

Legal Analysis *and* Writing

Third Edition

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Office Legal Memorandum

Assignment: Issues and Facts

Outline

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| II. Definition | VI. Key Points Checklist: <i>Preparing an Interoffice Memorandum</i> |
| III. Purposes, Uses, and Importance | VII. Application |
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Learning Objectives

After completing this chapter, you should understand:

- The importance of an office legal research memorandum
- The purposes and uses of an office legal research memorandum
- The sections of a basic office legal research memorandum
- How to draft the heading, statement of assignment, issue, brief answer, and fact sections of a memorandum



Jeff Lyons, a paralegal with Berdwin and Associates, received the following memo.

To: Jeff Lyons, Paralegal
 From: Rita Berdwin, Attorney
 Date: April 20, 2008
 Office File No: Cr. 2008-136
 Re: *State of Illinois v. Meril Findo*, Cr. 08-378, privileged communication

We have been retained to represent Meril Findo in the above-referenced case. He is charged with assault with a deadly weapon. Mr. Findo allegedly assaulted his neighbor, Joseph Markham, with a hammer. Mr. Findo and Mr. Markham were arguing over the location of a fence Mr. Markham was building. According to Mr. Findo, Mr. Markham became angry and attempted to hit him with a brick. A struggle ensued, and the brick fell and hit

Mr. Markham on the head. Mr. Markham claims that Mr. Findo became increasingly angry as the argument progressed; Mr. Findo grabbed a hammer and struck him repeatedly on the head and arms. Mr. Markham claims he never assaulted Mr. Findo with a brick. There were no witnesses to the argument. Mrs. Findo is currently separated from Mr. Findo and has agreed to testify against him. Her testimony is that before the confrontation, Mr. Findo stated, "Markham is out there building that damn fence again. I'll put a stop to this once and for all." He grabbed a hammer and went out the door. The Findoes' children, Tomas, age 16, and Alice, age 10, were present and heard the conversation. Neither Mrs. Findo nor the children saw the confrontation.

Prepare a memorandum addressing the question of whether the conversation between Mr. and Mrs. Findo is a privileged spousal

communication and, therefore, not admissible in the trial of Mr. Findo. I need the memo within two weeks. You can probably cover this in three to five pages.

This chapter and Chapter 13 address the process and considerations involved in preparing an office legal memorandum. The office legal memorandum is usually

composed of some or all of the sections presented in Exhibit 12–1.

The Application section of this chapter addresses the first half of Jeff’s assignment—the heading through the fact sections. The Application section of Chapter 13 covers the remainder of the assignment—the analysis through the recommendations sections.

Sections often included in an Office Legal Memorandum

Heading
Statement of Assignment
Issue
Brief Answer
Statement of Facts
Analysis
Conclusion
Recommendations

Exhibit 12–1

Sections of an Office Legal Memorandum

I. INTRODUCTION

The office legal memorandum is the type of legal writing a paralegal engaged in legal research and analysis most frequently prepares. The role of most paralegals is to provide assistance and support to an attorney. When this support function involves legal research, it usually focuses on research and analysis of the legal issues in a client’s case. The results of this research and analysis are communicated to the attorney in the form of an office legal memorandum. It is one of the most effective and valuable ways a paralegal can support an attorney.

Chapters 12 and 13 are devoted to the preparation of office legal memoranda. Two chapters are devoted to this topic for the following reasons:

- Most law office analytical legal writing involves the preparation of office legal memoranda.
- The considerations involved in the preparation of office legal memoranda also apply to the preparation of legal analysis documents for external use.

Chapter 12 focuses on the basic format for the office legal memorandum and the preparation of the first half of the memorandum: the heading through the statement of facts sections. The focus of Chapter 13 is on the heart of the memo: the legal analysis through the recommendation sections.

The preparation of an office legal memorandum is a multistep process involving the integration of legal research, analysis, and writing. This chapter and Chapter 13 cannot be read in a vacuum. They require the integration of the material presented in

Chapters 1 through 10. Although it is assumed you are familiar with those chapters, cross-references to specific chapters are included to help you integrate the material.

As mentioned previously, the majority of the legal research and writing prepared by a paralegal is designed for the use of the supervising attorney and not for external use, that is, use outside the office. The basic format and analytical process are fundamentally the same for both an office legal memorandum and a legal analysis document designed for external use. Therefore, you should keep in mind the information presented in this and the next chapter when reading Chapters 14 and 15. External use documents usually involve

- Correspondence to clients or other individuals informing them of the analysis of a problem
- Briefs submitted to a trial court or a court of appeals

II. DEFINITION

An **office legal memorandum** provides an objective, critical analysis of a legal problem. It is an informative document that summarizes the research and analysis of the legal issue or issues raised by the facts of a client's case. It contains a summary of the law and how the law applies to the facts of the case. It presents an objective legal analysis and includes the arguments in favor of and in opposition to the client's position.

A legal memorandum prepared for office use is referred to by many different names: interoffice legal research memorandum, office legal memorandum, office research memorandum, objective memorandum, legal memo, and so on. In this and the next chapter, the term office memo is used when referring to an office legal memorandum.

III. PURPOSES, USES, AND IMPORTANCE

The major purposes and functions of an office memo are the following:

1. Identifying and recording the law that applies to a specific issue or issues raised by the client's facts
2. Analyzing and explaining how the law applies to the issue
3. Assessing the strengths and weaknesses of the client's case
4. Presenting a conclusion and proposed solution based on the analysis

A well-crafted office memo may be put to a variety of uses in a law office.

- It may be used as a guide to determine whether a claim exists.

For Example

One of the client's potential causes of action involves a breach of the implied warranty of merchantability. In the client's case, the sale took place at a garage sale. The office memo reveals that under the applicable statute, the warranty applies only if the seller is a merchant. The case on point provides that individuals holding a garage sale are not merchants within the meaning of the statute. The office memo reveals that no cause of action exists for a breach of implied warranty of merchantability.

- It may be used as a guide to the course of action to be pursued.

office legal memorandum

A legal memorandum prepared for office use. It presents an objective legal analysis of the issue(s) raised by the facts of the client's case and usually includes the arguments in favor of and in opposition to the client's position. It is often referred to by other names, such as interoffice legal research memorandum, office research memorandum, and interoffice memorandum of law.

