

## Chapter 10 INTRODUCTION TO THE MEMO

### § 10.01. WHAT IS A MEMO?

The memorandum of law, or memo, is an internal office document. It is a research tool that analyzes the law as it applies to the facts of a client's case and offers an unbiased evaluation. 1 A memo includes both helpful and damaging information. It suggests solutions to a legal problem or predicts the outcome of a dispute. It is the precursor to informed decision-making about a case.

The memo is the most basic of legal documents and is essential to the practice of law. During the course of your legal career, you likely will write a multitude of memos for more senior attorneys. They will vary in length and in topic. They will also serve as a gauge of your ability to analyze and present a legal problem. Once you master this type of writing, you will draft other kinds of legal documents with greater skill and ease.

This chapter introduces you to the memo. It describes the purposes of a memo, the parts of a memo, and the hallmarks of a well written memo. Chapter 11 focuses on the parts of a memo in more detail, and demonstrates how to draft each section effectively.

### § 10.02. THE PURPOSES OF A MEMO

The purpose of a memo is to provide a realistic analysis of the law as it applies to the facts of the client's case. That analysis will be the basis for giving advice or making decisions about the case.

A memo can serve many purposes. Its purpose determines how extensive the research should be, what the nature of the analysis should be, and how it should be written. The memo should be written to serve the specific purpose for which it was requested. By way of example, an attorney may use a memo to:

- (1) evaluate the merits of a case,
- (2) decide whether to settle or try a case,
- (3) decide whether to accept a case,
- (4) inform the reader of the status of the law,
- (5) present recommendations as to how to proceed with a case,
- (6) conclude that more information is needed to properly evaluate the case,
- (7) identify the legal theories applicable to the case,
- (8) decide whether to file any motions,
- (9) prepare for trial,
- (10) form the legal foundation of motions, pleadings, and briefs,
- (11) prepare a contract, will, settlement agreement, or corporate papers,
- (12) prepare for negotiations, or
- (13) prepare for an appeal.

The memos you prepare during the course of a case will provide a convenient summary of the facts, issues, legal theories, and arguments involved in the case. You

and any other attorneys on the case will refer to them to refresh your memories as the case progresses.

### § 10.03. THE PARTS OF A MEMO

The memo is a structured document that is divided into distinct but related sections. Each section is labeled and performs a particular function. There is no universal memo format, and no mandatory order in which to present the parts of a memo. Many law firms, corporate legal departments, and government offices prescribe a standard form. You should find out whether there is a standard format in your office, or if not, whether the attorney for whom you are preparing the memo prefers a certain format. Although there are many variations in the structure of a memo, the following format is widely used:

- (1) a heading,
- (2) a brief statement of the issue to be discussed,
- (3) a conclusion,
- (4) a brief statement of the facts, and
- (5) a discussion of the pertinent authorities.

#### 1. The Heading

The Heading indicates that the document is a memorandum, the person to whom the memorandum is addressed, the person who wrote it, its date, and its subject matter, in the following form:

MEMORADUM

TO:

FROM:

DATE:

SUBJECT: (or RE:)

#### 2. The Issue

The Issue, sometimes called the Question Presented, frames the legal question to be resolved by the memo. If there is more than one issue or several subparts to an issue, number each issue and subpart separately. The Issue section of the memo informs the reader of the scope of the memo. A memo should not go beyond the scope of the Issue.

#### 3. The Conclusion

The Conclusion, sometimes called the short answer, provides a complete, but brief, answer to the Issue. At times an attorney will refer only to the Conclusion, at least initially. The Conclusion includes a concise statement of the reasons for your conclusion. It also orients the reader to the general thrust of the discussion. The Conclusion does not contain a detailed discussion of how you reached the conclusion. Citations to authority and cross-references to the body of the memo are inappropriate. In a memo that discusses more than one issue, number the conclusions to reflect the issues to which they refer.

