

# Research Memoranda

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## Roadmap

- Research memoranda are used to make a record of your legal reasoning and predictions and to show that they are well supported by research and analysis.
  - The goals in drafting a research memo are to solve a problem, be thorough, and be concise.
  - It is important to analyze both sides of a problem in a research memo and present both the good news and the bad news, the pros and the cons, the strengths and weaknesses of a client's matter.
  - Memorandum formats are formal structures within which to organize the materials and parts of a memorandum; they should be learned, internalized, and followed as they represent a traditional, familiar format that readers expect.
  - Organization of the discussion section of the memorandum requires you to present your analysis in IRAC format, using nested sets of IRACs, one for each issue and sub-issues.
  - Memoranda should be prepared with the thought that they will be shared and read more widely than by just the assigning attorney.
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## **A. Purpose, Audience, and Goals of Research Memoranda**

The purposes of research memoranda are to make a record of your legal reasoning and predictions and to show they are sound and well supported by your research and analysis. You may be asked to predict whether a cause of action or defense is likely to succeed or whether a transaction is feasible. Or you may be asked to predict advisable strategy, *e.g.*, which causes of actions or defenses are the strongest, or what ways a transaction can be structured and which are most advantageous.

The immediate audience of the research memorandum is the assigning attorney—the one who asked for the research. Assume this person is busy and pressed for time; they will want your predictions to be clear and the memo to be direct and easy to follow. They will expect the memo to come to an actual conclusion, even if it is qualified—as long as your qualifications are well explained. Assigning attorneys are not interested in an academic research paper reporting on the state or evolution of the law on an issue. They want an answer. They will hope your prediction is good news for them or the client, but that cannot always be the case. The assigning attorney will need to be apprised of “the good, the bad, and the ugly” in order to make informed decisions and advise the client. However, it must be clear in your memo that you are aware of and concerned about the clients’ interests. Thus, do not appear cavalier or disinterested in delivering bad news and understand that bad news is usually scrutinized more than good news.

It is likely others will read the memo as well. The assigning attorney will probably share it with other attorneys in the firm who are working on the case, and possibly attorneys outside the firm who are working on the same side. The client may be sent a copy of the memo. Also, the next audience for your memo may be a judge or court attorney since research memoranda are often turned into memoranda supporting or opposing motions. Your audience may also be the case file or a research bank, which means the memo will be read months or even years later when the issue in the case is ripe or

reappears in another matter. Thus do not assume your reader (even the assigning attorney) will be familiar with the matter or will know of any detail or material you have not expressly set out in the memo.

Your goals in drafting a research or prediction memo are (1) to solve a problem, (2) be thorough, and (3) be concise. Problem solving is the main goal. Memos address practical, real life problems and situations. In memos you need to give the answer clearly and directly, whereas in college essays you may have simply described the problem. It is not enough just to give the answer, however. Just like in elementary school math: You must show your work. In addition to stating your conclusion, you need to show how and why it is sound and well supported. The memo must be thorough and the analysis must deal with all sides of a problem, including those that may hurt the client's position. Your goal is *not* to adopt and defend a view. Thus, do not make the mistake of ignoring bad news. To make an accurate prediction of how a court will rule, or what a jury will find, you need to examine arguments on both sides. Even if you believe the client's position is strong, do not fall into the trap of being conclusory—explain why and how the facts and law support the position.

Memos must be *both* thorough and concise. Doing both is often challenging for beginning drafters, but this is an essential skill to develop. You are competing for the time and attention of your readers—even if they assigned you the problem in the first place. No one wants to read a 10 page memo if 5 pages will do. Since you cannot sacrifice thoroughness for concision, you need to search for and delete sentences and words that do not contribute to solving the problem at hand. Every sentence and word in a memo should be part of showing how and why your predictions are sound and well supported. Look for places where you have lapsed into college-paper-like description, or where you have simply narrated your research process. Delete these passages. Then with the remaining text, ask “can I say this in fewer words?”

## **B. Suggested Memoranda Formats**

There are two basic formats for the traditional office memorandum. Both follow the overarching structure of most legal writing: (1) introduction, (2) facts, (3) law and analysis (application of law to fact), and (4) conclusion. The first format begins with question(s) presented and short answer(s). The second format begins with a summary, sometimes called “Executive Summary.” Both formats put the drafter’s prediction or conclusion for each issue at the beginning. The prediction or conclusion is what the reader is most interested in, and putting it first provides context for the rest of the memo—which will show how and why the prediction or conclusion is sound and well supported.

The first of these two memorandum formats is the more formal and traditional, featuring a question presented and short answer section in the introductory portion. This format is particularly useful when delivering the results of a traditional law firm research assignment that asks you to research the law applicable to a set of facts and present your legal analysis. This first format follows (see next page):

## MEMORANDUM

TO:  
FROM:  
DATE:  
RE.:

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QUESTION(S) PRESENTED

SHORT ANSWER(S)

FACTS

DISCUSSION

Summary

Concise heading describing the first issue

Concise heading describing the second issue

Concise heading describing the third issue

*And so on*

CONCLUSION

The second format for a traditional memorandum is a bit more flexible and is more suited to a broader range of projects in which a memorandum might be required, including reports of discovery and due diligence review and the like. The difference is the elimination of the question presented and short answer sections, substituting in their place a single, unified summary, making this memorandum format more closely resemble that used in business and other non-legal fields.