For Example The case involves a question of whether the client had a duty to discover and disclose information in a real estate transaction. The client was unaware that his house had termites, and consequently, the buyer was not informed of this problem. The office memo reveals that the case law requires the seller to inspect for termites and disclose the results of the inspection to the buyer. This information may lead the attorney to recommend that settlement be pursued.

- It may serve to inform subsequent researchers in the law office, working on other cases with similar issues and facts, how the law applies. Future researchers do not have to spend time reinventing the wheel.
- It may serve to refresh the memory of the attorney assigned to the case on how the law applies to an issue. This is especially true in complex cases. It is also true in cases where the memo is prepared early in the case, and the issue is not reviewed by the attorney until months later when the matter is addressed by the court.
- It may be used as a guide for the attorney preparing a document to be filed with the court or correspondence for the client. The office memo may contain the statutory law, case law, and legal analysis that serve as the basis for the preparation of the document.

For Example The office memo addresses the question of whether a search warrant was improperly issued as a result of the insufficiency of the affidavit in support of the warrant. The office memo spells out the standards required for a warrant to be sufficient. The attorney may use the office memo as a basis for the preparation of a brief in support of, or opposition to, a motion to suppress the evidence seized when the warrant was executed.

Office memos are of primary importance because they provide the answer to legal questions. Their importance is evidenced by the fact that office memos are required at every stage of the litigation process.

- Early in the case, they identify the required elements of the cause of action and what is required to state a claim.
- They determine whether the client has a defense or a cause of action.
- Throughout the litigation they help determine what is required to support or oppose a motion.
- In the discovery process, they address discovery issues, such as what constitutes an attorney's work product.
- At the trial stage, they often analyze evidentiary issues, such as whether evidence is admissible.
- At the posttrial stage, they may address issues raised on appeal, such as whether the court properly ruled on a matter during the trial.

Ethics. Regardless of the purpose of the memo or at what point in the litigation process it is prepared, the actions of the supervisory attorney and the outcome of the case may largely depend upon the quality of the office memo. Also, as mentioned in Chapter 3, Rule 1.1 of the Model Rules of Professional Conduct requires that a client be provided competent representation. It is critical, therefore, that the performance of research, analysis, and drafting of the memo be thorough, careful, and complete.

As discussed in Chapter 10, legal writing is easier if you use a writing process. In this chapter, the writing process presented in that chapter is used as the framework for the preparation of an office memo. As discussed in that chapter, the three stages of the process are prewriting, writing, and postwriting.

IV. PREWRITING STAGE

The **prewriting stage** is composed of the following three sections:

- Nature of the assignment—an identification of the type and purpose of the writing assignment
- Constraints on the assignment—a consideration of any constraints placed on the assignment
- Organization—the organization of the writing assignment

A prerequisite to beginning the prewriting stage is the assembly of all available files and information concerning the client's case. All the relevant files and information must be complete. Once this is accomplished, the three sections can be addressed.

A. Nature of the Assignment

The first section of the prewriting stage requires a review of the assignment. This involves a determination of the following:

- Is the assignment clearly understood?
- What type of legal writing is required?
- Who is the audience?

1. Is the Assignment Clearly Understood?

Review the assignment and make a list of all the questions you have concerning the nature or specifics of the assignment. Review the questions with the attorney; take thorough notes when discussing the matter.

For Example The assignment is to analyze the client's case. You may need to seek clarification on which aspects of the case the supervisory attorney wants you to analyze or the specific questions or areas of law you should address.

The assignment may appear simple and clear at first, but as research and analysis progress, multiple issues or separate causes of action may become apparent. It may be necessary to have a brief follow-up meeting with the supervising attorney to determine whether the focus should be narrowed.

For Example A case that involves what appears to be a car wreck situation with a simple negligence issue may blossom into a case involving multiple issues, such as negligence, battery, and negligent infliction of emotional distress. It may be necessary to consult with the supervisory attorney to determine whether you should pursue each issue or if some of the issues should be assigned to other paralegals. If there are time constraints, it may be necessary for other paralegals to address the newly identified issues.

prewriting stage

The stage in the legal writing process where the assignment is organized, researched, and analyzed.

An additional concern when you address this question is to consider whether the assignment requires skills that you have not yet acquired.

For Example You have just begun working as a paralegal for a solo practitioner, and you are assigned the task of analyzing a complex products liability issue. The research and analysis skills required for the assignment may be beyond your current ability. If this occurs, discuss the matter with the attorney. More harm may occur if you try and fail than if you communicate your concerns. The attorney may divide the task into manageable sections and reassign parts of it to other paralegals or assign you to work with others to gain experience.

2. What Type of Legal Writing Is Required?

This question is easily answered; the assignment usually identifies the type of writing required. In the example at the beginning of the chapter, the assignment calls for the preparation of a law office memorandum. The organization, format, and elements of the office memo are discussed in the organization section of the prewriting stage later in this chapter.

3. Who Is the Audience?

An office memo is usually designed for office use only. Therefore, the reader of the memo (the audience) will be familiar with the law, and the use of legal terminology is appropriate. Determine the writing preferences of the person the office memo is being prepared for, such as those regarding style.

For Example Some attorneys prefer that the paralegal summarize the requirements of the statutory or case law. Some prefer that the law be quoted.

If the memo may be read outside the office, be sure to exclude any comments, recommendations, and so on that are intended only for office use, such as, “The client’s expectations are unreasonable.”

B. Constraints on the Assignment

The next section of the prewriting stage requires you to identify any constraint that may affect the preparation of the office memo. Ask yourself if there are any time or page limitations. These matters should be taken into consideration at the beginning. Time constraints govern the allocation of time for research, analysis, and drafting. Length constraints may limit the depth of research and analysis.

For Example If you are limited to five pages and one week, you may want to focus your research on the lead case or cases. There may not be sufficient time or space to address additional cases or secondary authority.

C. Organization of the Assignment

When preparing an office memo, the most important section of the prewriting stage is the organization of the memo. In this section, the format or outline of the office memo is identified and an expanded outline is created and used.

