Chapter 5: Drafting Legal Memoranda

Introduction

The legal memorandum is to U.S. law firms what the business strategy document is to corporations. It is intended to present a thorough and clear analysis of a particular legal issue and recommend a certain action to be taken. In general, your audience for a legal memorandum will be other legal practitioners, which means that the substance of your writing is especially crucial if your advice is to be heeded.

Topics Covered in This Chapter:

- Stating the issue in a proper opening
- Developing an outline
- Sections and headings
- Advanced paragraph and section transitions
- Avoiding redundancy
- Being succinctly detailed
- Applying sources

The Legal Memorandum

A legal memorandum is a predictive document designed to evaluate a particular issue, client or case and to make recommendations on the anticipated outcome based on existing law. It is a comprehensive document, often consisting of complex legal analysis and assessment of a narrow legal question. And in most cases, it is used as the basis for crafting a brief to the court if the case is accepted and ultimately tried.

Your goal in a legal memo is to provide a complete background on the issue, identify and explain all relevant precedent that would likely apply in the case, and present guidance about how the issue would likely be resolved by the court. Accordingly, the legal memo should contain the following elements:

- Headings
- Question Presented
- Short Answer
- Statement of the Facts
- Discussion (e.g., Analysis)
- Conclusion/ Recommendations

As with most legal documents, you have some discretion in terms of the titles for each section of the document and their order. However, a legal memo would not be complete without each of the elements listed above. A sample memorandum is included in Appendix A for your reference and below is a brief explanation of what each element should include.
Headings

It is a good idea to use a cover page or set aside the upper half of the first page of your legal memo for your headings. In this section, you will want to identify the document as either a Memorandum, Memorandum on Points of Law and Authorities, or Legal Memorandum (all refer to the same type of document).

Your next step is to address the memo properly. A memo is never written with the formalities of correspondence; however, it should have a specific audience in mind. Identify who the memo is addressed to and their title; who it is from (presumably you) and their title; the subject of the memo, which should reference the specific legal issue or client file name and number, and; the date the memo was completed. Do not include superfluous information in the heading section.

Question Presented

A carefully drafted question in a legal memo will undoubtedly set apart an outstanding legal writer from a mediocre one. If you were drawing a map to get somewhere, the question presented would be the address of where you are going. If it is drafted properly, you will have no trouble at all getting there. But if it is hastily drafted or incomplete, you may be wasting valuable time in your analysis.

The question presented is the legal question you are trying to resolve. Every case turns on one or two key legal issues, even if the case is full of minor legal issues. Your question presented highlights that key legal issue in light of controlling precedent or statutes. In other words, it provides you with the address of where you are going, but it also asks whether you will get there given the terrain ahead.

The question presented should be short—no more than one or two sentences—and it should be presented in the form of a question. However, it should not be so short as to leave out the substantive elements that you will be reviewing in the pages following. Some examples of poorly-drafted and well-drafted questions are listed below:

Poorly-drafted questions:

- Is the client guilty of trespass?
- Will Mr. Jones be able to get jurisdiction over the defendant?
- How does this jurisdiction define criminal homicide?

Well-drafted questions:

- Under Pennsylvania’s trespass statute, is a person liable for damages when they were pushed onto the property of another by force?
- Do New York courts grant personal jurisdiction over a defendant who spends his summers in New York but has taken no affirmative steps to change his residency?
- Does Massachusetts law define criminal homicide to include offenses by minors at the direction of their adult parents?

As you can see from these examples, the question presented is short, yet detailed enough to alert the reader to the particular aspect of the case that will be determine whether the client succeeds or fails.
Overlooking or misstating the key issue will lead you to provide the wrong analysis and thus the wrong advice.

**Short Answer**

The short answer is exactly what it says it is. You are providing the answer before you give the analysis. Of course, you cannot reasonably write this section of the memo before completing the legal analysis below. However, this short answer should be placed immediately after the question presented so that the reader has a quick question and answer up front and can then determine whether they wish to continue with the analysis.