#### 4. The Facts

This section requires a clear and concise statement of the facts relevant to the legal analysis presented by the memo. The facts let the reader know what happened. The purpose of the memo is to evaluate the soundness of a particular legal position given certain facts. Therefore, present the facts objectively and include both favorable and unfavorable information. Include all the facts that you will raise in the Discussion section.

#### 5. The Discussion

The Discussion section is the heart of the memo. In it you analyze the pertinent legal authorities and apply them to the facts of the problem. If there is more than one issue, address each issue separately. The Discussion, like the Facts, should be objective, not argumentative. Evaluate both helpful and damaging authorities. At the end of the Discussion, summarize the findings presented by the memo.

#### § 10.04. THE HALLMARKS OF A WELL-WRITTEN MEMO

The purpose of a memo is to inform and explain. If your memo bears the hallmarks enumerated below, it will achieve this dual purpose.

##### 1. Thorough Research

Thoroughly research the question you are assigned. Evaluate the law you find within the context of the facts of your case. Find and analyze all of the pertinent legal authorities, those that are helpful to your case and those that are damaging to it. Do not cite or rely on any authority without critically reading it yourself. Treatises and encyclopedias state the law only in general terms. Look up the cases on which they rely. Never rely on headnotes to cases. Remember that major decisions about the case will be made based on your memorandum, and that incomplete or inaccurate research will have far-reaching implications.

##### 2. Good Judgment

Be certain that the memorandum you prepare is what the assigning attorney wants. When you are given the assignment, be sure you understand what purpose the memo is to serve, when it is to be submitted, and how detailed it should be. Also be certain that you understand the question that you are to research. Even if the initial instructions are clear, problems may arise later. As your research progresses, the issue may take on a different focus, unanticipated questions may arise, or additional facts may become important. Return to the assigning attorney and resolve these problems. But use good judgment. Do not trouble the attorney with questions you should be able to resolve yourself or with the help of one of your peers.

##### 3. Objective Analysis

A memo must be objective. This is as crucial as it is simple. Your analysis of the legal authorities must be realistic and comprehensive. Examine your own arguments. Evaluate those you anticipate from opposing counsel. Consider the issues from every perspective. Honestly and thoroughly assess the strengths and weaknesses of your position. A memo is not the forum for persuasion, or for advocacy. Major choices and

decisions will be made on the basis of the memo you write. Those choices and decisions can be made intelligently only on the basis of an objective memo. Indeed, the client's interests would not be served if the appraisal of his position were anything less than scrupulously realistic and objective.

#### 4. Clear Writing Style

A memo is a complete and independent document. Another attorney who reads it should be able to fully understand the matter and make a decision. The memo memorializes, for all future readers of the file, the reasons those handling the case chose a particular course of action. By now you have read enough cases in your classes to appreciate the importance of writing style. Any poorly written legal document leads to confusion and uncertainty. A memo should be precise, accurate and well-organized in order to explain a legal question effectively.

##### a. Good Organization

The foundation of a good memo is careful, detailed organization. The memo must be organized and written so that your thoughts are clearly presented and precisely stated. Skillful writing, thoughtful analysis, and clear presentation will be wasted unless your work is organized intelligently. The reader should not have to work at comprehending your discussion. No one reads memos for entertainment. Your legal analysis and your approach to the problem should be apparent from your organization. Make the reader's task as easy as possible.

As with other types of legal writing, memo writing requires a particular organizational framework. State your conclusions first. Follow them with your reasoning. Use mechanical aids such as headings and sub-headings to help you organize the memo.

Outlining is a necessary organizational technique and one that will save you time. Outlining forces you to develop your analysis one step at a time and will expose the gaps in your discussion.

##### b. Write for the Reader

Analyze and consider the problem and your memo in detail. Remember that your primary audience is the attorney who requested it. You are not writing for yourself.