Most attorneys have a preferred format to follow when preparing an office memo. This format serves as a basic outline and starting point for the organization of the assignment. The prewriting section of Chapter 10 discusses the creation and use of an expanded outline from the office format. In this chapter, the focus is on the format and outline of an office memo and the requirements and considerations involved in the preparation of each section of the outline. This chapter and the next one include a discussion of the use of an expanded outline when preparing each section of the office memo.

There is no standard format for an office memo. Formats vary from office to office, and attorneys within an office may have different preferences. Follow the format preferred by your supervisor. The format presented in Exhibit 12–2 is the recommended format for a basic office memo. It includes all the basic sections of an office memo that you may encounter. Exhibit 12–3 presents the recommended format for a complex office memo. Following the presentation of the formats, the requirements and considerations involved in the preparation of each section are addressed in detail.

Certain sections, such as the “Statement of Assignment” and “Brief Answer” sections, are not included in all formats and may not be included in the format adopted by your supervisory attorney. They are included here so that you will be familiar with them in the event they are included in the format used in your workplace. Other sections, such as the “Issue” and “Analysis” sections, are required in all office memos. In addition, note that the organization of the format may vary from office to office.

For Example Some offices may prefer that the “Fact” section precede the “Issue” section. Usually the “Issue” section follows the “Statement of Assignment” and precedes the “Fact” section.

The recommended format for a basic office legal memorandum

- Heading
- Statement of Assignment
- Issue
- Brief Answer
- Statement of Facts
- Analysis
 - Rule of Law
 - Case law (if necessary)—interpretation of rule of law
 - Application of law to facts of case
 - Counteranalysis
- Conclusion

Exhibit 12–2

*Basic Office Legal
Memorandum Format*

The recommended format for a complex office legal memorandum

Heading

Statement of Assignment

Issue I

Issue II

Issue III

Brief Answer Issue I

Brief Answer Issue II

Brief Answer Issue III

Statement of Facts

Analysis Issue I

Rule of Law

Case law (if necessary)—interpretation of rule of law

Application of law to facts of case

Counteranalysis

Conclusion Issue I

Analysis Issue II

Rule of Law

Case law (if necessary)—interpretation of rule of law

Application of law to facts of case

Counteranalysis

Conclusion Issue II

Analysis Issue III

Rule of Law

Case law (if necessary)—interpretation of rule of law

Application of law to facts of case

Counteranalysis

Conclusion Issue III

Recommendations (Separate recommendation sections may follow conclusion of each issue.)

Exhibit 12-3

*Complex Office Legal
Memorandum Format*

There is no definition of what constitutes a complex office legal memorandum. Generally a complex office memo consists of more than one issue and is relatively long (more than ten pages). The formal outline of a complex office memo is merely an expansion of the basic office memo format. The components and considerations involved in the preparation of a complex office memo are the same as those involved in the preparation of a basic office memo. The sections are the same in basic content, although there are more sections.

For Example A complex memo may consist of three issues. The procedures recommended for identifying, stating, and analyzing each issue are the same as those involved in the preparation of a basic single issue memo. Each issue is addressed separately, and the process for addressing each issue is the same as that followed when addressing the single issue in a basic office memo.

The office memo format may require the inclusion of a table of authority or a table of contents. These usually follow the statement of the assignment.

For Example

TABLE OF CONTENTS	
	Page
I. Issues	2
II. Facts	3
III. Analysis Issue I	5
IV. Analysis Issue II	10
V. Recommendations	18
TABLE OF AUTHORITIES	
CASES	
	Page
<i>Smith v. Jones</i> , 354 F.2d 786 (9th Cir. 1970)	7
<i>Tod v. Doe</i> , 559 N.E.2d 31 (Ind. App. 1988)	13
CONSTITUTIONAL PROVISIONS	
Art. 3 Ind. Constitution	6
STATUTES	
Ind. Code § 35-42-3-2	6
Ind. Code § 35-42-3-8	13

V. SECTIONS OF THE OFFICE MEMORANDUM

This section discusses the heading, statement of assignment, issue, brief answer, and fact sections of the office memo. Chapter 13 addresses the analysis, conclusion, and recommendation sections.

A. Heading

Most office memos begin with a **heading**. The heading is usually brief and at a minimum contains:

- A heading in all capitals indicating the type of document, that is, MEMORANDUM OF LAW
- The name of the person to whom the memo is addressed
- The name of the person who prepared the memo
- The date
- Information identifying the subject of the memo. This may include the case name, the client's name, the case number, the office file number, and the subject matter of the memo. It usually follows "Re": There are various styles for the heading. Some of these are as follows:

For Example

MEMORANDUM OF LAW	
To:	Susan Day, Attorney
From:	Tom Clug, Paralegal
Date:	December 1, 2008

Case: *Smith v. Garage Doors, Inc.*
 Office File No.: Civ. 2008-1136
 Docket No.: Civ. 08-378
 Re: Whether a contract for the sale and installation of a garage door is a sale of goods covered by the commercial code or is a sale of a service.

OFFICE LEGAL MEMORANDUM—CONTRACTS

Title: *Smith v. Garage Doors, Inc.*, Civ. 08-378
 Office File Civ. 08-1136
 Requested by: Susan Day, Attorney
 Submitted by: Tom Clug, Paralegal
 Date Submitted: 12/1/08
 Re: Contract law, Commercial Code § 42-2-205
 Sale of goods/sale of service

OFFICE RESEARCH MEMORANDUM

To: Susan Day, Attorney
 From: Tom Clug, Paralegal
 Date: Dec. 1, 2008
 Re: *Smith v. Garage Doors, Inc.*, Civ. 08-378.
 Whether a contract for the sale and installation of a garage door is a sale of goods or a sale of a service; Commercial Code § 42-2-205.

B. Statement of Assignment

This section may also be referred to as a “Background” or “Purpose” section. Some offices require a section that presents a discussion of what the writer has been assigned to do. This section usually follows the heading and may include some background information. The purpose of this section is to provide the reader with a description of the topic covered and the parameters of the assignment.

For Example STATEMENT OF ASSIGNMENT. You have asked me to prepare a legal memorandum on the question of whether the sale and installation of a garage door by Garage Doors, Inc., is a sale of a service or a sale of goods covered by Commercial Code § 42-2-205.

