ATI CAREER TRAINING CENTER) (A CORPORATION SYSTEM), C/O REGISTERED AGENT CT CORPORATION SYSTEM, Delivered to Marie Garcia, Senior Operations Specialist Service of Process for CT.Corporation 350 N ST PAUL ST, STE 2900, DALLAS, TX, 75201 BY PERSONAL SERVICE.

FURTHER AFFIANT SAYETH NOT.


CAREY LINDSEY, Affiant
ID: SCH 03114 expires: 11/30/2013

(CR 49, Appendix A)

ATI did not answer. Weingarten obtained a default judgment on March 18, 2013. (R 233).

SUMMARY OF THE ARGUMENT

In a restricted appeal, the record must show strict compliance with the service rules. Here, the return of service does not name the person who actually served the process, as required by a recent amendment to Tex. R. Civ. P. 107(b)(9). Indeed, by using passive voice to say the suit papers “were served,” the return uses language that is widely recognized as a way to *obscure* who did something. This Court should thus vacate the default judgment against ATI.

ARGUMENT

The issue in a restricted appeal is whether error is apparent from the face of the record. *Hubichi v. Festina*, 226 S.W.3d 405, 407 (Tex. 2007). No presumptions are made in favor of valid service. *Id.* “[F]ailure to affirmatively show strict compliance with the Rules of Civil Procedure renders the attempted service of process invalid and of no effect.” *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985); *see also McGraw-Hill, Inc. v. Futrell*, 823 S.W.2d 414, 416 (Tex. App.—Houston [1st Dist.] 1992, writ denied). Deficiency in the return of service constitutes error on the face of the record. *Insurance Co. of State of Pennsylvania v. Lejeune*, 297 S.W.3d 254, 256 (Tex. 2009). “Virtually any deviation will be sufficient to set aside the default judgment in a restricted appeal.” *In re Z.J.W.*, 185 S.W.3d 905, 907 (Tex. App.—Tyler 2006, no pet.).

The Texas Supreme Court amended Rule of Civil Procedure 107, effective January 1, 2012, to clarify the requirements for a valid return of service. (*See* Appendix B). Those amendments included a new subpart “b.” It provides: “The return together with any document to which it is attached, must include the following information,” and identifies eleven specific items. One of them is “the name of the person who served or attempted to serve the process.” Tex. R. Civ. P. 107(b)(9).

This return does not satisfy this requirement, as it says the citation and petition “were delivered.” Rather than an active statement – *i.e.*, “I then served the citation and petition,” or “My partner Joe Smith served the process” — the return uses textbook passive voice. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 643 (2d ed. 1995) (“‘Voice’ refers to the relationship between the subject of a clause and its verb: if the verb performs the action of the subject (as in ‘Jane hit the ball’), the verb is active, whereas if it is acted upon (as in ‘The ball was hit by Jane’), the verb is passive.”) (Appendix C at 2).

The purpose of passive voice is to *conceal* the identity of the actor. It cannot “name the person who served the process” because it cannot name *anyone*. Bryan Garner explains:

“2.21 Use the active voice.

Voice, in language, refers to the relationship between the subject and the verb in any sentence that has a direct object. If the subject

performs the action of the verb, the sentence is active; if the subject is the recipient of the action, then it's passive. Here's the difference:

Active

The court reversed the judgment.

Passive

The judgment was reversed by the court.

. . .

Passively phrased sentences are often more abstract, since you need not mention the actor:

The judgment was reversed.

Or, worse yet:

Notice must be given.

Fine, but by whom? How much better to write:

X must give notice.

The passive voice may lead merely to vagueness, but it also lends itself to obfuscation. For example, 'A mistake was made' sounds like an attempt to conceal the blameworthy"

BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 40-41 (2d ed. 2002)

(emphasis added) (Appendix C at 7). Strunk and White agree:

"The active voice is usually more direct and vigorous than the passive:

I shall always remember my first visit to Boston.

This is much better than

My first visit to Boston will always be remembered by me.

The latter sentence is less direct, less bold, and less concise. If the writer tries to make it more concise by omitting ‘by me,’

My first visit to Boston will always be remembered,

it becomes indefinite: **is it the writer or some undisclosed person or the world at large** that will always remember this visit?”