## MEMORANDUM

TO:  
FROM:  
DATE:  
RE.:

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SUMMARY

FACTS

DISCUSSION

Concise heading describing the first issue

Concise heading describing the second issue

Concise heading describing the third issue

*And so on*

CONCLUSION

## C. Memoranda Components

### 1. Questions Presented

Questions presented set out the issues addressed in the memo. If you are using the traditional memo format, write a question presented for each main issue the memo addresses. Each question should identify the issue and the key facts that raise the issue and that are essential in your analysis. In the beginning, the easiest way

to ensure that you do this is to use the Whether/When format: Whether *[a legal consequence results]* when *[key facts]*?

The question must strike the right balance—it must be specific enough to the case you are discussing, but general enough so it identifies the subject of the memo for “memo bank” purposes. (Your memo bank is your collection of prior memos, work product, and other authorities saved and accessible for future reference.) Thus, include the names of the parties *and* their status or relationship. “Our client Moe Smith, owner of Moe’s Tavern” or “Smith’s employee, bartender Jim Jones.”

Also in the when portion of the question presented, make sure you describe actual specific facts rather than legal conclusions. For example, if the memo addresses validity of a will and whether the deceased was mentally incompetent at the time of its execution under the wills statute, this question is conclusory:

Is a will valid where signed by a mentally incompetent person? (Bad—this is a conclusion—in other words the answer to this question is “of course not.”)

Rewrite: Whether Peter Smith’s will is valid when Smith had an IQ of 70 and a blood alcohol content of .142 when he signed it.

The legal issue is whether Peter Smith’s will is valid. The key facts that raise this issue are his IQ and blood alcohol content.

Your analysis of an issue may involve a large amount of specific facts. You cannot list all of them in the question presented because the question will become too long and unwieldy. You must decide which specific facts are key—essential to your analysis—and what facts should be described more generally or by category. In these cases it is often best to write the final question presented and short answer after you have written the discussion section of the memo; a rough draft should help focus you at the beginning. When describing facts generally or by category, be sure not to describe legal conclusions, however.

Say, for example, the issue is whether your client is likely to prevail in an action for trademark infringement against a rival clothing company, and there are many different facts regarding whether the defendant’s use of its trademark is likely to cause confusion (an

essential requirement of infringement) with the plaintiff's product. This question is conclusory:

Whether our client, Allister Clothing Co. is likely to prevail in a trademark infringement action against J.J. Sport, where J.J. Sport's trademark is similar to Allister's trademark, and the two companies' products are similar and marketed and sold in similar ways.

The question is conclusory because similarity of the plaintiff's and defendant's trademarks, similarity of their products, and similarity of the products' marketing and sales are important legal factors that indicate likelihood of confusion. Thus, the drafter has described the facts in categories that are legal conclusions, *i.e.*, she has set out legal factors rather than specific facts.

Rewrite:

Whether our client, Allister Clothing Co. is likely to prevail in a trademark infringement action against J.J. Sport where J.J. Sport's trademark is an Irish setter, while Allister's is a golden retriever, and both trademarks are embroidered in thumbnail size on casual sports clothes that are marketed to young men and women through TV commercials, billboards, and magazine advertisements, and sold in mall retail stores and by catalog.

In this question the drafter has set out specific facts that are key to her analysis (specifically describing the two trademarks and noting they are both embroidered on clothing), as well more generally describing other facts in categories regarding similarity of the products and similarity of marketing and sales methods.

## **2. Short Answers**

Short answers contain your prediction for each main issue addressed in the memo. The question presented and short answer work together. The short answer must directly address and answer the question presented. It should begin with one or two words, *e.g.*:

Yes, No, Probably, Probably Not, and, if there is no other option, Possibly.

After the one or two word answer, set out the basic reason or reasons in a conclusory fashion. In setting out your reasons be sure to identify any sub-issues the memo will address. You do not need to further explain your reasons in the short answer segment. For example, if your question presented is the rewritten question above regarding trademark infringement, your answer could be:

Yes, because (1) J.J. Sport's trademark is similar to Allister's trademark, (2) the two companies' products are similar, and (3) their products are marketed and sold in similar ways; thus, J.J. Sport's use of its trademark is likely to cause confusion among consumers.

This answer identifies the sub-issues the memo will address, and is properly conclusory—it does not explain or attempt to support the basic reasons given. This is because the short answer should be just that—short.

Although the short answer should be conclusory, it must also be specific. The reader will want to know exactly why you reached each conclusion. Thus the reason(s) supporting your conclusion or prediction should be specific. Vague answers such as “No, under applicable law, our client will not be liable” do not give the reader enough information.

Finally, even worse than a vague answer is an equivocal one. In these, the reasons given are often preceded with words such as “if” “provided” or “as long as,” e.g.: “Yes, if (1) J.J. Sport's trademark is sufficiently similar to Allister's, (2) their two products are similar, and (3) their products are marketed and sold in similar ways.” This answer will leave the reader wondering, “Well, are they?”

### **3. Summary**

If your memo is in the question presented/short answer format, the summary comes at the beginning of the discussion section.

Otherwise, the summary comes at the beginning of the memo. The summary provides context for the memo and should present a clear, concise, accurate road map for your analysis.