For Example STATEMENT OF ASSIGNMENT. You have asked me to research the question of whether the search of our client’s automobile was an illegal search when she was stopped for a minor traffic offense and did not consent to the officer’s request for permission to search the back seat of her vehicle. Pursuant to your request, this memo includes an analysis of the relevant state and federal law.

C. Issue

In an office memo, present the issue(s) at the beginning of the memo following the heading and the statement of assignment. Doing so establishes the focus of the memo. A well-crafted memo informs the reader at the outset of the following:

- The law that applies
- The precise legal question
- The significant facts of the case

In other words, it identifies the specific question to be addressed and places it in the context of the applicable law and the facts of the case. It sets the scope of the memo, thereby saving the reader from having to determine the issue from a reading of the analysis section.

There are several matters to keep in mind when preparing the issue section of the memo.

- The issue should be correctly identified.
- The issue should be completely and correctly stated.
- An expanded outline should be used when preparing the section.
- Issues should be addressed separately when preparing complex office memos.

1. Identify the Issue

The **issue** is the precise legal question raised by the facts of the client's case. One of the most important tasks in the legal analysis process is to identify the legal issue correctly. Chapter 6 presents the analytical process that will help you identify the issue when preparing a memo.

issue

The precise legal question raised by the specific facts of a dispute.

2. Correctly State the Issue

Present the issue completely and correctly. When stated correctly, the reader is informed of the focus of the memo at the outset.

For Example

The issue involves a question of whether a will is valid if one of the witnesses does not actually see the testator sign the will. If the issue were stated, "Was the will validly executed?" the reader would have to read the analysis section of the memo to determine why it may not have been validly executed. There could be several reasons why the will may not have been validly executed: it may not have been witnessed correctly, there may not have been enough witnesses, it may have been signed improperly, and so on. If the issue is stated, "Under Probate Code § 29-5-7, is the execution of a will valid if one of the witnesses is present in the room when the testator signs but does not actually see the testator sign?" the issue is correctly and completely stated. The reader knows the precise question being addressed, the key facts, and the applicable law. The reader is not forced to obtain this information from the analysis section of the memo.

expanded outline

An outline that has been expanded so that it may be used in the prewriting stage. The use of an expanded outline allows the integration of all research, analysis, and ideas into an organized outline structure while research and analysis are being conducted. It facilitates the preparation of a rough draft.

3. Use the Expanded Outline

As discussed in Chapter 10, the use of an **expanded outline** can greatly simplify the identification and drafting of the issue. On the issue page of the expanded outline,

write every formulation of the issue as it comes to mind. The initial draft may be as simple as: “Was the will valid?” As you conduct research and gain a greater understanding of the applicable law, more complete formulations will become apparent.

For Example “Under the state probate code, is a will validly executed if a witness is merely present in the room when the testator signs?” “Under the probate code, is the execution of a will valid if one of the witnesses is present in the room when the testator signs but does not actually see the testator sign?”

When you begin to write the issue section of the memo, all your ideas concerning the issue and drafts of the possible ways it may be stated are before you in one place. The crafting of the final statement of the issue is merely a matter of selecting and combining the necessary elements from the various drafts. The use of the expanded outline in regard to the preparation of an office memo is illustrated in the Application section of this chapter.

4. Address Issues Separately

Office memo assignments, such as a complex memorandum, often involve more than one issue. When addressing such assignments, it is preferable that you list each issue sequentially in the issue section of the memo. In the analysis section of the format, address each issue separately and completely (this is discussed in the next chapter). Exhibit 12–4 presents an outline of the format.

The recommended format for the analysis section of a complex office legal memorandum

Analysis Issue I
 Rule of Law
 Case law (if necessary)—interpretation of rule of law
 Application of law to facts of case
 Counteranalysis
 Conclusion Issue I
 Analysis Issue II
 Rule of Law
 Case law (if necessary)—interpretation of rule of law
 Application of law to facts of case
 Counteranalysis
 Conclusion Issue II
 Analysis Issue III, and so on

Exhibit 12–4

Complex Memorandum: Analysis Section Format

When there are multiple issues, list them in the issue section in the order in which they are discussed in the analysis section. The issue listed as Issue I in the issue section should be the first issue addressed in the analysis section. Issue II in the issue section should be the second issue addressed in the analysis section, and so on. Also, list the issues in logical order. If the analysis of one issue is dependant on or affected by the analysis of another issue, present the issue that affects the other issue

first. For example, if the analysis of issue *B* is in some way affected by the analysis of issue *A*, address issue *A* first in the memo.

For Example The client alleges that she entered into a contract to purchase dresses from a dressmaker, and the dressmaker installed defective zippers in the dresses. The dressmaker claims that the contract between them was not a valid contract, and even if there was a valid contract, the zippers were not defective. There are two separate issues. Present and discuss the issue of whether there is a valid contract first because if there is no contract, there can be no breach. The issue section would appear as follows:

Issue I	Existence of contract
Issue II	Breach of contract

If the issues are not dependent on or affected by other issues, present them in chronological order.

For Example The client was involved in an automobile accident. The defendant ran a red light and hit the client's car. After the wreck, the defendant approached the client's car screaming and threatening the client. The defendant then pushed the client. At least four possible causes of action are present. They should be presented in the order in which they occurred:

Issue I	Negligence—the car wreck
Issue II	Assault—approaching client's car threatening and screaming
Issue III	Battery—pushing the client
Issue IV	Infliction of emotional distress—arising from the combined acts of assault and battery

Exhibit 12-5 presents a checklist for the issue section.

Checklist for use when preparing issue section

- Is the Issue correctly identified?
- Is the applicable rule of law included in the issue?
- Is the citation of the rule correct?
- Is the legal question clearly stated in the issue?
- Are the key facts included in the issue?
- If there are multiple issues, are they presented in the proper order such as logical or chronological?

Exhibit 12-5

Checklist: Issue Section

D. Brief Answer

The **brief answer** section of the office memo is composed of a brief, precise answer to the issue(s). It informs the attorney of the answer to the question and should include a brief summary of the reasons in support of the answer. Its purpose is to provide a quick answer to the issue. It should not include information that is not discussed in the analysis section of the memo.

brief answer

A section of a memorandum of law that presents a brief, precise answer to the issue(s) addressed in the memo.