Include all of the facts that you were given when you were assigned the problem. Do not assume that, because the assigning attorney is familiar with the matter, he or she will remember exactly what you were told. You must include every fact you rely on in your analysis. Explain the significance of the legal authorities in the context of the facts of the problem. Be certain that your conclusions do not appear without the benefit of the analysis that preceded them. Your discussion must progress logically. Carefully and clearly guide the reader through the memo. One way to do this is to provide the reader with a "road map," a guide to the discussion contained in the memo.

The memo is the end product of your exploration of the problem and its implications. Put yourself in the position of the person for whom you are writing the

memo. Ask yourself whether your memo provides that person with a thoughtful analysis of the problem. Only when you are satisfied that the memo is complete, that it fully answers the question put to you, and that it is your best work, should you submit it.

#### c. Precision and Clarity

To communicate your thoughts effectively, you must be precise and clear. You have been asked to resolve a concrete problem. Make certain that you provide a concrete answer and specific reasons for it. Be precise about the facts and the law, but do not miss the forest for the trees. Make it clear why the authorities you rely on are relevant. Do not just tell the reader that they are pertinent. Show how those authorities apply to your case. Draw the conclusions yourself. When reading your memo, the reader should fully understand it and should be satisfied with your resolution of the problem.

#### 5. Creativity

Your memo should present a comprehensive and organized analysis of the law in the context of the facts of your client's problem. On occasion, it might also display some legal creativity in regard to your recommendation for further action. When you are researching and writing the memo, be alert for alternative theories or creative approaches to the problem. Because you are the one who is most immersed in the issue and who is most aware of its permutations, you are the ideal person to provide a fresh perspective. Manifesting such creativity will demonstrate your initiative, even where your theory may ultimately not be workable.

#### 6. Correct Citation Format

Your memo must include citations to the authorities on which you rely. Moreover, the cites must be complete, accurate, and in proper citation form. Correct citation form is important for at least two reasons. First, sloppy and incomplete citations give the reader cause to suspect that the substance of your analysis is equally weak. Second, if you include an inaccurate citation in the memo, you probably will copy that citation in subsequent documents that rely on the memo's research. Simply put, bad citations can haunt you and create an extremely negative impression of your work.

### Chapter 11 THE MEMO: HEADING, ISSUE, AND CONCLUSION

As you learned in Chapter 10, the memo is a structured document that is divided into distinct sections. Each section has a label and performs a particular function. In Chapter 11 you will learn how to write each of these sections.

#### § 11.01. THE HEADING

The Heading uses the following format to set out the most basic information about the memo.

MEMORANDUM

TO: Leslie O'Brien-Wallace

FROM: Michael R. North

DATE: August 7, 1993

RE: Dane v. Lapp; file no. 56432-007; Recovery for negligent infliction of emotional distress under Pennsylvania law.

The centered heading indicates that the document is a memorandum. "TO" indicates the person to whom the memorandum is addressed. "FROM" indicates who wrote the memorandum. Although practices vary from one to the next, the recipient and the sender of the memo are usually referred to by their full names. Occasionally the tone is more formal and titles used, for example, Ms./Miss/Mrs. O'Brien-Wallace and Mr. North. Do not include job titles such as senior partner or associate after the name of the recipient or sender.

"DATE" indicates the date you submitted the memo. Including the date is important. Any reader of the memo must be able to assume that the research and analysis contained in the memo are accurate and complete as of the date of the memo. The law, however, may have changed by the date you or another attorney next refer to the memo. The date will advise the reader whether the research requires updating.

"RE" indicates the subject matter of the memo. You may also see "SUBJECT" used instead of "RE." Include the case name, or the client name if no case is pending, and the office file number. Describe briefly and broadly the legal question the memo addresses. Because most case files contain a large number of documents, including numerous memoranda, this information will make it easy to locate a particular memorandum in the future.

In addition, the explanation of the subject matter facilitates indexing and filing of the memorandum for general research purposes so that it may be used for future reference in other cases.

Suppose for purposes of illustration that you have just been called into the office of a more senior attorney and given the following facts.