If the memo begins with the summary, drafters should lead with their prediction or conclusion on the main issues. This is not necessary if the memo begins with the question presented and short answer. Otherwise you will follow the same general format:

1. Draft a sentence that sets out what must happen in order for the client to prevail or otherwise obtain its desired result, or what must happen in order for the other side to prevail. Often this is put in terms of what the client must prove, show, or do. Sometimes it is easier to state what the other side must prove, show, or do, especially if it has the burden of proof. The summary then briefly evaluates whether and why that is or is not likely to happen. Note, if what must happen includes more than one requirement, set forth those requirements in the same order as they are addressed in the memo.

2. If a statute is involved, quote the pertinent portions in the summary. There is no substitute for the actual statutory language to reassure the reader that your discussion and conclusions are tied to reality and make sense.

3. Set out the issues and sub-issues in terms of the main law(s) governing them. Do this in the same order as you address these issues in the discussion section of the memorandum. Include a citation to authority for each main law governing an issue.

4. State your conclusion on each issue. Depending on how complex your issues are, your discussion section might set out each issue and conclusion separately, or you might set out several issues and then your conclusions on each in the same order:

Issue 1/Conclusion,

Issue 2/Conclusion,

Issue 3/Conclusion.

—or—

Issue 1/Issue 2/Issue 3, and Conclusion1/Conclusion 2/Conclusion 3

5. With either format, set out your key supporting reasons for each conclusion.

6. Include citations to supporting legal authority for your conclusions and reasons.

7. If the matter involves important overarching laws that apply generally or to more than one issue, set them out in the summary, e.g., rules of construction or underlying policy.

#### **4. Statement of Facts**

Your goal in drafting the statement of facts is to present an accurate, concise account of the events and circumstances that sets up your analysis in the discussion section.

The statement of facts must provide enough information and context for an unfamiliar reader to understand what the matter is about and what happened. The challenge is to give enough detail for the reader to have a good picture of the players and what happened, but not to get bogged down in details that are not legally relevant. On the flip side, you do not want the facts to be too barebones, flat, dull, or lacking in texture.

It is often said that in memoranda, the statement of facts should be objective. True enough, but (1) objective doesn't mean boring, and (2) you will be expected to "work the deal" as much as possible for your client, while informing your assigning attorneys of any problems spots or weaknesses. This means developing the basic facts into patterns, implications, and findings of fact to support conclusions of law.

##### ***a. Basics***

You must include all legally material facts in the statement of facts, both the favorable and the unfavorable. In determining whether a fact is legally material, consider the research you have done, your knowledge, and your understanding of the applicable law both for and against your client. All facts necessary to analyze the issues

presented must be included. Thus, if you refer to a fact in your discussion section, it must first be set out in the statement of facts. Some drafters prefer to write the discussion section first and then the statement of facts once they are clear on what facts are relevant. Others prefer to tell the story first.

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### **Favorable Facts**

- (1) support your client's legal claim or defense, or
- (2) provide shading or background that you think will make a court or jury favorably view your client or its position.

### **Unfavorable Facts**

- (1) undermine your client's legal claim or defense, or
  - (2) provide shading or background you think might make a court or jury view your client or its position favorably.
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Clearly indicate the source of various facts. For example, "In his interview, Mr. Jones stated that \_\_\_\_\_." "The complaint alleges \_\_\_\_\_." This is critical as, once it becomes time to use your analysis in a memorandum or brief to a court or other decision maker, it will be necessary to cite to the source of all facts. Since you have tracked down this information for your memo, make a record of where it came from now. It is easier to check sources than to rediscover them from scratch. In memos, however, as long as the source of particular facts is captured, you do not have to keep repeating the source. For example above, you would not have to put "In his interview" in front of every sentence pertaining to facts taken from Mr. Jones' interview.

### ***b. Organization***

Context first. The first paragraph of the statement of facts should provide the background and context for the memo. The client and its problem or situation as well as other important parties or players should be identified. For example, “Our client Medium Co. came to us because one of its former employees, Blaine Jones (“Jones”), has threatened to sue it for wrongful termination and employment discrimination. Jones maintains that...” Define terms for people and entities that will be referred to often in the memo. In doing so, avoid strings of initials that do not produce pronounceable acronyms—instead, use one or two words from the full name that can be pronounced. In this example, (“Jones”) is the defined term for Blaine Jones. Do not use unnecessary words in defining terms, *e.g.*, (hereafter referred to as “Jones”). Putting the term in parentheses and quotation marks and capitalizing the initial letter of each word is enough to define it.

The opening paragraph in the statement of facts is important because it enables the reader to understand the subsequent details—why they’re important, where they fit, and the like.

After the opening paragraph, set out the facts in a logical sequence that will make it easy for a vaguely familiar reader to understand what the case is about and what happened. Often the best sequence is chronological order. Other logical arrangements are by issue, by subject, by witness, or from the general to the specific. Be sure not to jump back and forth from issue to issue or subject to subject, etc. Set forth all facts that pertain to an issue or subject before moving on.

### ***c. Show vs. Tell***

The statement of facts should be free of conclusions and argument. Instead, set out the specific facts that would *lead* the reader to a conclusion. For example, rather than writing “The teacher completely humiliated the student,” state specifically what the teacher said and did that you believe shows he humiliated the student. Avoid overreliance on adverbs and adjectives. Instead use concrete, precise terms that do not require adverbs or adjectives in order to

lead the reader to reach a conclusion, e.g., “In class, Mr. Burns put a ‘Hello Kitty’ sticker on Brad’s forehead and called him a ‘little girl.’ Many students referred to Brad as ‘Kitty’ for the remainder of the semester.”