Usually this section begins with a one- or two-word answer, such as “Yes,” “No,” “Maybe,” or “Probably not.” The brief answer is followed by a brief statement of the grounds in support of the answer.

For Example

Issue: According to the provisions of the Ski Safety Act § 679-33, does a resort have a duty to warn skiers of ice hazards on expert runs?

Brief Answer: No. The act provides that resorts have the duty to warn of hazards, and skiers are responsible for snow and ice conditions. The state supreme court has ruled that resorts have a duty to warn of snow and ice hazards only on intermediate and novice ski runs. The court specifically held that there is no duty to warn of any ice hazard on an expert run.

For Example

Issue I: Under the holographic will statute, Colo. Rev. Stat. § 15-11-503, is a holographic will valid if it is handwritten by a neighbor at the direction of the testator, but not written in the testator’s handwriting?

Issue II: Under the holographic will statute, Colo. Rev. Stat. § 15-11-503, is a holographic will valid if one of the witnesses to the testator’s signature is a beneficiary of the will?

Brief Answer Issue I: Yes. The statute requires a holographic will to be handwritten by the testator. The state court of appeals has held that the statute should be interpreted liberally to effect the intent of the testator. If there is clear and convincing evidence that the writing took place at the direction of the testator, the will is valid even if it is not written in the testator’s handwriting.

Brief Answer Issue II: No. The statute requires that the testator’s signature be witnessed by two disinterested witnesses.

Exhibit 12–6 presents a checklist for the brief answer section.

Checklist for use when preparing brief answer section

- Does the brief answer follow the office format, for example, a one- or two-word answer followed by a short statement of the reasons?
- Is it brief? Does it summarize the reasons in one or two clear sentences?
- Is there a separate answer for each issue?

Exhibit 12–6

Checklist: Brief Answer Section

E. Statement of Facts

Following the brief answer section is the **statement of facts** of the case. The purpose of this section is to inform the attorney of the factual context of the issue. Keep four considerations in mind when preparing the statement of facts (see Exhibit 12–7).

statement of facts

The section of a memorandum of law that presents the factual context of the issue(s) addressed in the memorandum.

Considerations to keep in mind when preparing the fact section

Importance of the facts	Don't underemphasize the importance of the facts. The law is always applied in the context of the facts of the dispute.
Contents of the section	Include the key and background facts.
Organization of the section	Organize the facts chronologically, topically, or a combination of the two.
Manner of the presentation of the facts	Present the facts accurately, objectively and free of legal conclusions.

Exhibit 12–7

Considerations: Fact Section

1. Fact Section—Importance

Some paralegals underemphasize the fact section of an office memo because they fail to understand the importance of the facts. The facts and, therefore, the fact section of the memo are important for several reasons.

- Every legal dispute involves a question of how the law applies to the facts of the case. Legal questions are not decided in a vacuum. The law is always applied in the context of a dispute raised by the facts of the case. The rule of law selected is determined by identification of the law that applies to the facts.
- The fact section may serve to refresh the memory of the attorney. The attorney may be working on other issues in the case or on several other cases and may not recollect the specific factual context of the issues addressed in the assignment. The fact section saves the supervisory attorney from having to review the file to determine the facts.
- In many law offices, office memos are kept in research files, categorized by areas of law. They are available for reference and use in other cases involving similar issues. Subsequent researchers may not be familiar with the facts of the case. The memo, therefore, should be self-contained. A subsequent reader should be able to obtain all the facts necessary to understand the analysis from the fact section. It should not be necessary to review the case file.
- The fact section protects you from possible criticism. If, after the preparation of the memo, additional facts come to light that affect the analysis of the issue and lead to a different conclusion, a well-drafted fact section provides a record of the factual basis of your conclusion. It protects you from the criticism that you misanalyzed or misapplied the law.

2. Fact Section: Content

The statement of facts in the office memo should not simply repeat the facts included in the memo assignment; it should include only a brief statement of the background

and key facts. The preparation of this section requires you to identify those facts necessary to provide the reader with a complete understanding of the factual context of the issues analyzed in the memo. It may require fewer facts than those included in the memo assignment or it may require additional facts.

Include in the fact section all facts referenced or included in the analysis section of the memo. The goal is to provide, as briefly as possible, enough facts so the memo is a self-contained document; that is, it should be sufficiently complete so that any reader who is not familiar with the facts of the case does not have to refer to the case file. To accomplish this end, the fact section should include background and key facts.

- *Background facts:* Background facts are necessary because they put the key facts in context. That is, they provide the reader with information necessary for an overall understanding of the context within which the key facts occurred.
- *Key facts:* These are facts that are so essential that if they were changed, the outcome of the case would probably be different.

When preparing the fact section of the office memo, refer to Chapter 5 for assistance in identifying key and background facts.

3. Fact Section: Organization

Organize the statement of facts in a manner that enables the reader to understand clearly the events that relate to the issue(s) addressed in the memo. There are basically three organizational formats for presenting the facts

- Chronological
- Topical
- A combination of chronological and topical

The format selected is usually governed by the nature of the facts.

Chronological Order. A chronological organization of the facts usually is adopted when the facts are a series of events related by time or date.

For Example The memo involves the following fact situation. On December 1, the client, Mr. Smith, was driving in the 600 block of First Street when the defendant, Mr. Doe, ran a red light at the intersection of First and Rose Street. As a result, Mr. Doe's vehicle collided with Mr. Smith's vehicle. Mr. Smith suffered a broken leg, and his wallet was stolen at the scene. On the way to the hospital, the ambulance was involved in a collision when it yielded at a stop sign. Mr. Smith suffered additional injuries, including a separated shoulder, in this collision. At the emergency room, his back was sprained when he was being helped onto the examining table by the hospital staff. Mr. Smith wants to know who he can sue for his various injuries and whether he can recover from Mr. Doe for the loss of his wallet. This example is referred to as the auto collision example in the remainder of this chapter.

The best way to present the facts of the case in the preceding example is chronologically. The facts that give rise to the various causes of action occurred in a linear sequence, and they are most clearly understood when narrated chronologically.