William Dane has retained the firm to file suit for injuries he sustained in an automobile accident. Mr. Dane also would like the firm to file suit on behalf of his fourteen-year-old niece, Edna. Edna witnessed the automobile accident. The accident occurred on June 10, 1997. Mr. Dane had volunteered to help his recently divorced sister by taking Edna to school. At 8:00 a.m. Mr. Dane dropped Edna off at school and drove away, intending to go to the grocery store. Edna waved good-bye to her uncle and turned to talk to some friends. As she was walking through the schoolyard with her friends, Edna heard a loud crash, followed by an explosion. When she turned to see what had happened, Edna saw that a car had collided with her uncle's car at an intersection one block away from the school. Her uncle's car was on fire. Edna ran to the scene of the accident. By the time she arrived, her uncle had been pulled from his car. Edna saw that her uncle had been severely burned and that he had a large gash on his forehead. Ever since the accident, Edna has suffered from recurring nightmares, a debilitating fear of automobiles, and chronic stomach problems. These conditions did not exist prior to the accident. An investigation of the accident disclosed that Mrs. Donna Lapp, the driver of the other car, had run a red light while intoxicated.

You have been asked to research whether, under these facts, Edna can make out a cause of action for negligent infliction of emotional distress under Pennsylvania law. The sample heading at the beginning of this section incorporates the information that would be required in the Heading of the memo concerning this case.

Before writing the Heading for your memo, review a few recent memos prepared by other attorneys in your office to determine the preferred style. You may find that there are minor variations from the format we describe.

#### § 11.02. THE ISSUE

The memo begins with the Issue section, also called the Question Presented. The Issue section of the memo states the legal question presented in your case. Here is an example of an issue concerning the Dane case:

Whether, under Pennsylvania law, a niece who witnesses the, aftermath of an automobile accident involving her uncle from a block away can recover for negligent infliction of emotional distress when she arrives at the scene and observes his severe injuries.

Here is another equally acceptable way to frame the issue:

Under Pennsylvania law, can a niece recover for negligent infliction of emotional distress if she is one block away when an automobile accident involving her uncle occurs and, immediately after the accident, arrives at the scene and observes her uncle's severe injuries?

The Issue section informs the reader of the scope of the memo. The scope of the memo should never exceed the scope of the Issue. Frame the question precisely. Failure to do so will mislead the reader about the limits of your discussion and analysis.

Identifying the issue is the foundation of effective analysis. On some occasions, the attorney who requests the memo will identify the issue clearly for you. More often, you will be able to identify the precise issue only after you have thoroughly researched and thoughtfully analyzed the problem. For this reason, finalize your draft of the Issue only after you have written the Discussion section of the memo.

To frame an issue, you must do two things. First, identify the precise rule of law. Second, identify the key facts. Key facts are legally significant facts. Key facts are those facts that determine whether and how a particular rule of law applies to your situation. These facts are of crucial importance to the outcome of the case. Once you have fully researched the law within the context of your facts, you can determine which facts are key. Finally, after identifying the precise rule of law and the key facts, draft the Issue to ask whether the rule of law applies under the particular facts of your case.

Consider the following examples of poorly phrased Issues, and ask yourself what the writers have done incorrectly:

Whether a bystander to an accident can recover for negligent infliction of emotional distress under Pennsylvania law.

Whether a bystander at an automobile accident will be able to bring a tort action to recover for negligent infliction of emotional distress.

Whether, under current Pennsylvania law, a bystander at an automobile accident can successfully bring a tort action for negligent infliction of emotional distress.

Comment: Although the writers properly identified the ultimate legal question, they failed to include the key facts. The reader is left to wonder about the circumstances that prompted the question. The reader should understand the question without having to refer to the facts section. If you fail to include key facts, you will draft an abstract question, a question without context. The writers of two of the Issues include a reference to Pennsylvania law. When possible, state the jurisdiction since the law may vary dramatically from one state to the next.

