

# LEGAL RESEARCH AND WRITING: USING PRECEDENT AND POINT FIRST WRITING

September 20, 2024



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# LEGAL MEMORANDA



What organization and structure will help Readers understand the information that you are providing?

Not perfect, not inevitable, but widespread convention:

Question(s) presented (issue(s))

Short answer

Facts

Analysis (Discussion—this is where you do IRAC for each issue)

Conclusion

Let the structure of the issue(s) dictate the structure of your analysis!!!



# MAKE YOUR READER A SMART, EFFICIENT READER --

OWED TO JUSTICE ROBERT CENTA



Make your reader a smart, efficient reader by:

1. giving context before detail;
2. using point-first writing; and
3. making your structure explicit and using it to tell the story.





**READERS ABSORB INFORMATION BEST IF THEY  
UNDERSTAND ITS SIGNIFICANCE AS SOON AS  
THEY SEE IT.**

Stephen Armstrong, *Thinking Like a Writer*



**STRUCTURE: READERS ABSORB INFORMATION BEST IF THEY UNDERSTAND HOW IT IS ORGANIZED BEFORE, NOT AFTER, THEY RECEIVE IT.**



- Make your structure explicit, which requires planning.
- Use headings, maps, road signs, tables of contents.
- Identify issues and frame as questions.
- Invert your questions presented into answers: they become headings that are crisp and informative.
- The headings reveal your structure. They make a tidy table of contents!
- Provide context again in each section.



## POINT FIRST WRITING

[WRITERS] TEND TO BEGIN WITH THE DETAILS OF THEIR ARGUMENT AND BUILD TO THEIR CONCLUSION. IN OTHER WORDS, THEY TEND TO WRITE POINT LAST. COGNITIVE PSYCHOLOGISTS TELL US WE HAVE IT BACKWARDS. WE SHOULD BEGIN WITH OUR CONCLUSION, OUR POINT, OR AT LEAST A CONTEXT SENTENCE OR TWO. WHY? AGAIN, BECAUSE READERS WILL BETTER REMEMBER AND ABSORB THE DETAILS WHEN THEY FIRST KNOW THE POINT OF THE DETAIL.

Hon. John I. Laskin



## **EDITING WITH A PURPOSE**

Edit for your audience

Edit the organization and headings

Edit at the paragraph level

Edit at the sentence level

Edit for passive voice

Edit for grammar and punctuation

Edit the case citations

Edit for your own known weaknesses

Final read through







Do not misstate

Do not overstate

Be clear

Be concise



# A BRIEF INTRO TO THE INTEROFFICE MEMORANDUM

- Privileged
- For legal readers
- Forms the basis for decisions about negotiations and legal strategy
- Surprisingly easily flipped into factum.



## 4. PREPARATION (1)

Understand your instructions:

- What is the question?
- Who is the audience?
- How does the memo relate to the bigger picture?
- What work product is required?
- When is it required?



# STRUCTURE OF INTERNAL MEMORANDUM.

- **Heading:**
  - To
  - From
  - Re
  - Date
  
- **Issue/Questions presented**
  - Carefully frame the focus of the memo
  - Do not include legal conclusions
  - Do include inner core of facts
  
- **Brief Answer**
  - State your prediction and summarize concisely why it is likely to happen.
  - Include at least an allusion to the determinative facts and rules.
  - Revise and edit to make it something that can be quickly read and understood.
  
- **Background/Facts**
  - Set out the events and circumstances upon which your prediction is based.
  - Determinative facts.
  - Plus additional background necessary to contextualize determinative facts.
  - Revisit when analysis is complete, to make sure this section includes every fact upon which analysis relied.
  
- **Analysis/Discussion**
  - Largest and most complex section of your memo.
  - Magnified version of brief answer—lead reader to the conclusion, teaches her how to think about the issue
  - Break up with sub-headings for each issue.
  - Cites authority: precedent, statutes, regulations, logically orders facts.
  - IRAC/IRAC/IRAC
  
- **Conclusion**
  - Mirror your brief answer
  - Do not introduce anything new (factual or analytical)
  - Wrap up and get out!!!



