

How to Write: A Memorandum from a Curmudgeon

To: New Associate

From: Curmudgeon

Welcome to the firm.

To work at this firm, you must know how to write. Here are the rules. Follow them.

I make three assumptions about all of your written work. First, it will contain no typographical errors. Second, it will contain no grammatical errors. Third, all citation forms will be correct. Please review your written work before you hand it to me to be sure that my assumptions hold true.

Style

Here are the rules of style. Follow them.

First, write in short sentences. If a sentence runs on for more than forty words, break the sentence in half. Make it two sentences.

Second, put two or three paragraphs on a typed page. If a single paragraph fills the whole page, break the paragraph in half. Make it two paragraphs.

Third, use only the active voice. At this firm, we write: "Jim threw the ball." Not: "The ball was thrown by Jim."

Fourth, when you have a choice, always use an action verb instead of the verb "to be" and an adjective. At this firm, we write: "The rule applies here." Not: "The rule is applicable here."

Fifth, start each paragraph with a topic sentence. This is important. Few people do it. You will do it. If you don't know what a topic sentence is, look it up. Now.

Sixth, use many headings and sub-headings to break up your memorandum or brief. Little pieces are easier to read.

Seventh, when you have a choice between using the word "which" and using the word "that," the word "that" is correct. (There are exceptions to this rule. Do not worry about them. If you follow my rule, you will be right 95 percent of the time. If I think that an exception applies, I will make the change.)

Eighth, do not start a sentence with the word "however." I don't care if it is technically grammatical; it is still bad style. Rewrite the sentence to put the word "however" in the middle of the sentence. (Again, there are exceptions to this rule. Do not worry about them. If you follow my rule, you will be right 95 percent of the time. If I think that an exception applies, I will make the change.)

Ninth, do not use the phrase "in order to." Use "to" instead. Why spend three words where one will do? (Apply the same principle anywhere else you can.)

Finally, it is *your* obligation to follow these rules. It is not my obligation to find your mistakes and fix them. You must develop the self-discipline to read your final work with an eye toward finding and correcting each of the nine errors listed above.

I have a great deal of self-discipline. I will read your work and fix your mistakes. This, however, is not my job. It is better for your career if you fix your own mistakes; I do not enjoy fixing them for you.

Discussing a Case

When you are writing a legal memorandum for internal use, there is only one proper way to discuss a case. This is the way:

In *Smith v. Jones*,

1. Somebody sued somebody for something.
2. The trial court held something. (The trial court did not “discuss” something or “analyze” something or “believe” something; it *held* something. Ordinarily, a trial court grants or denies a motion, or enters a judgment. Use the proper verb to describe the holding.)
3. The appellate court held something. (Ordinarily, an appellate court will affirm, reverse, vacate, or remand. Use the proper verb to describe the holding.)
4. Now, you can say anything else about the case that you care to.

If you start chatting about the case before you have covered items 1, 2, and 3, I will notice your error. I will change your memorandum and make it right. I will know that you lack self-discipline.

Why do I insist on a rigid formula for discussing cases? Because my clients prefer to win.

When I discuss a case in a brief, I think carefully about the persuasive force of the precedent. I prefer to cite cases where the trial court did what my *opponent* is seeking here, and the appellate court *reversed*. By discussing the holding of that case in my brief, I tell my trial judge that she could do what the other guy wants her to do, but that the appellate court would reverse. Judges do not like to be reversed. Accordingly, if a precedent contains the implicit threat of reversal, I will use that threat (gently, of course) when I discuss the case in a brief.

The second most persuasive precedent is a case in which the trial court did what I am asking the trial court to do in my case, and the appellate court affirmed. In that situation, I am able to tell my trial judge that if she does what I am asking her to do, she will not be reversed. There is no implicit threat here, but there is at least a guarantee of affirmance.

The least helpful case is one in which a court simply discusses an issue in *dictum*. If that is the best case that you can find, I will cite that case in my brief. Beggars can't be choosers.

Your memorandum, however, *must* tell me the holding of the case first. If you do not tell me the holding in your memo,

then I will not believe that you read and understood the holding. I will be forced to look up the case and read it myself. I will not like this.

The Structure of a Brief

Any child can write a persuasive brief. Here's the magic formula. Follow it.