Your short answer should always include the key reason that supports the answer to your question. It should never be “yes” or “no” alone. Consider the following examples of effective short answers:

- Courts in this jurisdiction have consistently ruled that intent is not a required element to prove trespass, making it unlikely for our client to prevail in this case.
- Past precedent in New York suggests that jurisdiction could not be found for temporary visitors; however, more recent cases have allowed exceptions for lengthier stays. Jurisdiction in our case is possible, but not certain.
- No. According to Massachusetts Code § 101.1, minors are excluded from the definition of criminal homicide and must be tried under the Juvenile Offenses Act.

Each of these short answers gives just enough information to make an informed decision, without burdening the reader with extensive analysis. However, the answer could not have been crafted without performing a thorough legal analysis and most lawyers reviewing legal memoranda should be expected to review that analysis carefully.

**Statement of the Facts**

The statement of the facts refers to the relevant and background facts only. Relevant facts are facts that have a bearing on the legal outcome of the case. Background facts are facts that relate to the legal outcome of the case but do not necessarily affect that outcome. All of this information should be presented in the fact statement in a neutral tone (you are not trying to convince the reader of anything here).

What you should be sure to discard are irrelevant facts—facts that have no relevance to or bearing on the legal outcome of the case. A typical client will present you with all the facts that they have, not knowing which ones will impact their potential case. Your job is to sift through those facts to weed out unnecessary information.

If there is any procedural history to the case (i.e., you are considering an appeal from an unfavorable trial court decision), include that in this section as well. Explain the outcome of the lower courts and, in one or two sentences, why they ruled against your client. Again, do this in a neutral manner.

Be sure not to raise any legal arguments in this section. Save those for the discussion that follows. Your facts section should give the story of the case, but nothing more.

**Discussion**
The discussion section of your legal memo is where you will begin your legal analysis. Here, you want to begin by expanding on the question that you presented above. What is it that you are asking and why is that the key issue? What role does the statute or key precedent that you found play in resolving that question? And what related questions are easily answered by the law that you are applying in the case (so that we may dispose of them quickly)?

The first thing you will need to do is to break down the rule that you plan to use, whether it is a statute, case, regulation, or set of cases. Every rule consists of a set of elements. Use those elements to guide your discussion, setting each one apart in a new subsection of the discussion. Be sure to note the connection between the elements in the rule. It will generally fall into one of the following categories:

- Conjunctive – every element of the rule is required in order for it to be applied.
- Disjunctive – at least one element of the rule is required in order for it to be applied.
- Factor or balancing test – the more elements of the rule that are met, the more likely it is that the rule will be applied.

How each element is connected to the rule will control how your analysis of each element fits into the rule and how you structure that analysis. For example, if you have a disjunctive rule, you may want to start with an analysis of the factor that you clearly have, which should make the remainder of the analysis less critical to the outcome.

Once you have identified each of the elements in the rule and how they are connected to one another, take each on its own and establish a research strategy for that element. Your goal is to identify the relevant statutes, caselaw, regulations, and other jurisprudence that defines and explains that element. You are not looking for an all-encompassing analysis of the theoretical foundations of the element. Rather, you are searching for an explanation of the element in the context of your case.

To do this, I suggest something akin to the following as a research strategy:

1. Learn about the element in plain English. Use secondary sources or, as a starting place, Google to give you sources that explain the relevance of the element and its evolution. Keep in mind that none of what you find in this first step will be recorded in the brief. This is for you to get your mind around the element to make you a more effective researcher.
   a. If you are already familiar with the element, use this as a refresher to review the latest news or analysis of the element. Spend no more than an hour doing so.
   b. If this is a new element to you or one you have not used in a long time, read several distinct sources to give you a framework within which to define the element. Spend two or three hours in this process.
2. Conduct a broad statutory and caselaw search. Based on the knowledge that you attained from step one, craft a set of search terms that broadly outlines the element and would capture even tangentially related jurisprudence. If you have access to a legal database such as LexisNexis, run your search here using a jurisdiction specific search (selecting the jurisdiction you plan to bring the case in). If you do not have access to a legal database, run the search in Google Scholar adding the name of the state in which you wish to acquire jurisdiction.
3. If you have a manageable number of cases to briefly review at this point (e.g., fewer than 50), begin skimming them to identify specifically what the court said about the element you searched for. Highlight this or jot it down on a notepad with the citation for the case. If you still
have too many cases, add an additional term to your search to narrow it further. You can also limit it by date to retrieve only cases in the last ten years, for instance.