Topical Order. Some fact situations do not lend themselves to a chronological presentation. In such situations, the facts are related more by topic than by time sequence.

For Example The memo involves the following divorce situation. The client, Mrs. Jones, is the petitioner in a divorce action. Mr. and Mrs. Jones disagree on the property distribution. They own three pieces of real property, parcels A, B, and C. All three parcels are held in both their names as joint tenants.

Parcel A includes the family home. The property is paid for. Forty percent of the mortgage was paid from an inheritance Mrs. Jones received from her father. The remainder was paid by both Mr. and Mrs. Jones from income from their respective employments. The assessed value is \$150,000.

Parcel B is a rental property. They purchased the property shortly after the marriage. The mortgage on the property is being paid from the rent payment and contributions from the income of both Mr. and Mrs. Jones. Their current equity is \$100,000. Ten thousand dollars of the equity is a contribution by Mr. Jones from his separate property.

Parcel C is recreational property. It was purchased five years after the marriage. It includes a small cabin and a storage shed. Their equity in the cabin and shed is \$75,000. Mrs. Jones contributed \$12,000 of the equity from lottery ticket winnings. The balance of the equity represents equal contributions from Mr. and Mrs. Jones.

In this example, a presentation of the facts by topic is most appropriate. The dates of purchase and the dates payments were made on the various parcels may be available, but presenting these facts by date would not lead to the clearest presentation of the facts. In the statement of facts, all the facts relating to each parcel should be presented separately, by parcel, regardless of the time sequence. All the facts relating to parcel A should be presented together; all the facts relating to parcel B should be presented together; and all the facts relating to parcel C should be presented together. The facts are more clearly understood when all the facts relating to each parcel are presented together; therefore, each parcel should be addressed separately in the fact section of the memo.

Combination of Chronological and Topical Order. It may be appropriate to present the facts both chronologically and topically.

For Example In the previous example, assume that parcel B was purchased by the husband three years prior to the marriage, parcel A immediately after the marriage, and parcel C five years later. Assume, also, that there is personal property: an automobile purchased two years after the marriage and a boat purchased three years after the marriage.

In addition to the issues concerning the three parcels, there are other issues in the divorce involving the other property. The appropriate presentation of the facts is a combination of the chronological and topical schemes.

In this situation, the real and personal property should be presented in the fact section in a chronological sequence according to the order of purchase, such as

parcel B first, then parcel A, followed by the automobile, the boat, and finally parcel C. Note that all the information concerning each parcel of property is included when the parcel is discussed, even though some factual events concerning the parcel may have occurred after the purchase of another parcel.

For Example All the information concerning parcel B is included in the discussion of parcel B, even though some of that information may have occurred after the purchase of parcel A. Mr. Jones's \$10,000 contribution of separate property may have taken place after parcel A, the automobile, and the boat were purchased.

It would be confusing in this example to present all the facts in chronological order only. It is much clearer to present the property in chronological order and, in the discussion of each piece of property, present all the facts relating to that piece of property, regardless of when they occurred.

The goal in the organization of the statement of facts is the clear presentation of the facts. Select the organizational format that best meets this goal.

4. Fact Section: Presentation: Ethics

As mentioned in Chapter 11, Rule 3.3(a)(1) of the Model Rules of Professional Conduct provides that a lawyer should not make false statements of law or fact to a tribunal. Therefore, when drafting the facts section of the memo, you should present the facts accurately and objectively, and avoid legal conclusions.

Accuracy. Accuracy in presenting the facts means that all the facts are presented, including those unfavorable to the client.

For Example If, in the auto collision example, Mr. Smith was speeding when the defendant ran the red light, this fact should be included. Although it may not be a key fact that affects the outcome of the negligence claim, it is at minimum a background fact that should be included.

Accuracy also means not adding or changing facts. It is not proper to add a fact even if the existence of the fact seems obvious.

For Example In the auto collision example, it is not proper to state that the defendant knew she was running a red light if there are no facts indicating her actual awareness of that fact. It is improper to add such a fact even if it seems obvious.

Objectivity. State the facts objectively; present the facts in a neutral, not slanted, manner.

For Example *Slanted presentation:* "Mr. Banker obviously knew what he was doing when he advised Mrs. Widow to buy a risky stock when the market was at its peak."
"Mrs. Widow unfortunately relied on his bad advice to her detriment."

The use of *obviously*, *unfortunately*, *detriment*, *bad*, and *risky* slant the presentation of the facts in favor of Mrs. Widow. The facts should be stated neutrally.

For Example *Neutral presentation:* “The market was at its peak when Mr. Banker advised Mrs. Widow to buy the stock. Mrs. Widow relied on his advice and purchased the stock. The value of the stock subsequently fell, and Mrs. Widow suffered a loss of \$1,000.”

Legal Conclusions. When composing the fact section, avoid legal conclusions.

For Example “Mrs. Roe was driving negligently through the school zone.” The phrase *driving negligently* is a legal conclusion.

For Example “Mrs. Roe was driving thirty-five miles per hour through the school zone. The posted speed is fifteen miles per hour.”

Exhibit 12–8 presents a checklist for the fact section of an office memo.

Checklist for use when preparing the facts section

- Are sufficient background facts presented to inform the reader of the factual context of the assignment? Will the reader be required to refer to the case file to understand the analysis of the issues?
- Are all the key facts included? Will the reader have to refer to the case file to obtain key facts?
- Are the facts organized chronologically, topically, or chronologically and topically combined?
- Are the facts presented accurately and objectively?
- Are legal conclusions excluded from the fact presentation?
- Is the fact section complete?

Exhibit 12–8
Checklist: Facts Section

VI. Key Points Checklist: *Preparing an Interoffice Memorandum*

- ❑ An office memo should be a self-contained document. Include in the memo all the information necessary to understand the context of the legal analysis. Subsequent readers should not need to refer to the case file to understand the issue, facts, or analysis.
- ❑ To achieve the goal of properly presenting the issue, include the rule of law, legal question, and key facts in the issue. Refer to Chapters 7 and 8 when identifying and stating the issue.
- ❑ Present the fact situation objectively and include both background and key facts.