Whether a niece who witnesses the aftermath of an accident involving her uncle will be able to state a cause of action for negligent infliction of emotional distress.

Comment: The writer of this Issue omitted one very significant fact: the niece's distance from the accident. The writer should also have included a reference to Pennsylvania law as the controlling jurisdiction. Whether Edna can recover damages for negligent infliction of emotional distress as a result of witnessing an accident involving Mr. Dane.

Comment: When including the key facts in your Issue, avoid identifying any of the people, places, or things in your case by proper name. Names may have no meaning to your reader because the facts section of your memo does not come until later. Even if you, the author of the memo, return to the file after the case has been dormant, you may not recall who all the players are. Instead of using proper names, use general categories to describe the people, places, or things in the Issue.

The Issue should consist of a concise, one-sentence question. The Issue usually starts with "whether" and should call for a yes or no in response. The Issue also may begin with an interrogative such as "is" or "can." Be certain that your Issue is precise and complete. Do not, however, draft a question that is so complex, lengthy, and awkward that your reader cannot follow it. Ask yourself whether the rule of law is stated clearly and succinctly. Examine your facts and critically evaluate which are essential to the Issue. Do not generalize because you will risk distorting the Issue. A memo can address several questions. The questions might be distinct or related and can consist of several individual questions or a question with subparts. Writing and rewriting the questions and their subparts often promotes a more thorough understanding of the problem. Generally, the more specifically the question is phrased, the more precisely it will be understood. Do not, however, divide the Issue into so many questions and subquestions that the reader will become confused. Do not use a single subquestion. If the question is divided into subparts, there must be at least two subparts.

Do not forget that the memo is an informative document that realistically evaluates your client's position. Adopt an objective, non-partisan tone. Even if a key fact is unfavorable to your client's position, you must include it.

Do not draft a question to suggest a certain answer. Avoid advocacy in issue writing.

Here are two good examples of Issues. They come from different cases:

Under the Pennsylvania Workers' Compensation Act, can an employee recover for injuries that he sustained in a personal fight with a co-worker

during working hours when, six months earlier, he had a work-related dispute with the same co-worker?

Under New Jersey law, can the parents of a child born with Down's Syndrome rely on the "discovery rule" or the "concealment exception to bring an action for wrongful birth two years after the statute of limitations has run when:

A. before the birth, their physician stated that amniocentesis would detect any genetic defects in the fetus;

B. the mother underwent amniocentesis; and

C. after the birth, the physician stated that the amniocentesis had not detected Down's Syndrome, even though he knew that the technician had made errors in performing the test and had arrived at an incorrect result?

These Issues are well written. Both include the legal question and the facts that are key, according to the case law. The questions are precise and objective. They advise the reader of the scope and focus of the memo. As the samples demonstrate, there is no one correct way to draft an Issue. Simply be certain that your Issue contains all of the necessary elements, that you have framed it succinctly and accurately, and that you have made it comprehensible.

### § 11.03. THE CONCLUSION

The Conclusion, sometimes called the Brief Answer or Short Answer, provides a short answer to each question that the Issue section poses. In addition to answering the question, this section includes a concise statement of the reasoning that supports the conclusion. The Conclusion section provides immediate answers to the questions that the memo raises. The Conclusion section immediately follows the Issue section. For that reason, some attorneys begin with a direct response to each of the questions, such as "yes," "no," "probably," "probably not," and "maybe." Because few things in the law are ever absolutely clear, and because a non-committal answer adds little to a well written conclusion, we prefer memoranda without this type of response. Nevertheless, opinions and practices vary; therefore, be alert to the preferences of those for whom you are working. In writing the Conclusion section, accommodate the reader. In a memo discussing more than one issue, identify each conclusion with a number corresponding to the issue to which it refers. Be certain that each answer is self-contained. While each answer should contain a succinct explanation of the reasoning that supports your conclusion, do not discuss the details of your analysis. Do not include citations to cases, statutes, regulations, or other types of authority on which you rely. Only on the rare occasion when an authority is dispositive of the question, should you note it in the Conclusion. Relegate all suppositions and hypotheses to the Discussion