WILLIAM STRUNK JR. & E.B. WHITE, THE ELEMENTS OF STYLE 18 (4th ed. 2000) (emphasis added) (Appendix C at 9). *See also* WILLIAM A. SABIN, THE GREGG REFERENCE MANUAL 223 ¶ 1037 (8th ed. 1996) (“The passive form of a verb is appropriate (1) when you want to emphasize the receiver of the action (by making it the subject) or (2) when the doer of the action is not important or is **deliberately not mentioned**.” (emphasis added)) (Appendix C at 9).

Texas courts recognize these principles. For example, in *Pisharodi v. Barrash*, the Corpus Christi Court of Appeals affirmed a no-evidence summary judgment with this reasoning:

The issue is whether appellant's proffered summary-judgment evidence establishes that appellees republished Dr. Barrash's statements outside the quasi-judicial context. We conclude that it does not. Dr. Pisharodi's affidavit uses the passive voice to assert that the letter “has been circulated,” and that others “have become aware” and “have been told” of the letter. Dr. Pisharodi also asserts that *he* was compelled to share the letter with others. Nowhere does he assert that *appellees* republished, or authorized republication of, the allegedly defamatory statements in the letter.

No. 13-05-744-CV, 2007 WL 2729177 at * 4 (Tex. App.—Corpus Christi 2007, pet. denied) (emphasis in original). *See also* *Nelson v. State*, 129 S.W.3d 108, 112

(Tex. Crim. App. 2008) (“In this clause it makes no difference who discovers the disqualification or how it is brought to the attention of the trial court; that portion of the clause is in the passive voice.”). *See generally Adkins v. General Motors Corp.*, 556 F. Supp. 452, 455 (S.D. Ohio 1983) (“The statute is not particularly helpful, since it speaks in the passive voice (‘suits . . . may be brought’), and does not identify who can bring suit.”).

This return does not give “the name of the person who served . . . the process.” A reader could guess that process was served by Carey Lindsay, who verified the return. (CR 49) Any such guess, however, would be precisely the kind of “presumption” in favor of service that a restricted appeal does not allow. *See supra* at 4. It would be particularly wrong here, where such a guess would flow from the passive voice – language recognized by courts and commentators as *concealing* the identity of the actor. A textbook example of evasive language is plainly not what the Supreme Court intended with its amendment to Rule 107, and this Court should vacate the default judgment based upon that language here.

CONCLUSION

For the reasons stated above, Appellate requests that the default judgment against it be vacated.

Respectfully submitted,

/s/ David S. Coale

David S. Coale

State Bar No. 00787358

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Attorneys for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned certified that on August 22, 2013, the foregoing Brief of Appellant was electronically filed with the Clerk for the First Court of Appeals. A copy was also served by certified mail and simultaneously served by email upon the following:

Yasmin Islam Atasi
Stephen R. Clarke
Winstead, P.C.
1100 JP Morgan Chase Tower
600 Travis Street
Houston, Texas 77002

/s/ David S. Coale

David S. Coale

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the typeface requirements of Tex. R. App. P. 9.4(3) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), if applicable, because it contains 1,370 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(l).

DATED: August 22, 2013.

/s/ David S. Coale

David S. Coale

Attorney of Record for Plaintiff-Appellant

000346750.v.1

APPENDIX A

CAUSE NO. 2012-58785

WEINGARTEN REALTY INVESTORS,
PLAINTIFF

VS.

ATI ENTERPRISES, INC, D/B/A ATI
CAREER TRAINING CENTER,
DEFENDANT

§
§
§
§
§
§
§

IN THE 189TH JUDICIAL DISTRICT COURT

HARRIS COUNTY, TX

AFFIDAVIT OF SERVICE

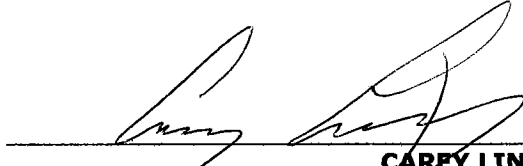
BEFORE ME, the undersigned authority, on this day appeared, **CAREY LINDSEY**, personally before me and stated under oath as follows:

My name is **CAREY LINDSEY**. I am over the age of eighteen (18), I am not a party to this case, and have no interest in its outcome. I am a private process server authorized by and through the Supreme Court of Texas, am in all ways competent to make this affidavit, and this affidavit is based on personal knowledge. The facts stated herein are true and correct.