4. At the end of this process, you should have a long list of cases that have addressed the element and you should start seeing opinions that refer to other cases that you have already come across. This is a sign that you are reaching the end of your caselaw search for this element. Once you run out of “new” analyses by the courts of your element, you can stop the search.

5. Be mindful of any statutes, regulations, or advisory opinions on point. These will usually be referenced in the cases that you identify; however, newer statutes and regulations may not have had an opportunity to be tried in the courts yet, so run a search with the same search terms for statutes and regulations in the jurisdiction where you plan to file suit.

6. Next, rank your cases by their weight, placing opinions with the most precedential value on top and those with least on the bottom. Make note of the dates of the decisions to ensure that you have the latest analysis.

7. And finally, validate your authority. In LexisNexis, you would do this with the Shepard’s function, which tells you if the cases you plan to rely upon have been questioned, criticized, overturned, or supported by other courts. There is no equivalent online mechanism outside legal databases to perform this validation.

The legal research process is lengthy and can be quite expensive if a legal database is used. The tips above are meant to focus your search and help you to quickly identify the most relevant authorities to support your analysis. However, bear in mind that complex cases may require more extensive searches as well as the use of persuasive authority from other jurisdictions. That is beyond the scope of this text.

Now that you have identified the relevant caselaw and statutes that interpret the element you are interested in within the context of your case, you can begin to present the analysis. Begin with the lead case or statute—usually a case or statute that provides a clear definition for the element. For example:

*The Pennsylvania Supreme Court defined the element of “dwelling” to include any non-movable structure in which residents received their meals and slept most nights.* [Citation]

This hypothetical definition of “dwelling” will inform the remainder of our analysis of whether a client accused of burglary (among other things) was in fact entering the “dwelling of another.” Leading with a case from the highest court in the jurisdiction, assuming it is still good law, is an effective way to set the tone for the rest of the analysis. The rest of the analysis will support and clarify this definition, lending it the particularity that you will need to link or distinguish the element from your client’s actions.

There are two approaches to drafting the discussion section of a legal memo: 1) leading each paragraph with a new case that speaks to one or more of the elements, or; 2) leading each paragraph with a refined analysis of the element supported by one or more cases. In my experience, the latter approach is more effective at providing clear and convincing evidence to support the ultimate conclusion.

Each paragraph in your memorandum, following the second approach, should look something like the following:

*Sentence 1: Definition or clarification of the element.*

Example: *Most courts in this jurisdiction have held that a motorhome is not a dwelling within the legal meaning of “burglary.”*
Sentences 2-3: Supporting analysis of the thesis sentence.

Example: In Jones v. Smith, the court found that a motorhome used occasionally for vacations was not a dwelling because usage was sporadic. [citation]. In Holmes v. Nugent, the court held that a conversion van with a bed and small kitchen used for week-long business trips was not a dwelling because the owner maintained a residence elsewhere. [citation].

Sentences 4-5 (if necessary): Conflicting evidence that may question the thesis sentence.

Example: However, in Sandy v. Shore, the court concluded that a motorhome that was parked permanently in a trailer park and used for eating and sleeping every day was a “dwelling” within the meaning of the law. [citation].

Final Sentence: Preliminary application of the analysis to your case.

Exercise: In our case, our client maintained a residence in addition to his motorhome and did not spend more than two weeks at a time in the motorhome.

If your analysis is more complex, you may wish to use full paragraphs for each of the points listed above. However, your sequence should be the same—1) identify the rule; 2) support and clarify the rule with applicable cases, and; 3) provide a preliminary conclusion based upon the facts of your case. Repeat this process for each element of the rule, paying close attention to the connection between each element.