You may find it helpful to draft the Conclusion after you have drafted the Issue and written the Discussion. Drafting these sections will force you to understand fully the reasons for your conclusion. Writing the Conclusion is a two step process. First, begin

the Conclusion by restating your Issue as a declarative sentence. Second, add a brief explanation of the reasoning supporting your conclusion. The Conclusion should be ten to fifteen lines. Consider again the facts of the Dane matter, the illustrative case for this chapter. Then, please review the following sample Conclusions from student memoranda.

Under Pennsylvania law, a niece will be able to recover damages for negligent infliction of emotional distress if the emotional distress was foreseeable to the defendant. The factors determining foreseeability include: (1) whether the plaintiff was near the scene of the accident, (2) whether the shock resulted from the direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, and (3) whether the plaintiff and the victim were closely related.

Comment: The writer has done only part of the job. This Conclusion sets out the elements of the test that a plaintiff must meet to recover. The recitation of the law is correct. The Conclusion, however, fails to answer the question.

A Pennsylvania court would hold that the bystander at the automobile accident could recover for negligent infliction of emotional distress because such emotional distress was reasonably foreseeable.

Comment: Strictly speaking, the writer has answered the question and provided a succinct explanation of the reason for the answer. The Conclusion, however, lacks key facts. When the issue is devoid of key facts, the Conclusion is often similarly defective. Key facts are as critical to a Conclusion as they are to an Issue. While you need not reiterate every key fact in your Conclusion, include enough facts to give the Conclusion context and meaning. Legal conclusions are based on interpretations of facts in the context of the applicable law.

Edna will be allowed to recover for her emotional distress because of her close proximity to the accident, her shock as a result of the perception of the accident, and her relationship with Mr. Dane.

Comment: The writer has answered the question and summarized the reasons for it. The writer's usage of proper names, however, deprives the reader of the ability to identify the players and their roles.

A niece bystander can recover for negligent infliction of emotional distress because the emotional distress was reasonably foreseeable to the defendant. Pennsylvania, in *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979), adopted a three-step test to evaluate whether the emotional distress was foreseeable: (1) whether the plaintiff stood near the scene of the accident, (2) whether the emotional impact and distress followed sensory observance of the accident, and (3) whether the plaintiff and the victim were closely related. The niece stood only one block from the accident. The niece saw her uncle immediately before the event, heard the event, and saw the scene and her uncle immediately after the event. The niece/uncle relationship is a close relationship. All elements of the test are therefore satisfied and a claim for negligent infliction of emotional distress is made out.

Comment: In the Conclusion, do not set out the governing standard, or the applicable law, in such detail. Do not apply the law to your facts. Application in the Conclusion section is usually ineffective because it is too general. It can be misleading because it is usually incomplete. If the attorney reading the Conclusion develops a misimpression, you are responsible. Do not condense your analysis. The Discussion section should be the sole source of analysis. Provide only the answer and a brief statement of your reasoning. This Conclusion is too long given the nature of the question. Moreover, citations to authority are improper in the Conclusion.

Here are two good Conclusions:

(1) A Pennsylvania court would allow a niece who witnessed an auto-mobile accident involving her uncle from one block away to recover for negligent infliction of emotional distress because: (1) she was near the location of the accident, (2) her shock was a result of her direct sensory perception of the accident, and (3) she is closely related to the victim.

(2) A Pennsylvania court would permit a niece who heard a car accident involving her uncle from a block away and who then immediately witnessed his severe injuries to recover for negligent infliction of emotional distress.

As with the Issue, there is no one correct way to write a Conclusion. Be certain that you answer the question and that you provide a brief statement of the reasoning that supports that answer, as the writers of the above two samples have done.