Just the facts: avoid words or phrases in the statement of facts that amount to legal conclusions. For example, if the matter involves adverse possession—which has a continuity of use requirement—do not write a sentence such as “June Smith and her family used the neighboring parcel continuously starting in 1998.” Also, many beginning drafters cannot resist explaining the law or making legal arguments in the statement of facts, e.g. “The fact the Smiths built a gazebo on the property is significant in demonstrating a hostile use.” Save any legal conclusion, explanation, or analysis for the discussion section.

Use verbatim quotes from people where you want to direct attention to particular facts, or where the speaker or writer has used slang or terms that you do not want attributed to you. Avoid too many quotes, as your reader will start to skim over them. Finally, use quotation marks only for *another person’s* words. Do not put quotes around *your own* words for emphasis or otherwise.

## **5. Main Discussion**

The discussion section is the heart of the memo, where drafters show how and why their predictions or conclusions are sound and well supported. Remember though, this is different than defending a position or thesis in a college paper. Your memo will be used to make decisions, plan strategy, advise clients, and the like. So it must be thorough and accurate and cover all sides of the issues.

If your memo is in the question presented/short answer format, the discussion begins with an executive summary discussed above. Otherwise the organization for both memo formats is the same.

### ***a. Large Scale Organization***

The discussion section of a memo is based on the IRAC format (Issue, Rule/Law, Application/Analysis, Conclusion) and is composed of IRACs with each issue and sub-issue getting its own IRAC. The first step in drafting the discussion is deciding on a logical and cohesive order for addressing the issues and sub issues. This order may change during the drafting process, but it is important to think about and begin with a framework.

Start by identifying the main issues in the matter. These are the broad legal questions that need to be solved in order to address the client's problem or situation. For example, if you have been asked to research what causes of action or defenses a client might have in a situation, the main issues would be the separate causes of action or defenses you have discovered in your research. Also, if the assigning attorney has identified an issue, you should address it in the memo—even if it turns out to be inapplicable or irrelevant. If that is the case, you need to explain how and why it does not figure into the matter. The same goes for any issues that seemed obviously present in the beginning, but which your research revealed were inapplicable. You should make a record and explain why you eliminated the issues. What you do not want is for this conversation to occur:

Assigning attorney: "This seems like a clear case of attractive nuisance. Why isn't that in the memo?"

You: "Um, I thought so too, at first, but it turns out no."

Assigning attorney: "Why?"

You: "Well, I need to check back with my notes, it was last week ..."

Assigning attorney: Tossing the memo back at you. "Yeah, do that, and fix this by the end of the day."

After you have identified the main issues, decide upon the order in which to address them. Usually it is best to begin with any threshold issues, *e.g.*, standing, jurisdiction, statutes of limitation, legality of a proposed transaction, and things of a similar nature. The remaining order depends on the issues themselves and how they relate to each other. A default order is to rank the issues from those

most favorable to the client to the least favorable. Related issues that involve similar types of facts, law, and tests should be put next to each other. For example, potential tort causes of action would be addressed together before addressing potential contract causes of action or vice versa. Sometimes, it is best to start with an issue that is easily addressed and dispensed with.

The main issues will often have sub-issues. At the drafting stage you should have a good understanding of cases and applicable law. Identifying sub-issues begins with identifying the elements or factors of the applicable law and the client facts relating to them. Generally case law or a statute will set out series of elements and/or factors or a multipronged test. For example, if one of your main issues is whether your client has a cause of action for negligence, the sub-issues would be (1) duty, (2) breach of the standard of care, (3) cause in fact, (4) proximate cause, and (5) actual injury. Of these five, there may be no dispute that the client was actually injured, in which case your discussion of the negligence issue has four sub-issues: duty, standard of care, cause and proximate cause. One IRAC for each may be sufficient. However, depending on the applicable law and the facts of your case, one or more of these sub-issues may have sub-issues themselves. In other words, there may be more than one legal question that must be answered. For example, breach of the standard of care may involve (1) predicting what the standard of care is, and (2) predicting whether or not the applicable standard was met. If so, you would need an IRAC for each.

All issues and sub-issues should be identified by a point heading that concisely describes them. Also, if a memo has several main issues that consist of sub-issues, a one paragraph mini-summary for each main issue may be appropriate. The mini summary would consist of your overall conclusion on the main issue supported by your conclusions on the sub-issues with citations to authority.

Discussing the identification and organization of issues and sub-issues in the abstract is of limited value, however. This is a process that begins with your basic understanding of the law and continues with your research and legal analysis of a matter. Before you begin drafting, you should have an idea of the various IRACs that you think will comprise the discussion section of the memo—even if you have

not written or even outlined them yet. Think of IRACs as building blocks and, before you start drafting, have a concrete idea of where you think they should go. In other words, begin with an explicit structure in mind. Know also, however, that this structure may change or you may need additional IRACs.

