Chapter 15: Parts of a Memo

# Overview

Formal legal memoranda are one of the most common types of predictive writing that law students do. This type of document allows students to practice, refine, and demonstrate their grasps of core legal writing concepts such as reading and briefing cases, following rules for document design and organization, rule synthesis, case synthesis, use of analogy and distinction, and predicting legal outcomes. Memoranda are used as internal documents for an attorney to assess how a legal rule will likely be applied to a given set of facts.

There are several components that make up your formal legal memorandum: Header, Question Presented, Brief Answer, Statement of Facts, Discussion, and Conclusion. When writing your memorandum for this class, your final product will have a strict word limit. In the sections below, you will learn the purpose of each section, what you should include in it, during what part of your writing process I recommend you write that particular component, and how to format the component.

# Header

The **header** in a formal legal memorandum should state to whom the memorandum is addressed, who wrote the memorandum, the date that the memorandum was provided to the recipient, and what the memorandum addresses.

# Question Presented / Issue

The **Question Presented**, or **Issue**, tells the reader the legal issue to be answered and incorporates the major relevant facts that must be considered to determine the answer. You will have one Question Presented per legal issue being decided. So, if you have two legal issues, you will write two Questions Presented, with one Question Presented addressing each legal issue. If you have a legal issue that breaks down into two subparts, then you will have an overall Question Presented with two sub-questions presented. Your Question(s) Presented should provide a roadmap to the reader of what each legal issue to be answered in the discussion will be.

There are two different options to format a Question Presented. You can use the traditional under-does-when/whether-can-when model, or you can use the Deep Issue model proposed by Bryan A. Garner, The Deep Issue: A New Approach to Framing Legal Questions, 5 Scribes J. Leg. Writing 1 (1994-95).

In the traditional model, under the legal rule, you state the legally significant facts and the legal question as one sentence. If you use a whether-can-when structure you will punctuate the sentence with a period rather than a question mark.

In the Deep Issue model, you are not constrained by one sentence. Id. at 4, 6. Instead, with a Deep Issue, you write three separate sentences: one that states the legally significant facts, one that states the legal rule, and one that states the legal question. Id. Your fact sentence or your rule sentence will go first depending on what is the more effective arrangement. Id. Your final sentence with the legal question will go last and it will end with a question mark. Id. Each Deep Issue should be no more than 75 words for all three sentences together. Id. at 5.

When you are writing your memorandum, plan to write a first draft of each Question Presented after you have completed your research and before you have written your Discussion. By using this order, you will be testing your understanding of the legal question and helping you determine the organization of the Discussion. However, after you have written the Discussion you should then revisit your Question Presented and confirm that it still accurately reflects how you wrote your Discussion. Your Questions Presented must be in the same order that the concepts are presented in your Discussion.

In the example at the end of the chapter, I show you one Question Presented using each model. However, when you write your formal memorandum, you should select one model to use.

# Brief Answer / Conclusion / Short Answer

In a formal legal memorandum, your **Brief Answer** should be placed directly below your Question Presented and it should answer the Questions Presented. If you have multiple legal issues that require multiple Questions Presented, then you will generate a Brief Answer for each legal issue. The Brief Answer to each Question Presented should be placed in the same location within the list. For example, the answer to the first Question Presented should be placed first in the Brief Answer section, and the answer to the second Question Presented should be placed second in the Brief Answer section. The first sentence of each brief answer should provide a direct response, such as “probably yes” or “probably no.” The remainder of the Brief Answer will explain the answer given in the first sentence.

You should plan to draft the Brief Answer after you have written your Discussion and after you have solidified your Question Presented. Just because you are writing this section later, however, does not mean it is any less important. Rather, you likely will not be certain of what your Brief Answer is until after you have completed your analysis and framed your question. What follows is an example of how to set up and format your Brief Answer.

For the header at the top of the section, you should use the same format for both the Question Presented and Brief Answer: use all caps, center the words, and underline them.

# Statement of Facts

Your **Statement of Facts** section is where you tell the reader four main types of facts. First, you state the parties and their relationship both to one another and also to the legal question. You will also include the legally significant facts the reader needs to know to answer the legal questions, the key background facts to understand the entire picture, and the procedural facts that tell what actions, if any, have been taken in this situation.

For the header at the top of the section, you should use the same format as the Question Presented and Brief Answer: use all caps, center the words, and underline them.

The first paragraph of the Statement of Facts should identify the parties and establish their relationship both to each other and to the legal question. The reader needs a clear understanding of the players involved in order to understand why the facts being shared are relevant and to whom they matter. The remaining paragraphs should tell a story using the legally significant facts and key background facts. The facts should be presented as objectively as possible. Remember that your role is as an advisor when writing this memorandum, and it is part of your duty to accurately present information, even if certain pieces feel damaging to the client.