Conclusion/Recommendations

Your conclusion should be concise and based clearly upon the analysis that you already performed. The goal here is to take each of the preliminary conclusions that you drafted at the end of your discussion of each element, and formulate a single final conclusion in sync with those findings.

A few things to note in the conclusion section:

- Do not begin any new arguments or introduce any new jurisprudence here.
- Do not repeat the question presented.
- Do not state the conclusion with absolute certainty—there is always room for doubt.

Your conclusion should leave the reader feeling like you have successfully glued all of the elements together and made your recommendation undeniable. Whether you have concluded that your client will win or lose their case, your logic must be clear and sound. Your recommendation will likely be relied upon to take (or avoid) legal action. Incomplete or incorrect guidance can cost the firm financially and may affect their reputation overall.

Rest assured that if you have performed your analysis thoroughly and have followed the logical approach outlined above, you can feel confident in your guidance. Legal professionals in the United States have applied this approach for many years and have come to rely upon the simple logic that it offers. Applying it in your own drafting will help to make you a more effective legal writer.
Exercise: Framing the Issue [forthcoming]

Questions to ask about every legal memorandum that you draft:

- Identifying the issue
  - What is the central question you need answered?
  - Are there related questions that should be addressed?
  - What led to the question in the first place?
- Framing the issue
  - Have you kept your issue statement short?
  - Is your issue statement persuasive?
  - Does your issue statement recommend a certain outcome?
- Supporting the issue
  - Is your issue supported by foundational statements?
  - Is your issue free of opinionated statements?
- Analyzing the issue
  - Have you applied inductive reasoning to establish a rule?
  - Have you outlined the rule?
  - Have you applied the rule to your
- Concluding
  - Does your conclusion logically follow your analysis?

Case Briefs

A case brief is a short summary or abstract of a case that has already been decided. These are relied on extensively by law students and less frequently by practitioners when conducting legal research. A case brief serves to inform the reader in an efficient manner the key elements of the case that they would need to know to explain it to a third party, analyze it in light of a particular client’s facts, or factor it into a legal memorandum.

A typical case brief should be no more than one page. Highly complex cases involving numerous issues of law may require an additional page. However, more than two pages eliminates the key function of a case brief—to provide an efficient overview of a case.

A case brief should be prepared whenever you or another party needs quick access to the information in the case, or in the event that you will likely reference this case again in future legal memoranda. Having
A database of well-written case briefs can be a valuable time-saving tool. If you keep them organized properly on your computer or in your files, you will be able to quickly refresh your memory of the case and determine whether it will help you in your future legal research projects.

The elements of a case brief are relatively standard. And like the legal memorandum, you have some flexibility in how you organize those elements. It is wise to adopt a method that is comfortable for you and others who read your briefs and to maintain that method for consistency. In general, you will want to include the following elements in a case brief:

- Parties/ Case Citation
- Facts and Procedural History
- Issues
- Decision/ Holding
- Reasoning
- Separate opinions (if applicable)
- Analysis

How will you fit all of that information on one page? By using short, substantive sentences. This is an excellent learning tool for legal writers who tend to write in a verbose manner, using more words than necessary to convey a point. The case brief is meant to be highly condensed and to give the reader only the information that is essential to their understanding of the case.

**Parties/ Case Citation**

At the top of your case brief, you should include the names of the parties and the citation of the case. Only use the last names of the parties and try to write the citation in Bluebook format so that it is easily transferred to the legal memorandum or court briefs later. Also, be sure that you are briefing the most recent case. In Lexis, you can confirm this by clicking the Shepardize button, which will show you where the citation you are using fits into the procedural history of the case.

When you refer to the parties throughout the brief, it is wise to refer to them by their court designation:

**Trial court designations: Plaintiff vs. Defendant**
Appellate court designations: Appellant vs. Appellee
Supreme Court designations: Petitioner vs. Respondent

The first party listed in the name of the case will always be the Plaintiff, Appellant or Petitioner. The second party listed will always be the Defendant, Appellee, or Respondent. However, these designations may change on appeal, so do not assume that the Appellant on appeal was also the Plaintiff at the trial court.