I. *Introduction*

An introduction contains one or two short paragraphs. It has no footnotes. It says something enticing about the case.

II. *Allegations of The Complaint* (in a motion to dismiss) *or*

Undisputed Facts (in a summary judgment motion)

or

Facts (for most other briefs):

In short sentences, bring the reader up to speed.

Include in your statement of facts every fact that you will later mention in your argument. Do not include facts that are unnecessary for your argument. Provide citations to the record for every fact.

III. *Argument*

Our client is entitled to win for [three] reasons. First, [reason one]. Second, [reason two]. Third, [reason three].

A. *Our Client Should Win for Reason One*

The other guy falls prey to reason one. Our client therefore wins for reason one.

In this state, the rule is that litigants win for reason one. For example, in *Smith v. Jones* [discuss case, as per the formula above].

Similarly, in *Doe v. Doe*, [discuss case, as per the formula above].

[One sentence or paragraph explaining why our situation is indistinguishable.]

Therefore, our client wins for reason one.

B. *Our Client Should Win for Reason Two*

Etc.

When writing your argument, remember that we are practitioners, not academics. Your professors discussed cases because they found cases to be interesting. We prefer statutes or rules to cases.

If there is a statute or rule on point, discuss it before you begin discussing the case law.

IV. *Conclusion*

For these reasons, this court should [grant our motion or deny the other guy's motion].

Put a date on it here. Otherwise, you (or some other person using the brief as a model in the future) will

regret not knowing when the brief was written. Paper certificates of service can get torn off and lost, and electronic proofs of service are often in separate documents.

The Style of a Brief

There are matters of style unique to writing a brief. First, when writing a brief, avoid alphabet soup. Judges read many briefs every day. Most lawyers use alphabetical short forms for the names of parties, statutes, and agencies. Those alphabetical short forms become meaningless after a judge has read the first twenty or thirty briefs. If ABC Co. thinks FDA regulation triggers MDA preemption in the U.S., then ABC Co. will lose. In this firm, we use words, not gibberish.

This rule applies in particular to selecting short forms for parties' names. Use words, not letters, as a short form. For example, "National Superior Fur Dressing & Dying Company" does *not* become "NSFDDC." This is gibberish.

There are exceptions to this rule. They include IBM, AT&T, GM, and VW. If I think that an exception applies, I will make the change. You use words, not letters.

When selecting the words to be used as the short form, think about the persuasive force of the words. For example, National Superior Fur Dressing & Dying Company could be shortened to "National Superior" if you would like the company to sound like a large corporation. On the other hand, the short form should be "Superior Fur" if you want the company to sound like a Ma-and-Pa outfit.

Second, unless court rules require otherwise, use the parties' names, not their status in litigation. Thus, we represent "Superior Fur"; we do not represent "the defendant." (Once again, there may be rare exceptions to this rule. We might represent "the defendant" rather than "Vlad the Impaler." Again, you do not decide to use an exception. If one is appropriate, I will make the change.)

Third, use block quotations rarely, if at all. Your judge is busy. The judge's eye will naturally jump over a block quotation and go on to the next line of text. By including a block quotation, you are inviting the judge not to read the critical quotation.

You can avoid block quotations by using quotations of fewer than fifty words. If necessary, use a quotation that is forty-nine words long. Then say: "The Court went on" Then use another forty-nine-word quotation. This will trick the judge into reading the quotation. This trick is not simply permitted; it is required at this law firm.

If you feel compelled to include a block quotation in a brief, assume that the judge will not read it. You must trick the judge into learning the content of the block quotation. You do this by summarizing the substance of the block quotation in the sentence immediately preceding it.

Thus, do not introduce a block quote: "In *Smith v. Jones*, the Court held: . . ." Rather, introduce the quote: "In *Smith v. Jones*, the Court held that our client wins and the other guy loses: . . ." By using this form, the judge will get your point even when he does not read the block quotation.

Fourth, use argumentative headings. “This Court Should Grant Summary Judgment Because There Is No Private Right of Action under the Federal Food, Drug and Cosmetic Act.”
Not: “The Relevant Provisions of the FFDCA.”

Finally, keep the brief as short as humanly possible.

Those are the rules. Follow them.

We’ll get along just fine.

Curmudgeon