- ❑ Follow the format adopted where you work when preparing the office memo. You may be familiar with or prefer a different format; if appropriate, recommend changes to the office format. If your suggestions are not adopted, be sure to follow the format used in the office.
- ❑ Be sure you understand the assignment. If you are unclear about any aspect of the assignment, ask the supervisory attorney. Do not waste time pursuing answers to the wrong question or performing the wrong task.
- ❑ If the complexity of the task requires skills beyond your ability, communicate your concerns.

VII. Application

This section illustrates the principles and guidelines discussed in the previous sections through their application to the assignment presented in the hypothetical at the beginning of the chapter. Jeff Lyons's assignment is to research a question involving privileged spousal communications. He performs the assignment by adopting and following the writing process presented in Chapter 10. A brief summary of the steps Jeff follows when applying the writing process is included in this section.

The first step of the prewriting stage of the writing process is to review the assignment. After reviewing the assignment, Jeff has no questions concerning the nature of the task ahead and the constraints on the performance of the task. The assignment is to prepare an office memo for Rita Berdwin, his supervisory attorney; the memo should not exceed five pages; and he must complete the memo within two weeks.

The next step of the prewriting stage is to organize the approach to the research, analysis, and writing of the assignment. To accomplish this, Jeff retrieves the office memo format preferred by Ms. Berdwin. Assume the format preferred by Ms. Berdwin is the recommended office memo format presented in Exhibit 12-1. From this format, Jeff prepares an expanded outline. Using three-hole punched or binder paper (or computer files if he uses a computer), he creates a separate page for each section of the outline. One page is titled Statement of Assignment, one page is titled Issue, one page is titled Brief Answer, one page is titled Statement of Facts, and so on. He continues in this manner until there is a separate page for each section and subsection of the outline.

Once the expanded outline is completed, Jeff begins the prewriting process. As any idea comes to him concerning the assignment, he enters the idea on the appropriate page of the outline.

For Example Assume that, at the outset, he has an idea about how the issue should be stated. "Is the conversation between Mr. and Mrs. Findo a privileged interspousal communication that cannot be admitted at trial?" He immediately enters this possible formulation of the issue on the Issue page of the expanded outline.

Jeff locates the statute governing privileged spousal communications, 735 ILCS 5/8-801 (West 1992). The relevant portion of this statute provides, "In all actions,

husband and wife may testify for or against each other, provided that neither may testify as to any communication or admission made by either of them to the other or as to any conversation between them during marriage . . .” He places a copy of this statute in the Rule of Law section of the outline.

Jeff’s research locates the lead case on point, *People v. Sanders*, 99 Ill. 2d 262, 457 N.E.2d 1241 (1983). He places the relevant portions of the case in the Case Law section of the expanded outline. These portions are as follows:

- The defendant’s murder conviction was based in part upon the testimony of his wife.
- She was allowed to testify about two conversations she had with the defendant that took place in the presence of their three children—thirteen, ten, and eight years old.
- The conversations implicated the husband in the murder.
- The defendant appealed the conviction, claiming the trial court erred when it allowed the testimony.
- The defendant argued that under the statute the conversations were privileged spousal communications and, therefore, were not admissible.
- The state supreme court, upholding the court of appeals, stated, “The appellate court appears to have exhaustively researched the subject and concluded, as we do, that the great weight of authority is that the presence of children of the spouses destroys confidentiality unless they are too young to understand what is being said (citations omitted). Nothing in the record indicates that Robert, then 13 years old, was not old enough or sufficiently bright to understand the conversation at which he was present, particularly inasmuch as the wife’s testimony indicates that some of it was directed to him. In these circumstances, under the rule followed in this State, his presence rendered the conversation ineligible for the protection of the statutory privilege.”

Jeff may place the entire case in the outline or include only the relevant parts. If only the relevant quotations are included in the outline, he notes the page numbers of the quotations.

Upon reviewing the information at hand, Jeff concludes that he has sufficient information to complete the assignment. He continues researching, however, to make sure he has thoroughly explored the question, and he updates his research to ensure that it represents the current law.

While researching and thinking about the case, whenever Jeff has an idea about how something should be written or where something should be placed in the memo, he enters the information in the expanded outline.

For Example A reading of the statute reveals that the privilege applies only to conversations between spouses during the marriage; therefore, a key fact is that the conversation took place during the marriage. While reading the case, he discovers that the presence of children of the spouses destroys confidentiality unless the children are too young to understand. Therefore, the fact that the children in the client’s case, present during the conversation, were 16 and 10 years old is also a key fact. As he becomes aware of this information, Jeff notes these key facts on the fact and issue pages of the expanded outline.

When Jeff has completed the prewriting stage of the writing process, the expanded outline contains all the information necessary to write the memo. Each section of the expanded outline contains the following:

- The research relevant to the section
- Any draft sentences, sentence fragments, and ideas relevant to the section, such as transition sentences
- Notes concerning the drafting of each section, such as order of presentation and what must be included

A brief summary of each section of the expanded outline is as follows:

- On the statement of assignment page, Jeff has noted all of his thoughts regarding how this section should be written.
- The issue page includes a reference to the statute, key facts, and every formulation of the issue that has occurred to Jeff as he worked on the assignment.
- The brief answer page includes draft sentences on how the brief answer should be phrased. Ideas for this section may have come to him while he was preparing the analysis, conclusion, or other sections of the memo.
- Included on the facts page is a list of all the key and background facts he identified as he conducted research. Jeff also has noted any drafts of sentences he may use regarding the composition of the section.
- On the rule of law page of the analysis section, he has included the applicable statute with the correct citation. He has listed here any ideas he had on drafting this section, such as transition sentences.

For Example “The statute does not provide guidance concerning what effect the presence of children during the communication has on the privilege. Therefore, case law must be consulted.”

- The case law page of the analysis section contains the case citation and a copy of the case or relevant sections of the case. Also included here are any notes Jeff has made concerning the discussion or presentation of the case in the memo.
- On the application page of the analysis section, Jeff has included any information, ideas, or sentences regarding how the rule of law from the case and statute will be applied to the facts.
- The counteranalysis page of the analysis section includes any information concerning the counteranalysis, such as opposing case law.
- On the conclusion and recommendation pages of the outline, just as on the other pages of the expanded outline, Jeff has included notes, ideas, draft sentences, and so on that he may use when drafting these sections.