The citation is the address of the case in a reporter. A reporter is a paperback or online book where all published cases can be found. Most cases will have multiple citations because they are published in multiple reporters. These are known as parallel citations. Although courts still use these in their opinions sometimes, it is not usually necessary to include parallel citations in your case briefs or in your legal memoranda. The first citation following the party names is sufficient to find the case in a paperback or online reporter (or in Google).

Facts/ Procedural History

Just as with the legal memorandum, the facts of a case brief should be very short. The process is a bit easier for briefs because you are extracting facts from a court opinion that has already condensed the facts substantially from the trial. Unlike in a memo, where you need to sift through a client’s facts to determine which ones are relevant, the court has done that work for you. However, you must still be selective in which facts you include in the brief so that don’t get lost in unnecessary details.

Your statement of the facts should be one short paragraph in length in the brief. The words should be your own—not the words of the court. This ensures that you understand the facts of the case and can easily explain them in the context of the legal argument being made. Your focus should be on the complaint and the reason it was filed in the first place, which will come forth in the fact statement of the court’s opinion.

You should also include in this section a brief procedural history. This could be as simple as saying that the case is an appeal from an unfavorable trial court ruling against the current appellant, or it may be a slightly lengthier explanation of the motions that led to the current procedural posture of the case. In no case should this section exceed two sentences.
**Issues**

The issue is the central legal question in the case that the court was asked to address. In many cases, the court explicitly states the issue at the outset, usually following the facts and procedural history of the case. In some cases, however, it is less clear and requires you to sift through the language of the court to find the question they are addressing.

If possible, state the issue as a question that can be answered directly. Consider the following example of an issue statement from the model brief found in Appendix B:

*Whether the petitions of Gul and Hamad, appellants, are not moot and whether the district court made certain procedural errors in reaching the contrary conclusion?*

With an issue presented in this manner, the analysis and holding can be easily linked-up to the question, giving you a straightforward outline of the case. In this example, the case turns on whether the court below made procedural errors. In other cases, the court may consider whether a particular statute applies, or whether an exception can be carved out from a provision of law. In all of these cases, framing the issue as a question will help you to identify the answer.

**Decision/ Holding**

The holding of the court is quite simply how it ruled in this case. How did it answer the question that you posed in the previous section—affirmatively or negatively? This section can be as short as a few words, such as:

*The court affirmed the lower court’s decision.*

**Reasoning**

Some lawyers combine the holding with the reasoning/ analysis section for brevity. That is a matter of preference.

The reasoning section describes the analysis the court conducted in reaching their decision. This section should only include the analysis performed by the majority if it is a split decision. In this section, you will
go into more detail about the key cases or statutes the court relied upon in reaching their decision, and any factors that stood out as particularly relevant in the analysis. Keep the following questions in mind when drafting the reasoning section, all the while remembering to keep this to one or two paragraphs:

1. What did the court hold?
2. What did the court base their holding on?
3. Why did the court apply that law/case as opposed to others?
4. What factors did the court highlight in their analysis?
5. If the court established a new legal test or definition, what is it?

**Separate Opinions**

In split decisions, some judges join the majority opinion and others either concur or dissent. The dissent and concurrence should be noted, but only briefly as they are not part of the precedent created by this decision. Each separate concurrence or dissent should be explained in one sentence.

**Concurring Opinion** – the judge agrees with the outcome of the majority decision but not with the analysis used to reach that outcome.

**Dissenting Opinion** – the judge disagrees with the outcome and the analysis used to reach that outcome by the majority.

**Analysis**

The final analysis section is distinct from the reasoning described above in that this section focused on the impact of the decision on the public at large or other cases in particular. Your goal in this section, if you see a need to include it in your brief, is to describe the significance of this case in the overall field of law and policy in your own words. You would especially want to include this section when the case:

- changes a previously accepted approach to something;
- overturns a significant law or questions a line of cases; or
- holds a law unconstitutional

Examples of case briefs can be found in Appendix B.