The Statement of Facts can be organized either chronologically or topically. As the writer, it is up to you to arrange the facts in a manner that makes the most sense for the reader to understand why the facts matter and how they fit into answering the legal question. What this arrangement will look like varies from legal question to legal question. Use your best judgment and think about what organization you, as a reader, would want to see. Do not write the Statement of Facts in the order in which you encounter the information in your provided materials. Rarely will a client give you the facts in a usable order. Likewise, the assignments that you receive during your legal writing classes also anticipate that you will use your judgment to rearrange the facts in a manner that best fits with the legal question.

To decide what facts are relevant, consider what facts you need to know to be able to solve the legal issue presented. Any fact that you think is important enough to be in your Question Presented should also be in your Statement of Facts. Another way to determine what facts are relevant are to articulate which facts, if changed, would modify the outcome of the legal question. Facts that explain the procedural history of the case, in broad strokes, are important. Dates are important if there is a timing issue. Facts that are irrelevant should not be included because they cloud the reader’s understanding and demonstrate that you do not have a strong grasp on what is important to determine this case.

The final paragraph of the Statement of Facts should consist of the actions that have thus far been taken in the current situation, including whether a lawsuit has been filed, if opposing counsel has given any deadlines for a response, or if there are any statutes of limitations that are about to run.

Finally, be sure that you only write facts in your Statement of Facts; it is not the place to argue, to draw legal conclusions, or to editorialize. The Discussion section of your memorandum will provide you ample opportunity to present your legal analysis and draw conclusions.

Plan to write your first draft of Statement of Facts after you have written your first draft of your Question Presented and after you have created an outline of your Discussion but before you write your Discussion. By writing your Statement of Facts before you write the entirety of your Discussion, you ensure that you have a solid grasp on what the facts are in this situation, which is key for providing effective legal analysis. After you have written your full Discussion, you should then go back and read through your Statement of Facts to confirm both that you have included all legally significant and key background facts that you used in your Discussion and also that your organization of the facts matches with your Discussion organization in a way that will make the information most accessible to the reader.

# Discussion

The **Discussion** section of your memo is where you tell the reader what your conclusion is to the legal question posed in the Question Presented and where you expand on your Brief Answer to support your conclusion. You will use a statement of the legal rule, an explanation of the rule being used in past cases, and then an application of the rule to the current factual situation to “show your work” for your conclusion.

For the header at the top of the section, you should use the same format as the Question Presented and Brief Answer: use all caps, center the words, and underline them.

The first part of your Discussion section is your Introduction, where you lay the groundwork for the reader to understand what legal issue is being addressed. First, summarize the general legal rule. This rule can either be from a statute, a rule that you have synthesized, or both.

Then, explain which parts of the legal rule are not at issue, if any. Sometimes the legal dispute is only about one part of how to apply the rule, and you do not want to spend time addressing anything that is not in dispute. Explain what facts can be taken as “givens,” which means facts that all parties agree exists and has a particular type of legal impact. Be sure that, when explaining what is not going to be discussed, you explicitly state why these are not at issue.

Next, narrow your focus down to what part of the legal rule is at issue and give the narrowed rule that the Discussion will apply to predict the outcome. This narrowed rule serves as a roadmap to the reader to navigate through the legal analysis. As a reminder, this roadmap should also complement the order in which you present your Question Presented and your Brief Answer. Remember to include appropriate citations when you state your rule!

After your introductory paragraph, write your legal analysis using your legal writing organizational structure (in this class, CREAC). Your Discussion follows the order of issues that you laid out in your roadmap. Each issue will have its own CREAC (Conclusion, Rule, Explanation, Application [including counteranalysis], and Conclusion [narrowed]).

Your Conclusion acts as your topic sentence and signals to the reader how to consider the next paragraphs within the context of the legal issue. The rest of the CREAC-block will guide your reader through how you reached this Conclusion.

The Rule in the CREAC-block will be the part of your overall rule that is applicable to the particular part of the legal issue you are addressing, as defined by your Conclusion in the CREAC-block.

For your Explanation section, use helpful factual illustrations of how the rule was applied in past cases. Be sure to cite cases when necessary, which likely will be after every sentence in this section. Show how the authorities demonstrate the rule is what you have stated it is through explaining how the rule has been applied in past cases. Synthesize the explanation in a logical way that benefits your reader’s understanding of the legal issue rather merely providing case summaries. You might have to explain the rule’s purpose and the policies it serves. Be sure to cite a source for each statement of a rule, a holding, the court’s reasoning, or the facts from a case. Finally, remember that you will not yet be discussing the present legal situation in the Explanation section.

In the Application section, use fact-matching, analogy, and distinction to show why the past cases predict the outcome you have stated will occur in the present situation. Here, you should be deftly weaving the past cases and the current situation together. Keep in mind that you are showing your work for how you reached your Conclusion, so you want to be as explicit and clear as you can. Do not leave any connecting work for the reader to do alone. You should provide each connection.

Also in your Application section you will provide a counteranalysis that presents what could be another logical outcome in this case. The counteranalysis has to be believable, and you should also show that it is the weaker of logical outcomes. Again, use analogy and distinction, weaving the past cases from your Explanation section into the facts of the current situation to show how “that other outcome” is less likely than the conclusion you draw. The counteranalysis should not be lengthy but it must be complete.