### ***b. Small Scale Organization—The IRAC***

You will draft an IRAC for each issue and sub-issue in the discussion section. Identify the issue using a point heading, which can be quite short, even one or two words, *e.g.*, “Duty” or “Proximate Cause”—as long as the heading clearly flags the issue. The heart of the IRAC will be the explanation and illustration of the rules or laws, followed by an application of them. This is where you show your work supporting your prediction or conclusion. Depending on the length or complexity of the analysis you may also have a separate conclusion at the end—the “C” of the IRAC. Often this is not required because the application should begin with your conclusion on the issue or sub-issue in its topic sentence. The IRAC form is discussed in detail in [Chapter 2](#).

### ***c. Rules/Laws: Identify, Explain, and Illustrate***

The applicable laws should be set out and explained in order of broad to narrow, general to specific. Thus, begin with a topic sentence setting forth the basic law pertaining to the issue or sub-issue followed by a citation to supporting authority. Then you would set out and explain various requirements, factors or tests that are applicable. Laws are often explained with other laws. A requirement might be further explained with a test or series of factors used to determine if that requirement is met, or with the purpose underlying the requirement. Or you may have synthesized an explanation by identifying a common thread among cases. Explaining a law in an IRAC is *not* repeating it again in different words or engaging in academic discourse or any other college-paper-type reflection or

narration. Eliminate any sentences that do not directly contribute to solving the legal issue or issues at hand.

Every law you set out and explain must be accompanied by a pin citation to the authority from which it came, *e.g.*, a case or statute. A pin cite includes not just the first page of a case, but the specific page on which the law or explanation is set forth or from which it is derived. Similarly, a pin cite to a statute includes the specific section or subsection in which it is set forth or from which it is derived. Including a pin cite with every law or explanation will help you avoid superfluous narration. Your explanations of the law must be based on specific authority to which you can directly refer the reader through citations.

Illustrating the law means including specific factual examples from cases that show how a particular requirement was met or not met, or to show when a factor or series of factors was or was not present. Specific facts and holdings are necessary to show how a law works in practice, in reality. Without them the rule/law section will read like an abstract list. Placement of illustrations depends on the laws being explained. Sometimes the laws will relate and nest so easily that you can explain them together in one paragraph and follow that with a paragraph of case examples. However, if you have a separate paragraph of illustrations but have to refer back to match which law a case is illustrating, you will need to illustrate as you go—meaning certain laws will need to be illustrated before moving to explaining others. Remember, for illustrations to be useful, they must contain the specific facts of the cases.

You need to set forth, explain, and illustrate all the laws applicable to an issue, favorable and unfavorable. If you think the other side will use a law, explanation, or case to support their position, you should include it in the rule/law section. To leave it out is to deprive readers of the information they need to make a decision, plan strategy, advise a client, and the like.

Finally:

(1) any law, explanation, or cases that you refer to in the application/analysis section must first be set forth in the rule/law section. If something is important enough that you use it in your analysis, the reader should already be familiar with it.

(2) Do not discuss client facts in the rule/law section. Set forth, explain, and illustrate all the applicable laws first, then apply them in the application/analysis section.

#### ***d. Application/Analysis***

In the application/analysis portion of the IRAC you analyze whether the client facts meet or fail to meet the laws you have set forth, explained, and illustrated. Begin with a topic sentence stating your conclusion on the issue or sub-issue, accompanied by a pin cite to supporting authority. Be specific, direct, and concise, *e.g.*: “Here, June Smith’s use of the property next door was open and notorious,” not “In the present case, our client June Smith’s use of the property was sufficient under applicable law.” Then tell why and show how this conclusion is sound and well supported. “Tell” by making assertions, *e.g.*, that particular requirements were met, or not, or certain factors are present, or not. Every assertion must be accompanied by a pin cite to supporting authority.

“Show” by comparing and/or contrasting the client facts with those in the cases you have to illustrate the laws. (If you find that you used a case in the application/analysis section that was not in the rule/law section—go back and add it.) Be specific in your comparisons and contrasts. Sometimes you will elaborate on the facts of case; other times you will briefly remind the reader of what happened in a case. Do not expect the reader to remember a case, even if it feels like you have just written about it. Often times case names run together. Thus, although you will know exactly what happened in the *Jones*, *Smith*, and *Brown* cases, the readers likely will not be able to match up the facts with the case name. That means they will have to stop reading your analysis and refer back to the rule/law section—something you never want to happen because it wastes their time.

Your application/analysis section should be cohesive. This means you need to show how the facts of your client’s situation relate to each other, which of those facts are most significant, and which are contributing facts and why. You do not want your analysis to appear

like “and another thing..., and another..., oh yeah, here’s another..., and this one ... too.”

Analyze all sides of an issue or sub-issue, both favorable and not. If your analysis is fairly strong or better, in favor of the client’s position, you may do this by assessing counter arguments after your main analysis. Counter arguments are arguments you think the other side is likely to raise but have particular flaws or weaknesses that you can point out, without the need for lengthy analysis. You must be specific and incisive in responding to counter arguments. It is not sufficient to repeat points you have made in your main analysis. If you find you have done this, you may need to move the counter arguments into the main analysis.

If the issue is a close one, or the law favors the other side, you should analyze both sides in the main analysis. If the issue is close, the main analysis will be incomplete if you save addressing weakness for your analysis of counter arguments. The reader will feel sandbagged. They will finish the main analysis with the impression that the issue is favorable to the client, only to find out that this is not, in fact, the case. If the issue favors the other side, this effect is magnified. Therefore it is best to elevate these counter arguments to the main analysis. You must analyze both sides, but you need to show you are aware of the client’s interests and that they are important to you.

