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A. THE LEGAL MEMORANDUM

▼ What Is an Objective Legal Memorandum and Why Is It Written?

An **office memorandum**, often called a memo, explains in an objective rather than a persuasive or argumentative manner the current state of the law regarding an issue. It clarifies how that law applies to a client's transaction or legal problem. A memo should explain the current law—both favorable and unfavorable—and any legal theories related to the issues.

The balanced approach of a legal memo helps an attorney see the strengths and weaknesses of a transaction or dispute. Only when an attorney can see all sides of an issue can he or she determine how best to represent a client. Sometimes your research will determine whether the client has a case or not. If in writing a memo you advocate a single position or attempt to persuade an attorney, the attorney cannot make an informed decision about a dispute or transaction. This can be a very costly error in terms of money, time, client loyalty, court favor, and legal ethics.

A memo also assists an attorney in predicting how a court might decide a particular issue. A memo could be drafted to address an issue raised as a case progresses in court. As a paralegal, you might research whether the law provides for the dismissal of an action; your research and memorandum might form the basis for such a motion to dismiss or for subsequent court documents. You might also write a memo to assist an attorney in drafting an appellate brief, a document used to appeal a trial court's decision.

ETHICS ALERT

You must provide an attorney with an accurate representation of the law. It is an ethical violation if an attorney presents a knowingly false representation of the law. For example, if the case is a well-known and often cited case, but one you omit from a memo and that the attorney later omits from the court brief, the attorney may be sanctioned. See Rule 3.3 Candor Toward the Tribunal of the ABA Model Rules of Professional Conduct.

B. AUDIENCE

▼ Who Reads a Memorandum?

You will usually research a legal question to determine whether a client has a claim or should proceed with a case. Following your research, you generally prepare a memo for an attorney. Your memo also might be sent to the client. Your primary audience, then, is the assigning

attorney, and the secondary audience is the client. When drafting your memo, think about how to best explain the problem so that each audience understands it.

Often memoranda are saved in **memo banks** accessible to all firm or corporation attorneys and paralegals, so other attorneys and paralegals might review your memo.

> *ETHICS ALERT*
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> Do not send a research memo you drafted to a client unless an attorney has reviewed and approved the document.

C. COMPONENTS OF A MEMORANDUM

▼ What Is Included in a Memorandum?

A memorandum can have a variety of components arranged in different orders. The components and their order often vary from attorney to attorney. Ask the assigning attorney if your firm or corporation has a particular style. Review a sample memo so that you can study the style he or she prefers, or go to the memo bank to review a sample. The format discussed in this chapter is one commonly accepted style. See the sample memo in Illustration 19-1.

ILLUSTRATION 19-1. Sample Memorandum

ATTORNEY WORK PRODUCT PREPARED FOR LITIGATION

MEMORANDUM

To: Benjamin Joyce
From: William Randall
Date: November 7, 2021
Re: *Harris v. Sack and Shop*

QUESTION PRESENTED

Is Sack and Shop, a grocery store, liable for injuries sustained by Harris, a store patron who slipped on a banana peel that had been left on the grocery store floor for two days after the store employee and manager had been told it was there?

BRIEF ANSWER

Probably yes. Sack and Shop, a grocery store, likely breached its duty of care to a store patron, Rebecca Harris, who was injured when she slipped on a banana peel that the grocery store had allowed to

ILLUSTRATION 19-1. ***Continued***

remain on the grocery store floor for two days after both the store employee and manager knew about the peel.

FACTS

Rebecca Harris is suing our client, Sack and Shop Grocery Store, for negligence.

Harris went to the store to purchase groceries on July 8, 2021. While she was in the produce section, she slipped on a banana peel that a grocery store employee dropped on the floor. The employee had dropped the peel on the floor two days earlier. The employee had failed to clean it up, even after a patron, who saw him drop it, asked him to clean it up. The patron also told the store manager about the banana peel and the manager asked an employee to clean it up. The employee still failed to clean up the peel and the manager failed to ensure that the employee removed the peel.

Harris sustained a broken arm and head injuries as a result of the slip and fall.

DISCUSSION

The issue presented in this case is whether Sack and Shop Grocery Store was negligent when Rebecca Harris slipped in the store's produce section. A defendant is negligent if the defendant owed the plaintiff a duty, the defendant breached that duty, and the defendant's breach of that duty was the proximate cause of the plaintiff's injury. *Hills v. Bridgeview Little League Ass'n*, 745 N.E.2d 1166 (Ill. 2000). A grocer owes a duty of reasonable care to its patrons, and the grocer will be found negligent if a store employee or manager breached the store's duty of reasonable care to its patrons, and, as a result of that breach, the patron was injured. *Ward v. K Mart Corp.*, 554 N.E.2d. 223 (Ill. 1990); *Thompson v. Economy Super Marts, Inc.*, 581 N.E.2d 885 (Ill. App. 1st). A store owner may be liable when a patron, who is a business invitee, is injured by slipping on a foreign substance, if a store owner knew of the presence of the foreign substance or should have discovered it. *Olinger v. Great Atl.& Pac. Tea Co.*, 173 N.E.2d 443 (Ill. 1961). In our case, Sack and Shop owed a duty of reasonable care to Harris because she was a store patron—a business invite. Based on that duty of reasonable care, Sack and Shop must keep its store floor free of foreign substances that it knew of or should have discovered.