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FURTHER AFFIANT SAYETH NOT.

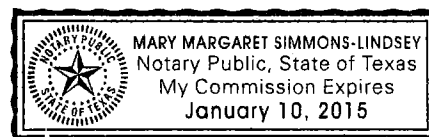


CAREY LINDSEY, Affiant
ID: SCH 03114 expires: 11/30/2013

Before me personally appeared the above-named affiant, who, being first duly sworn, stated upon oath that the above-stated facts are true and correct and within his or her personal knowledge, and subscribed the same on this 19 day of oct, 2012.



Notary Public In And for the State of Texas



APPENDIX B

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 11- 9250

**FINAL APPROVAL OF AMENDMENTS TO
TEXAS RULES OF CIVIL PROCEDURE
99, 107, 108, 117, 239, 534, 536a, 688, 689, 737.4, 742, AND 742a**

ORDERED that:

1. Pursuant to section 22.004 of the Texas Government Code, and in accordance with the Act of May 19, 2011, 82nd Leg., R.S., ch. 345 (HB 962), Rules of Civil Procedure 99, 107, 108, 117, 239, 534, 536a, 688, 689, 737.4, 742, and 742a, are amended as follows.


2. By Order dated October 17, 2011, in Misc. Docket No. 11-9214, the Court proposed amendments to Rules 99, 107, 108, 117, 239, 536a, 688, 689, 737.4, 742, and 742a of the Texas Rules of Civil Procedure and invited public comment. Following public comment, the Court made additional revisions to the rules. This Order contains the final version of amended Rules of Civil Procedure 99, 107, 108, 117, 239, 534, 536a, 688, 689, 737.4, 742, and 742a that take effect January 1, 2012.


3. The provisions allowing a return of service to be filed electronically or by facsimile when those methods of filing are available supersede any contradictory local rules or court orders.

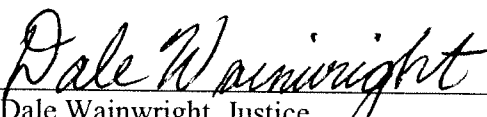
4. The Clerk is directed to:

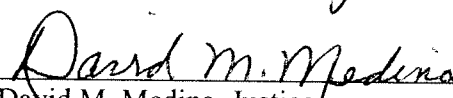
- a. file a copy of this Order with the Secretary of State;
- b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;
- c. send a copy of this Order to each elected member of the Legislature; and
- d. submit a copy of the Order for publication in the *Texas Register*.


Dated: December 12th, 2011.

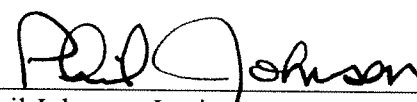

Wallace B. Jefferson, Chief Justice

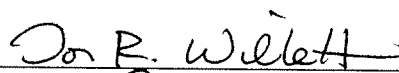

Nathan L. Hecht, Justice

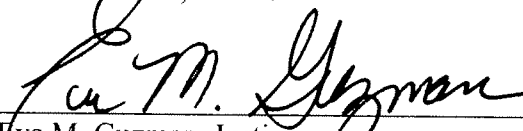

Dale Wainwright, Justice

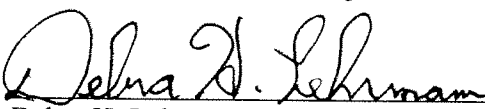

David M. Medina, Justice


Paul W. Green, Justice


Phil Johnson, Justice


Don R. Willett, Justice


Eya M. Guzman, Justice


Debra H. Lehrmann, Justice

RULE 99. ISSUANCE AND FORM OF CITATION

a. **Issuance.** Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Upon request, separate or additional citations shall be issued by the clerk. The clerk must retain a copy of the citation in the court's file.

...

RULE 107. RETURN OF SERVICE

(a) ~~The return of the officer or authorized person executing the citation must complete a return of service. The return may, but need not, shall be endorsed on or attached to the citation. same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified.~~

(b) The return, together with any document to which it is attached, must include the following information:

- (1) the cause number and case name;
- (2) the court in which the case is filed;
- (3) a description of what was served;
- (4) the date and time the process was received for service;
- (5) the person or entity served;
- (6) the address served;
- (7) the date of service or attempted service;
- (8) the manner of delivery of service or attempted service;
- (9) the name of the person who served or attempted to serve
the process;

(10) if the person named in (9) is a process server certified under
order of the Supreme Court, his or her identification
number and the expiration date of his or her certification; and

(11) any other information required by rule or law.