Finally, your Conclusion [narrowed] closes the analysis for this issue by restating your Conclusion from the beginning and then adding in the specific facts and legal understandings that are needed. In some ways, this will resemble your Brief Answer, but you should not copy and paste your Brief Answer into this section.

Repeat your analysis using CREAC for each legal issue that must be addressed by the memorandum.

There will be times when your Conclusion and Rule are stated in the same sentence. For instance, if you are discussing whether a party consented to a touching, you might say, “Because Sheila agreed that Brandy could braid her hair, Sheila cannot now claim that Brandy committed battery.” Also, there will be times that you will provide a single Conclusion and Rule that will have more than one Explanation section and more than one Application section. If you have a rule that has multiple elements or factors, then you will need to address each piece in its own Explanation and Application section.

The bulk of your writing time will be spent crafting, drafting, and refining the Discussion section. I recommend creating an outline of your Discussion after you have written your first draft of your Question Presented. Once the outline feels complete, then write the Statement of Facts. After you have your first draft of your Statement of Facts, return to your Discussion outline and write a complete first draft of your Discussion section.

There is an example Memorandum in Appendix G that uses Unmarked Cases (Appendix A), Reading Cases (Appendix B), Briefing Cases (Appendix C), and Rule Synthesis Example (Appendix D) to write a Memorandum showing how the author synthesized a rule from those cases and then applied the rule to a particular factual scenario.

# Conclusion section

Your **Conclusion** section of your memorandum (not to be confused with the Conclusion sections in your CREAC legal analysis) ties everything together by stating the overall conclusion to the legal issue using the parties’ names, combining the separate CREACs into one, and providing the reasons and relevant facts that support the outcome. The Conclusion will be more thorough than the Brief Answer but will be significantly shorter than the Discussion.

For the header at the top of the section, you should use the same format as the Question Presented and Brief Answer: use all caps, center the words, and underline them.

Write this section once you have completed all the other sections of the memorandum. You might not be certain how your Conclusion should look until after you have thought through the rest of the sections. However, be careful that you do not rush the Conclusion drafting process. Ending on a strong note with a well-crafted Conclusion enhances a memorandum, while rushing to tie everything together leaves a sour note in the reader’s mind.

# Template Components

## Header

MEMORANDUM

TO: Senior Partner

FROM: XXXX

DATE: November 25, 2019

RE: Client Name’s specific legal question that you have been asked to address in sufficient detail so that if someone picks up the memorandum a year later, they can look at this line and know what it is about.

## Question Presented

QUESTION PRESENTED

1. **Under** the legal rule that controls this issue **does** the legal question that needs to be answered occur **when** specific legally significant facts are present?
2. This is the legal rule that controls this issue. These are the specific legally significant facts. What is the answer to the legal question?

## Brief Answer

BRIEF ANSWER

1. Probably yes. Under the legal rule, this is the answer to the legal question when these specific legally significant facts are present.
2. Probably no. Under the legal rule, this is the answer to the legal question when these specific legally significant facts are present.

# Step-By-Step

* Read through all given instructions and materials
* Take notes on parties, facts, authorities, procedural history etc
  + Make a timeline of the facts
  + Write down any questions you have
* Ask your professor questions if you are confused
* Research
  + Make a research plan
  + Determine how you will organize your research
  + Begin research
  + Analyze research and determine what sources you will keep/omit
  + Form narrowed legal rule
* Begin Formatting
* Create Header
* Write a first draft of your QP
* Create an outline of your Discussion
  + Introduction
  + CREACs, including Counteranalysis
  + Conclusion
* Write first draft of Statement of Facts
* Write a first draft of the Discussion- spend the bulk of your time here
  + Write Introduction section
    - Include a narrowed rule
    - Include a roadmap for organization of the Discussion
  + CREACs, Including Counteranalysis
  + Conclusion
* Revisit your QP and confirm that it still accurately reflects how you wrote your discussion
* Draft your Brief Answer
* Revisit the Statement of Facts and confirm all facts used in Discussion are included in brief
* Revise and Edit
  + Consistency and cohesion
  + Large-scale organization
  + Small-scale organization
  + Citation
  + Grammar/Punctuation/Style/ Spelling
* Read it out loud
* Edit again
* Turn in when you’re proud of it

# Concluding Notes

The components we have just discussed in such detail above are not going to be required, or even desired, for every memorandum you will be asked to produce for internships, externships, clinics, and associate positions. Instead, your supervisor might ask you to produce a document that is quicker to skim through or a checklist that can be used in court. However, the primary purpose behind the memorandum (to predict a legal outcome) and the method you use to produce the memorandum (where you examine past cases to determine how to apply the law to the current set of facts) still remain. If you can produce a quality formal legal memorandum, then you are in an excellent position to create these other types of practice-oriented predictive writing documents.