Finally, (1) all client-specific facts you refer to in the application/analysis portion of an IRAC in the discussion section must first be set forth in the statement of facts section of the memo, and (2) any law, explanation, or case used or referred to in the application/analysis portion must first be set out in the rule/law portion.

#### ***e. Conclusion***

In many IRACs a separate conclusion is not necessary because you have set forth the conclusion in the topic sentence of the application/analysis portion. However if the analysis section is particularly complex, close, or if you have assessed several counter

arguments, you may need to wrap up the issue with a separate and concise statement restating your conclusion before moving on.

## **6. Conclusion**

After the main discussion section, *briefly* set out your overall conclusion regarding the main issues in the memo and supporting reasoning. There must be nothing new—no new facts, rules, reasons, or analysis—in the conclusion. Note: sometimes, by the time you get to your conclusion, you really see things clearly and understand what’s going on. So you write a longish, strong conclusion that should have been part of the main discussion. If this is the case, it is time to go back and edit or redraft the discussion with this clear understanding in mind. It also may indicate that you should go back and re-write the introduction. Most legal drafters will tell you that the best introductions in any legal document result from writing that section last.

### **D. Testing Your Draft with a Heading and Topic Sentence Outline**

A good way to test memoranda for overall substance and organization is to create a heading and topic sentence outline. After you have completed a draft of the memo, highlight the documents headings and subheadings along with the topic sentences of every paragraph, then copy them in order into a separate document and print it out.

First, check if the headings and topic sentences identify all the subjects, issues, and points necessary to analyze the problem or matter. Thus, in the statement of facts are all the significant categories of facts clearly identified? In the discussion section, are all issues that needed to be addressed identified? Are the major or overarching applicable laws identified in the topic sentences of the rule/law paragraphs? Are your overall conclusions for each issue and

sub issue set forth in the topic sentences of your application paragraphs?

If the outline reveals any ambiguities or omissions in facts or analysis, review your draft. It may be that you have left out subjects or issues that you intended to address or that you realize need to be addressed or steps in analysis may have been omitted—which mean more substantive drafting is needed. Or, you may have fully addressed the necessary subjects and issues, but the headings and topic sentences do not adequately identify them—which means revising or adding headings or topic sentences.

Second, check if the headings and topic sentences are arranged in a logical order that is easy to follow. Pared down to headings and topic sentences you should be able to tell if the memo provides context before details, puts familiar information before new information, and has an explicit structure. A heading and topic sentence outline also reveals whether the issues and sub issues are logically arranged, *e.g.*, threshold issues are addressed first, and issues and sub issues that relate to each other or that follow each other are put one after another. Also, the subjects and issues may be arranged in logical order, but some topic sentences may need transition words to make their relationship explicit.

Third, check if the headings clearly and concisely identify the subject of the section or subsection and that the topic sentences clearly and concisely identify the subject or point of the paragraph. In other words, check your headings and topic sentences first in isolation to ensure they are clear and strong, and then make sure they are accurate.

## **E. Research Memorandum Drafting and Reviewing Guidelines**

These guidelines will aid drafters as a checklist in drafting, reviewing, revising, and editing their own memos.

### **1. Substance/Analysis and Organization**

### ***a. Question(s) Presented***

Does the question identify the main issue(s) addressed in the memo and the key facts? *E.g.*, Whether (*legal issue*), when (*key facts*). Detractions from questions presented include questions that leave out important facts, questions that are too general (they do not identify the issue with sufficient specificity), or that are conclusory (they contain all or part of the answer).

### ***b. Short Answer(s)***

Does the answer begin with one word, *e.g.*, “Yes” “No” or “Probably,” and directly address and answer the question presented? Does it state the basic reason(s) in a conclusory fashion? Does the answer identify the major sub-issues the memo will address? (The question should set out the overall issue, and the answer should identify the sub-issues). Detractions include answers that do not set out affirmative conclusions (watch for the words “if” and “provided that”), that do not include reason(s) in support, or that contain too much explanation.

### ***c. Statement of Facts***

Does the first paragraph provide context for the memo? Are the parties, players, and general situations identified? Are terms defined for the parties and players as necessary (if not already done in the question presented (Short Answer or executive summary)? Does the statement of facts include all legally material facts—all the facts that are referred to in the discussion section? Based on your knowledge of the law, does the statement contain all facts necessary to analyze the issues presented? Does the statement include helpful background and context facts? Does it appear that the facts are presented neutrally? Is the statement free of conclusions or

argument? The statement of facts should show versus tell the reader what went on that is relevant to the question presented.

Are the facts set forth so that it is easy for a busy, unfamiliar, or vaguely familiar reader to understand what the case is about and what happened? Are the facts arranged in a logical sequence, *e.g.*, chronologically, by issue or subject, by witness, or from general to specific. Detractions include omitting facts, failing to put contextual facts in the beginning of the statement, and jumping back and forth from issue to issue or subject to subject. Set forth all facts that pertain to an issue or subject before moving on.

Does the statement of facts clearly indicate the sources of the various facts so that these sources can later be efficiently located?

#### ***d. Discussion***

##### ***(i) Summary<sup>1</sup>***

Does the summary set out the basic claim or defense—what a party will have to do, show, or prove to prevail? Does this sentence identify these requirements in the same order they are addressed in the main discussion? If a statute is involved, does the summary quote the pertinent portions of it? Are the essential governing rules for each issue set out with supporting citations? Then do you set out your conclusion for each issue, along with your essential, specific supporting reasons with supporting citations? Does the summary include any overarching rules that apply to all the sub issues?