(c) When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer or authorized person must also contain the return receipt with the addressee's signature.

(d) When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if ~~he can~~ ascertainable.

(e) The officer or authorized person who serves or attempts to serve a citation must sign the return. If the return is signed by a person other than a sheriff, constable, or the clerk of the court, the return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form:

"My name is _____, my date of birth is

(First) (Middle) (Last)

_____, and my address is _____, _____, _____, and

(Street) (City) (State) (Zip Code)

_____. I declare under penalty of perjury that the foregoing is
(Country)

true and correct.

Executed in _____ County, State of _____, on the _____ day of _____,

(Month) (Year)

Declarant"

(f) Where citation is executed by an alternative method as authorized by Rule 106, proof of service shall be made in the manner ordered by the court.

(g) The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if those methods of filing are available.

(h) No default judgment shall be granted in any cause until ~~the citation, or process under Rules 108 or 108a, with~~ proof of service as provided by this rule or by Rules 108 or 108a, or as ordered by the court in the event citation is executed by an alternative method under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment.

RULE 108. DEFENDANT WITHOUT SERVICE IN ANOTHER STATE

Where the defendant is absent from the State, or is a nonresident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice may be served by any disinterested person who is not less than eighteen years of age, competent to make oath of the fact in the same manner as provided in Rule 106 hereof. The return of service in such cases ~~shall be endorsed on or attached to the original notice, and shall be completed in accordance with the form provided in Rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer.~~ A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State to the full extent that he may be required to appear and answer under the Constitution of the United States in an action either in rem or in personam.

RULE 117. RETURN OF CITATION BY PUBLICATION

The return of the officer executing such citation ~~shall be indorsed or attached to the same, and show how and when the citation was executed, specifying the dates of such publication, be signed by him officially and shall be accompanied by a printed copy of such publication.~~

RULE 239. JUDGMENT BY DEFAULT

Upon such call of the docket, or at any time after a defendant is required to answer, the plaintiff may in term time take judgment by default against such defendant if he has not previously filed an answer, and provided that ~~the citation with the officer's return thereon~~ return of service shall have been on file with the clerk for the length of time required by Rule 107.

RULE 534. ISSUANCE AND FORM OF CITATION

- (a) **Issuance.** When a claim or demand is lodged with a justice for suit, the clerk when requested shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition if any is filed. Upon request, separate or additional citations shall be issued by the clerk. The clerk must retain a copy of the citation in the court's file.

...

RULE 536a. DUTY OF OFFICER OR PERSON RECEIVING AND RETURN OF CITATION

- (a) The officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay.

(b) The ~~return of the~~ officer or authorized person executing the citation must complete a return of service. ~~The return may, but need not, shall be endorsed on or attached to the same citation. ; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified.~~

- (c) The return, together with any document to which it is attached, must include the following information:

- (1) the cause number and case name;
- (2) the court in which the case is filed;
- (3) a description of what was served;
- (4) the date and time the process was received for service;
- (5) the person or entity served;
- (6) the address served;

- (7) the date of service or attempted service;
- (8) the manner of delivery of service or attempted service;
- (9) the name of the person who served or attempted to serve
the process;
- (10) if the person named in (9) is a process server certified under
order of the Supreme Court, his or her identification
number and the expiration date of his or her certification; and
- (11) any other information required by rule or law.

(d) When the citation was served by registered or certified mail as authorized by Rule 536, the return by the officer or authorized person must also contain the receipt with the addressee's signature.

(e) When the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertainable.

(f) The officer or authorized person who serves or attempts to serve a citation must sign the return. If the return is signed by a person other than a sheriff, constable, or the clerk of the court, the return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form:

"My name is _____, my date of birth is
(First) (Middle) (Last)

_____, and my address is _____, and
(Street) (City) (State) (Zip Code)

_____. I declare under penalty of perjury that the foregoing is
(Country)

true and correct.

Executed in _____ County, State of _____, on the _____ day of _____,
(Month) (Year)

Declarant”

(g) Where citation is executed by an alternative method as authorized by Rule 536, proof of service shall be made in the manner ordered by the court.