## ■ **Brief Answer**

- Should line up perfectly with issues. (I.e., if you have 3 issues, and the second one is broken into two sub-parts, you should have three brief answers, with your second one broken up into two sub-parts.)
- Include at least an allusion to the determinative facts and rules.
- Revise and edit to make it something that can be quickly read and understood. Satisfy the customer who will only read the first page of your memo.



# STYLE (1)

- Never quote from a case without introducing or summarizing it.
- Use proper citations
- Proofread – typos weaken credibility
- Simple language – short sentences – to the point.

Paul Dawson, Dolden Wallace Folick LLP



## STYLE (2)

- Above all, be clear.
- Sift down to what is truly relevant.
- Provide all necessary details about cases, but no more.
- Never refer to a case without saying why it matters.

Paul Dawson, Dolden Wallace Folick LLP



# FURTHER READING



Hon. John I Laskin, “Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums” (August 1999) 18:2 *The Advocates’ Society Journal*.

Stephen V. Armstrong, *Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing* (4th edition), Practising Law Institute, 2021.

Strunk and White, *The Elements of Style* (4th edition).





# THE RELEVANCE OF RELEVANCE

- In a certain case facts A, B and C exist.
- The court finds that facts B and C are material and fact A immaterial, and
- then reaches conclusion X (e.g., judgment for the plaintiff)
- The doctrine of precedent enables us to say that in any future case in which facts B and C exist, or in which facts A and B and C exist the conclusion must be X. If in a future case A, B, C, and D exist, and you can convince the Court that fact D is material, the first case will *not* be a direct authority, though it may be of value as an analogy.



# EVERY SITUATION HAS SOMETHING NEW: NO TWO CASES ARE IDENTICAL

Even cases with very similar facts are not identical. Two cases can be similar on three primary facts, A, B, and C and the judge may have come to conclusion X in the first case. You may find that holding favourable, want to insist it should apply in the second case. However, the addition of fact D to a future case means that conclusion X may or may not follow.

Presence of new fact D = Effect of either

- Distinguishing the future case from the precedent; or
- The precedent may be extended to apply to the future case.

Spoiler Alert: There is always a fact D!



# LEGAL RESEARCH AND WRITING: THERAPY DOGS

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# EXERCISE – THERAPY DOGS

Justice Michelle O’Neill, an Ontario Superior Court judge has instituted the use of a therapy dog in her courtroom. Clover is a golden retriever who specializes in comforting people when they are under stress. Justice O’Neill allows these specially trained dogs to offer children and other vulnerable witnesses solace while they testify in front of juries.

In a recent case she allowed Annie, a 15-year-old testifying against her abusive parent, to have the dog in the witness box with her. Justice O’Neill reports that she allowed Annie to hold Clover because the child was obviously traumatised, and the Defendant was in the court room and appeared threatening. At least once when the teenager hesitated in Justice O’Neill’s courtroom, the dog rose and seemed to push the girl gently with her nose.

After testifying Annie said she was most grateful to Clover. “It was like I had no other friends in the courthouse except Clover,” she said.

Annie’s father was convicted and sentenced to 25 years to life.

What would you argue if you were Annie’s father’s lawyer? What kind response would you make if you were a prosecutor?



**ON APPEAL, TO WHOM WOULD THE FOLLOWING CASE BE USEFUL ?  
HOW WOULD YOU EXPECT IT TO BE USED?**



**A case permitting a small child to hold a teddy bear while he testified.**



**ON APPEAL, TO WHOM WOULD THE FOLLOWING CASE BE USEFUL ?  
HOW WOULD YOU EXPECT IT TO BE USED?**

- A case forbidding a defendant from bringing his pet dog with him to court.



**ON APPEAL, TO WHOM WOULD THE FOLLOWING CASE BE USEFUL ?  
HOW WOULD YOU EXPECT IT TO BE USED?**



**A case permitting a witness to have her seeing-eye dog accompany her to the witness stand.**



**ON APPEAL, TO WHOM WOULD THE FOLLOWING CASE BE USEFUL ?  
HOW WOULD YOU EXPECT IT TO BE USED?**

A case allowing minor victims in a large sex abuse case to testify via video tape.





**ON APPEAL, TO WHOM WOULD THE FOLLOWING CASE BE USEFUL ?  
HOW WOULD YOU EXPECT IT TO BE USED?**

**A case forbidding a child to  
sit on his mother's lap in the  
witness stand.**



**THE END!**