If you are using the memo format that begins with an executive summary rather than questions presented and short answers, do you begin the summary with a brief conclusion regarding the main issue(s) addressed in the memo?

##### ***(ii) Main Discussion Identifying, Explaining and Illustrating the Law***

Do you begin with the overarching law applicable to the issue or sub issue? Do you set out the rules, elements, tests, standards, factors, and cases necessary for an unfamiliar reader to understand how and why the issue is likely to be decided? Are the laws, elements, tests, standards, factors, and cases sufficiently explained? Are they sufficiently illustrated with examples from the cases? Are they set out in a logical sequence, e.g., broad to narrow, general to specific? Is every law, element, test, factor, law explanation, or case accompanied by a pin citation to a supporting authority? Is every law, element, test, standard, factor, or case that you refer to in your application first set out in the rule/law section? This includes those relevant to counter arguments. When you compare or contrast the client's facts with a case in the application section, be sure to illustrate the case first in the rule law section. Do not discuss client facts in the rule/law section.

Are the rules synthesized from the cases so that a busy, unfamiliar reader can easily understand how they work, what's important, what a court or jury will look to in deciding the issue?

Detractions from the main discussion include:

- (1) omission of important laws, elements, standards, tests, factors, or cases;
- (2) omission of any laws, elements, standards, tests, factors, or cases you refer to in your application section;
- (3) failure to adequately explain these items and illustrate how they work;
- (4) mere lists of statements from cases or descriptions of cases (a.k.a. sequential case analysis) instead of synthesis of the cases and then critical facts;
- (5) discussing client facts; and
- (6) failing to cite to supporting authority.

### ***Application (Analysis)***

Does each application/analysis section begin with a topic sentence with your overall conclusion on the issue or sub-issue with a citation? Is this sentence direct and specific? Are all of the material client-specific facts addressed? Are they addressed in a logical

sequence, e.g. strongest to weakest?” Do you make clear how these facts relate and which are more significant and why? Do you both tell (make assertions with supporting citations) *and* show (compare/contrast the client’s facts with the facts of the cases)? Do you use the cases effectively (by comparison or contrast) to show how and why the client facts meet or fail to meet the applicable laws, tests, standards, etc.? Have you cited to the cases while telling and showing? When discussing your client’s facts, have you linked those facts to cases and cite those cases to show the reader the facts you are discussing are legally significant? Have you assessed potential weaknesses either through counter arguments or the main analysis?

Detractions from the application section of the discussion include:

- (1) Omission of material client specific facts (good or bad);
- (2) Failure to show how the facts relate or which facts are particularly significant and why;
- (3) Discussion or reference to any laws, elements, tests, standards, factors, or cases that are not first set out in the rule/law section (if you compare or contrast the client facts to the facts of a case, be sure you have first illustrated that case in the rule/law section);
- (4) Insufficient use of the cases to show whether, how, and why the client facts meet or fail to meet the applicable rules, elements, tests, standards;
- (5) Insufficient citation;
- (6) Failure to address weaknesses or counter arguments.

### ***e. Conclusion***

The conclusion of the memo should succinctly set out your resolution to the main issue(s) addressed by the memo, your key reasons in support, and supporting citations.

## **2. Paragraphs**

Do your paragraphs begin with a topic or transitional sentence that identifies the subject or main point of the paragraph? Then does each sentence in the paragraph (1) relate to the topic or transitional sentence, and (2) relate to the sentences around it? The second requirement is accomplished by arranging the sentences in logical order, and by using transition words as signals, *e.g.*, however, conversely, also, moreover.

Detractions include:

- (1) paragraphs without clear topic or transition sentences;
- (2) sentences that do not relate to the topic identified; and
- (3) paragraphs that are choppy or disconnected because the sentences are not arranged logically or smoothly, or transition words are needed.

### **3. Sentences and Word Choice**

Are your sentences as clear, direct, and concise as possible? Always look for ways to use fewer words and to eliminate unnecessary words. Use specific, concrete words. Have concrete subjects and active predicates. Where possible have your subjects be people or entities that can act rather than concepts.

Put yourself in the position of the distracted unfamiliar reader. Are any of your sentences too long or hard to follow? Three lines of text is stretching the limit—give a hard look at sentences over 2 ½ lines, and sentences under 2/3 of a line (for choppiness). If you must have a long sentence, break it up with enumeration, *e.g.*, (1), (2), (3) or (a), (b), (c). If the reader might have to read a sentence more than once to understand what you mean, the sentence needs revision.

Eliminate any words or sentences that simply narrate the process of your analysis, *e.g.*, “This issue was addressed by the Illinois Supreme Court.” Instead, state the rule, requirement, test, or standard and cite the case(s).

Avoid intrusive phrases or clauses (don’t interrupt yourself).

Use parallel structure, *e.g.*, don’t have present tense and past tense in the same sentence.

Avoid legalese and words or phrases you would normally not use, but do not use slang or overly casual terms.

Make sure you use the right word: e.g. courts “rule,” and “hold” but they don’t “feel” or “argue.”