(h) The return and any document to which it is attached must be filed with the court and may be filed electronically or by facsimile, if those methods of filing are available.

(i) No default judgment shall be granted in any cause until ~~the citation with~~ proof of service as provided by this rule, or as ordered by the court in the event citation is executed by an alternative method under Rule 536, shall have been on file with the clerk of the court three (3) days, exclusive of the day of filing and the day of judgment.

RULE 688. CLERK TO ISSUE WRIT

When the petition, order of the judge and bond have been filed, the clerk shall issue the temporary restraining order or temporary injunction, as the case may be, in conformity with the terms of the order, and deliver the same to the sheriff or any constable of the county of the residence of the person enjoined, or to the applicant, as the latter shall direct. If several persons are enjoined, residing in different counties, the clerk shall issue such additional copies of the writ as shall be requested by the applicant. The clerk must retain a copy of the temporary restraining order or temporary injunction in the court's file.

RULE 689. SERVICE AND RETURN

The officer receiving a writ of injunction shall indorse thereon the date of its receipt by him, and shall forthwith execute the same by delivering to the party enjoined a true copy thereof. ~~The original shall be returned to the court from which it issued on or before the return day named therein with the action of the officer indorsed thereon or annexed thereto showing how and when he executed the same.~~ The officer must complete and file a return in accordance with Rule 107.

RULE 737.4. SERVICE AND RETURN OF CITATION; ALTERNATIVE SERVICE OF CITATION

(a) *Service and Return of Citation.* The sheriff, constable, or other person authorized by Rule 536 who receives the citation must serve the citation by delivering a copy of it, along with a copy of the petition and any attachments, to the landlord at least six days before the appearance date. At least one day before the appearance date, the person serving the citation must file a return of

~~service with the court that return the citation, with the action written on the citation, to the justice who issued the citation. The citation must be issued, served, and returned in like manner as ordinary citations issued from a justice court.~~

RULE 742. SERVICE OF CITATION

The officer receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he must complete and file a return of service in accordance with Rule 536a with the court that shall return such citation, with his action written thereon, to the justice who issued the citation same.

RULE 742a. SERVICE BY DELIVERY TO PREMISES

...

(d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and on or before the day assigned for trial he must complete and file a return of service in accordance with Rule 536a with the court that shall return such citation, with his action written thereon, to the justice who issued the citation same.

APPENDIX C

A DICTIONARY OF
MODERN
LEGAL USAGE

SECOND EDITION

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pass. **A. Judicial Senses.** The phrase *pass on* or *pass upon* has a peculiar meaning in legal writing, namely, "to decide." It is used primarily of questions of law: "When our courts first came to *pass upon* constitutional questions, what they read in Coke's Second Institute . . . appeared but a common-law version of what they read in French and Dutch publicists as to an eternal and immutable natural law . . ." Roscoe Pound, *The Spirit of the Common Law* 75 (1921; repr. 1963)./ "The state courts have power to *pass on* both state and federal questions . . ." Charles A. Wright, *The Law of Federal Courts* 752 (4th ed. 1983).

Yet the phrase has been used also in reference to juries, which of course decide questions of fact: "It is not the province of this court to *pass upon* the weight of the evidence; we think there was a fair question for the jury, and they must *pass upon* it uninfluenced by any intimation from us."/ "Some courts have nearly gone to the extent of holding that where the language is severe, the jury should *pass upon* the case under proper instructions."

B. Testamentary Senses. In the context of wills and estates, *pass* (= to transfer or be transferred) may be either transitive or intransitive. Ordinarily it is intransitive—e.g.: "The purpose of the makers was that the property of the one first to die *pass* at his or her death as he or she directed . . ."/ "Intestate real property *passes* by descent and intestate personal property *passes* by distribution."

But it may also be transitive—e.g.: "The instrument is supposed to *pass* property only upon death."/ "The judgment of the county court construing the first paragraph of the will to *pass* all personal property possessed by the testator at his death to his widow is affirmed."

passable; passible. The former means "capable of being passed; open"; the latter means "feeling; susceptible to pain or suffering." Cf. **impassible.** See -ABLE (A).

passerby. Pl. *passersby*.

passim (= here and there) is used in citing an authority in a general way and indicates that the point at hand is treated throughout the work. Specific references are preferred in legal citations; when a general reference is called for, see *generally* is the signal most frequently used. *Passim* is especially useful in the index of authorities contained in the front matter of a brief.

passing off, as a noun phrase, should be two words. A few writers have hyphenated the

phrase—e.g.: Suman Naresh, *Passing-Off, Goodwill, and False Advertising*, 45 Cambridge L.J. 97 (1986)—but this rendering of the phrase is recommended only when it acts as a PHRASAL ADJECTIVE. See **palming off**.