Once the research and analysis are finished and the expanded outline is completed, the writing process can begin. The use of the expanded outline greatly simplifies the writing process.

For Example All the various ways the issue may be stated are included on the issue page of the expanded outline: “Is the communication between Mr. and Mrs. Findo privileged?” “Is the conversation between Mr. and Mrs. Findo a privileged interspousal communication that cannot be admitted at trial?”

“Does the presence of children of the spouses during a conversation render the communication nonprivileged?” “Is the interspousal communication privilege destroyed if the communication takes place in the presence of children of the spouse?” “Under Illinois law, is the interspousal communication privilege destroyed when the conversation takes place in the presence of 16- and 10-year-old children of the spouses?”

When Jeff begins to draft the issue section of the memo, the task is made easier because all the various formulations of the issue are in one place. All Jeff has to do is compose the issue by selecting and combining the best language from the various formulations on the issue page of the expanded outline.

Using the writing process presented in Chapter 10, the writing tips presented in Chapter 11, and the guidelines presented in the other chapters of this text, Jeff completes the assignment. The completed portions of Jeff’s assignment that involve the sections of the office memo discussed in this chapter, the heading through the facts sections, are presented below. Because the remaining portions of an office memo, the analysis through recommendations sections, are discussed in Chapter 13, those sections of Jeff’s completed office memo are presented in the Application section of that chapter.

OFFICE MEMORANDUM OF LAW

To: Rita Berdwin, Attorney
 From: Jeff Lyons, Paralegal
 Date: April 30, 2008
 Case: State v. Findo
 Office File No.: Cr. 2008-136
 Docket No.: Cr. 08-378
 Re: Privileged spousal communications

Statement of Assignment

You have asked me to prepare a memorandum of law addressing the question of whether the conversation between Mr. Findo (our client) and Mrs. Findo, which took place in the presence of their children, ages 16 and 10 years old, is a privileged spousal communication and, therefore, is not admissible in the criminal trial of Mr. Findo.

Issue

Under the Illinois privileged spousal communication statute, 735 ILCS 5/8-801 (West 1992), is a spousal conversation privileged and not admissible into evidence if it takes place in the presence of the spouses’ children, ages sixteen and ten years old?

Brief Answer

No. The communication is not a privileged communication protected by the provisions of the statute. The state supreme court has ruled that the privilege is destroyed when the conversation takes place in the presence of children of the spouses who are old enough to understand the content of the communication.

Statement of Facts

Mr. Findo is charged with assaulting his neighbor, Mr. Markham, with a deadly weapon, a hammer. Mr. Markham claims that Mr. Findo attacked him and struck him several times with a hammer. Mr. Findo claims he did not attack Mr. Markham with a hammer; he claims that Mr. Markham attacked him with a brick and during the struggle the brick fell and hit Mr. Markham on the head. Mrs. Findo, currently separated from her husband, has agreed to testify that before the confrontation, Mr. Findo stated,

“Markham is out there building that damn fence again. I’ll put a stop to this once and for all.” This conversation took place in the presence of the Findoes’ children, Tomas, age sixteen, and Alice, age ten. There were no witnesses to the argument. Neither Mrs. Findo nor the children saw the confrontation.

Quick References

brief answer	000	office legal memorandum	000
chronological organization	000	prewriting stage	000
ethics	000	statement of assignment	000
expanded outline	000	statement of facts	000
heading	000	topical organization	000
issue	000		

Summary

The drafting of an office legal memorandum is one of the most important and often difficult types of legal writing assignments a paralegal performs. It requires the integration of the research, analysis, and writing skills discussed throughout this text.

An office memo is designed for office use and is usually drafted for the supervisory attorney. It involves the legal analysis of issues raised by the facts of a client’s case. It is designed to identify the law that applies to the legal issue, analyze how the law applies to the issue, and present a proposed solution or conclusion based on the analysis.

The writing process presented in Chapter 10 is recommended when preparing an office memorandum. The recommended format for the organization of the office memo is as follows:

- Heading
- Statement of Assignment
- Issue
- Brief Answer
- Statement of Facts
- Analysis
 - Rule of law
 - Case law (if necessary)—interpretation of rule of law
 - Application of law to facts of case
- Counteranalysis
- Conclusion
- Recommendations

This chapter presents the considerations involved in the preparation of the heading, statement of assignment, issue, brief answer, and statement of facts sections of the office memo. Chapter 13 discusses the considerations involved in the preparation of the analysis through recommendations sections.

The heading section contains information describing who the memo is from and to, the name of the case, and the nature of the issue. The statement of assignment

section provides a description of the topic covered and the parameters of the assignment.

The issue section follows the statement of assignment. It is one of the most important parts of the memo. It informs the reader of the precise legal question addressed in the analysis section of the memo. It should include the applicable rule of law, the exact legal question, and the key facts that are necessary for the resolution of the issue. The brief answer section provides a brief and precise answer to the issue and a brief summary of the reasons in support of the answer.

The statement of facts section provides the facts of the client's case that gave rise to the issue addressed in the memo. It includes the background and key facts of the dispute and should provide sufficient factual information to allow the reader to understand the analysis without having to refer to the case file or any other source outside the memo.

Many of the procedures and steps involved in preparing an office memo apply to the preparation of legal writing designed for external use, such as correspondence to clients and documents to be filed with a court, including trial court and appellate court briefs.

Internet Resources

The Internet resources for this chapter are the same as those listed in Chapter 10. The best strategy is to perform a narrow search for a specific type of legal writing and topic, using, for example, "issues, legal memorandum, public service contracts."

Exercises

Additional assignments are located on the Online Companion and the Student CD-ROM accompanying the text.

ASSIGNMENT

For each assignment presented at the end of Chapter 13 and each Chapter 13

assignment in Online Resource, prepare the heading, statement of assignment, issue, brief answer, and statement of facts sections of an office memo. Use the format and guidelines presented in this chapter when performing this assignment.



For additional resources, visit our Web site at www.paralegal.delmar.cengage.com



Additional assignments are located on the Student CD-ROM accompanying the text.