#### **4. Technical**

Make time to proofread. This requires time away from the document to rest and refresh your eyes and mind. Make sure there are no proofing, grammar, *Bluebook*, quotation, formatting, or style errors. If you use another source’s words, you must put quotation marks around those words and pin cite to the exact page of the source from which you are quoting. To do otherwise is plagiarism.

### **F. Communicating the Substance of the Memorandum to the Client**

You or someone in the firm will communicate to the client of the results of your research and analysis to keep the client informed and enable them to make decisions regarding their case. Some drafters rewrite the memo removing much of the citation and some of the legal analysis to make it shorter and quicker for the client to read. The problem with this option is often unnecessary time spent (and billed) converting one perfectly good document into another.

The better practice is often to send the client a copy of the memo with a transmittal or enclosure letter that (1) contains an expanded executive summary of the memo that adds an assessment of any counter arguments or potential weaknesses, (2) asks the client to carefully review the facts set out in the memo—because any conclusions and predictions are based on those facts—and to inform the drafter of any errors, omissions or additions to the facts, and (3) asks the client to contact the drafter with any questions or comments. For further discussion regarding transmittal letters see [Chapter 4](#), section E.

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## Checkpoints

- Research memoranda are used to make a record of your legal reasoning and predictions and to show that they are well supported by research and analysis.
- The goals in drafting a research memo are to:
  - solve a problem,
  - be thorough, and
  - be concise.
- It is important to analyze both sides of a problem in a research memo and present the good news and the bad news, the pros and the cons, the strengths and weaknesses of a client's matter.
- Memorandum formats are formal structures within which to organize the materials and parts of a memorandum; they should be learned, internalized, and followed as they represent a traditional, familiar format that the reader expects.
- The basic formats for traditional office memoranda include (1) an introduction—either questions presented and short answers, or an executive summary, (2) a statement of facts, (3) discussion section containing law and analysis (application of the law to the facts), and (4) a conclusion.

- Questions presented set out the issues addressed in the memo.
- Questions presented should describe actual specific facts rather than legal conclusions.
- Short answers contain your prediction and essential supporting reason(s) on each issue.
- A short answers must directly address the question presented and should begin with one word or two words, *e.g.* Yes, No, Probably, Probably not.
- After the one or two word answer, set out the basic reason(s) in support in conclusory fashion.
- The summary or executive summary either comes at the very beginning of the memo (replacing the question presented and short answer) or at the beginning of the discussion section if using the question presented/short answer format.
- If the memo begins with an executive summary, the drafter should begin the summary with his or her prediction of the outcome of each main issue addressed in the memo.
- In drafting the summary, follow this basic format and these requirements:
  - Draft a sentence setting out what must happen in order for the client or opposing party to prevail.
  - If a statute is involved, quote the pertinent portions.

- Set out the issues in terms of the main law(s) that govern them, in the same order as those issues are addressed in the memo.
  - Set out your conclusion on each issue.
  - Include the key reason(s) supporting each conclusion.
  - Include citations to supporting legal authority for your conclusions and reasons.
  - If the matter involves important, overarching laws that apply generally, or to more than one issue, set them out in the summary.
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- The statement of facts should provide an accurate concise description of the facts that sets up your analysis in the discussion section. It needs to provide enough context and information for an unfamiliar reader to understand what the matter is about and what happened.
  - The statement of facts must contain all legal material facts, both favorable and unfavorable to the client, and any fact referred to in the discussion section must be included in the statement of facts.
  - Begin the statement of facts with a paragraph that provides the context and background for the memo. Identify the client and their problem or situation as well as any other important parties or players.

- Then set forth the facts in a logical sequence that makes it easy for the reader to follow and understand the facts, *e.g.*, chronological order, by issue, by subject, by witness, general to specific.
- The statement of facts should be free of conclusions and argument, instead describe the specific facts that would lead the reader to a conclusion.
- The discussion section is where drafters show that their predictions on the issues are sound and well supported.
- Each issue and sub issue in the memo is addressed using the IRAC format.

**I:** Identify the issue or sub issue in a point heading

**R:** Set out, explain and illustrate the applicable laws/rules (favorable and not), going from broad to narrow, general to specific. Provide pin citations to supporting legal authority for each law, each explanation, and each illustration.

**A:** Begin each application section with a topic sentence containing your overall conclusion on the issue or sub issue, with a pin cite to legal authority supporting it.

Then tell why and show how your conclusion is sound and well supported:

Tell by making assertions, supported by legal authority, that the client's facts meet or fail to meet the various

rules, tests, standards, requirements set forth in the rule/law section, or by making assertions supported by legal authority that relevant factors are or are not present in your client's facts.

Show by comparing and/or contrasting the facts of your client's case with the facts of cases used in the rule/law section.

- Assess both the strengths and weaknesses of the client's case, either in the main application/analysis or through assessing counter arguments.

**C:** A separate conclusion after the application may be necessary if the analysis is complex, close, or contains several counter arguments. Otherwise, you may omit it because the topic sentence of the application section contains your conclusion on the issue of sub issue.

- Test your memorandum for overall substance and organization by creating and reviewing a heading and topic sentence outline.
  - Once you have a complete, quality draft, thoroughly assess the memo using the memorandum guidelines.
  - Make time to print and proofread the memo separately before turning it in.
  - Often the results of your research will be communicated to the client by sending the memo to the clients along with a transmittal letter. Keep in mind when drafting the memo that it will be read by others than the assigning attorney—including the client.
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