PASSIVE VOICE. "Avoid the passive," one often hears; yet many do not really understand what voice is in grammar, let alone what the passive voice is. "Voice" refers to the relationship between the subject of a clause and its verb: if the verb performs the action of the subject (as in "Jane hit the ball"), the verb is active, whereas if it is acted upon (as in "The ball was hit by Jane"), the verb is passive.

True, the two sentences say essentially the same thing, but the emphasis is changed. The passive results in a wordier sentence, disrupts the ordinary sequence of events in the reader's mind, often causes DANGLERS, and often obscures the actor. Consider: "The ball was hit." As in that sentence, passive voice may lead to vagueness, or lend itself to purposeful obfuscation (see (E) below). Small wonder that politicians find so many uses for the passive (e.g., "Mistakes were made"—President Reagan's response to intense questioning about the Iran-Contra debacle). See PLAIN LANGUAGE (D).

More to the point, although the passive voice has its occasional legitimate uses—usually, when the actor is either unimportant or unknown—its frequent use makes a piece of writing much less interesting and readable. Avoiding the passive is good general advice; but one should not make a fetish of it. Following are different types of passive voice with their own peculiar problems, along with suggested remedies.

A. The Otiose Passive. This is the type of passive that results from lazy thinking, as in "The ball was hit by Jane." This syntax subverts the English-speaking reader's reasonable expectation of a direct actor-action-consequence sequence, unless a departure from that sequence is somehow an improvement. E.g., "Common trust fund legislation is addressed to [read *addresses*] a problem appropriate for state action."/ "The fee simple interest could have been conveyed by her to the defendant." [Read *She could have conveyed the fee simple interest to the defendant.*]/ "It is not found that [read *The court does not find that*] defendant did so with the intent and purpose of destroying the value of plaintiff's interest in the promissory note, as the complaint alleges."/ "After both sides had rested, a conference was had between the trial judge and counsel [read *the trial judge and counsel conferred* (or *had a conference*)]."/ "It is insisted by Sue [read *Sue insists*] that the power

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The third passage is earthy. The writer not only uses the first person but also talks to us directly. The tone is unusually informal for legal writing. The writer's voice is everywhere apparent. He pokes fun at the vocabulary of psychologists and, one infers, disdains the jargon of lawyers. He uses the barnyard metaphor of having *truth by the tail* and trying to *work up over the rump*. The pace is leisurely, as the writer elaborates the ideas in the second paragraph one by one. The vocabulary is that of educated colloquial English.

Despite marked differences, the word choice in all three quotations is within acceptable limits for legal writing. The most formal passage is not impenetrably abstruse, nor is the least formal passage breezy or chummy. Most 20th-century legal writing lies somewhere between the first and the second examples; much of what will be written in the 21st century ought to approach the third. We might advantageously adopt a style more relaxed than the one that talks about "perceiving truths" and that wonders whether "we may ascertain with increasing certainty the extent and nature of those truths." For all that, we might better have truth by the tail and start working up over the rump.

GRAMMAR AND SYNTAX

2.21 Use the active voice.

Voice, in language, refers to the relationship between the subject and the verb in any sentence that has a direct object. If the subject performs the action of the verb, the sentence is active; if the subject is the recipient of the action, then it's passive. Here's the difference:

Active

The court reversed the judgment.

Passive

The judgment was reversed by the court.

The two sentences say essentially the same thing, but the focus differs, the emphasis has changed. The subject and the object swap places. Passively phrased sentences are often more abstract, since you need not mention the actor:

The judgment was reversed.

Or, worse yet:

Notice must be given.

Fine, but by whom? How much better to write:

X must give notice.

The passive voice may lead merely to vagueness, but it also lends itself to obfuscation. For example, "A mistake was made" sounds like an attempt to conceal the blameworthy (the writer, no doubt?).

Even so, the passive results more often from lazy thinking than from deception. Whatever the cause, the passive can lead to problems, as when a federal judge observed: "The statute is not particularly helpful, since it speaks in the passive voice ('suits . . . may be brought'), and does not identify who can bring suit."²⁶

The English-speaking reader expects a true sequence in actor, action, and recipient—as opposed to an inverted sequence—unless an inversion somehow improves the statement. Typically, changing a passive voice to active saves words and makes reading easier:

Not this:

The fee simple interest could have
been conveyed by her to the defendant.

But this:

She could have conveyed the fee
simple interest to the defendant.

26. *Adkins v. General Motors Corp.*, 556 F. Supp. 452, 455 (S.D. Ohio 1983).

THE
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BY
WILLIAM STRUNK Jr.

*With Revisions, an Introduction,
and a Chapter on Writing*

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Boston London Toronto Sydney Tokyo Singapore

14. Use the active voice.

The active voice is usually more direct and vigorous than the passive:

I shall always remember my first visit to Boston.

This is much better than

My first visit to Boston will always be remembered by me.

The latter sentence is less direct, less bold, and less concise. If the writer tries to make it more concise by omitting "by me,"

My first visit to Boston will always be remembered, it becomes indefinite: is it the writer or some undisclosed person or the world at large that will always remember this visit?

This rule does not, of course, mean that the writer should entirely discard the passive voice, which is frequently convenient and sometimes necessary.

The dramatists of the Restoration are little esteemed today.

Modern readers have little esteem for the dramatists of the Restoration.

The first would be the preferred form in a paragraph on the dramatists of the Restoration, the second in a paragraph on the tastes of modern readers. The need to make a particular word the subject of the sentence will often, as in these examples, determine which voice is to be used.

The habitual use of the active voice, however, makes for forcible writing. This is true not only in narrative concerned principally with action but in writing of any kind. Many a tame sentence of description or exposition can be made lively and emphatic by substituting a transitive in the active voice for some such perfunctory expression as *there is* or *could be heard*.

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- b. Verbs ending in *s*, *x*, *z*, *sh*, *ch*, or *o* add *es*.

he misses
she fixes

it buzzes
he wishes

she watches
it does

- c. Verbs ending in a vowel plus *y* add *s*; those ending in a consonant plus *y* change *y* to *i* and add *es*.

say: he says
convey: she conveys

employ: she employs
buy: he buys

try: it tries
apply: she applies

- d. Verbs ending in *i* simply add *s*.

taxi: he taxis

ski: she skis

- e. The verb *to be* is irregular since *be*, the first principal part, is not used in the present tense.

I am
you are
he, she, it is

we are
you are
they are

- f. A few verbs remain unchanged in the third person singular.

PRESENT TENSE: he may
PAST TENSE: he might

she can
she could

it will
it would

➤ See page 260 for a usage note on *Don't*.

Passive Forms

- 1036 The passive forms of a verb consist of some form of the helping verb *to be* plus the past participle of the main verb.

it is intended (present passive of *intend*)
we were expected (past passive of *expect*)
they will be audited (future passive of *audit*)
she has been notified (present perfect passive of *notify*)
you had been told (past perfect passive of *tell*)
he will have been given (future perfect passive of *give*)

- 1037 A *passive* verb directs the action toward the subject. An *active* verb directs the action toward an object.

ACTIVE: Melanie (*subject*) will lead (*verb*) the discussion (*object*).
PASSIVE: The discussion (*subject*) will be led (*verb*) by Melanie.

➤ For additional examples, see the entry for *Voice* on page 525.

- a. The passive form of a verb is appropriate (1) when you want to emphasize the *receiver* of the action (by making it the subject) or (2) when the *doer* of the action is not important or is deliberately not mentioned.

I was seriously injured as a result of your negligence. (Emphasizes *I*, the receiver of the action. **RATHER THAN:** Your negligence seriously injured me.)

This proposal is based on a careful analysis of all available research studies. (Emphasizes the basis for the proposal; the name of the person who drafted the proposal is not important.)

Unfortunately, the decision was made without consulting any of the board members. (Emphasizes how the decision was made and deliberately omits the name of the person responsible.)

Fred Allen once defined a conference as a gathering of important people who "singly can do nothing but together can decide that nothing can be done."

(Continued on page 224.)