The first element to consider is whether Sack and Shop owed a duty of reasonable care to Harris. A business owes a duty to its invitees or patrons to exercise reasonable care to maintain its premises in a "reasonably safe condition for use by the invitees." *Ward*, 554 N.E.2d at 226. Harris was a customer in the store. Sack and Shop, a grocery store, is a

(continued on p. 409)

ILLUSTRATION 19-1. ***Continued***

business. Therefore, Sack and Shop owed Harris a duty of reasonable care to maintain the premises.

The next question to consider is whether Sack and Shop breached its duty of reasonable care to Harris. A store will be found to have breached its duty of reasonable care to a patron if a store employee fails to properly and regularly clean the floor of the store. *Olinger v. Great Atl.& Pac. Tea Co.*, 173 N.E.2d 443 (Ill. 1961), or if the business had knowledge of the dangerous condition. *Id.* Also, if a business created the hazard, the business can be found to have breached its duty of reasonable care to a patron. *Pabst v. Hillman's*, 13 N.E.2d 77 (Ill. App. 1st 1938).

Id. In our case, Sack and Shop's employee had two days to clean the floor before Harris fell. That could be considered a failure of the store's duty of reasonable care to properly maintain the premises and to regularly clean the store floor. Also, Sack and Shop through its agent—an employee—had created the dangerous situation because the employee dropped the banana peel on the floor. In addition, a customer had placed the store employee and the manager on notice of the banana and neither one cleaned up the banana peel. Therefore, Sack and Shop breached its duty of reasonable care to Harris.

The plaintiff, however, still must establish proximate cause, that is, that the injury resulted as a natural consequence of Sack and Shop's breach of its duty of reasonable care. In *Pabst*, a store owner's failure to clear green beans from a store floor, resulting in injury to a patron who slipped on the floor, was found to be the proximate cause of the patron's injuries. *Id.* at 80. In this case, Sack and Shop's failure to clean the peel from the floor was a breach of its duty of care to Harris. This breach resulted in injury to Harris when she slipped on the neglected banana peel. Sack and Shop's breach of its duty will be found to be the proximate cause of Harris's injuries.

The final element that must be established for Sack and Shop to be liable to Harris for negligence is that the plaintiff, Harris, suffered injuries. In this case, Harris sustained a broken arm and head injuries as a result of the slip and fall on the banana peel. Therefore, Harris will be able to show that she was injured.

CONCLUSION

Sack and Shop owed Harris a duty of reasonable care. The store is likely to be found to have breached that duty of reasonable care because an employee and the store manager failed to remove a banana peel—a foreign substance—from the grocery store floor during the preceding two days. The injuries Harris sustained were directly caused by a slip on the banana peel. Therefore, Sack and Shop is likely to be found liable to Harris for negligence.

PRACTICE POINTER

Place the words "Attorney Work Product" or "Attorney Work Product Prepared for Litigation" on any legal memo you prepare. The attorney *work product doctrine* is to protect legal materials prepared for legal representation against disclosure to third parties. The doctrine, however, is not a complete protection. Federal Rule of Civil Procedure 26 (b)(3) provides that disclosure of such materials may be compelled for "substantial need" and "undue hardship." To help preserve this protection if challenged in court, label your memos.

ILLUSTRATION 19-2. Sample Memorandum: Dwyer Battery Action

ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION

MEMORANDUM

To: William Houck
From: Ivy Courier
Date: November 7, 2021
Re: Dwyer Battery Action

QUESTION PRESENTED

Did an actionable battery occur when Mann intentionally struck Dwyer with a bucket, without Dwyer's consent, causing Dwyer to suffer physical and monetary injuries?

CONCLUSION

Mann's intentional striking of Dwyer with a bucket and sand was an actionable battery.

FACTS

Our client, Mary Dwyer, a 36-year-old bank teller, wants to bring an action for battery against Carol Mann, a 36-year-old mother, who threw a metal bucket filled with sand at Dwyer at a local park. While Dwyer sat on a park bench, she teased Mann's seven-year-old son. Mann did not like this teasing and threw a bucket filled with sand at Dwyer. Sand landed in Dwyer's eyes while she was wearing soft contact lenses. As a result, Dwyer's contacts had to be replaced. The bucket also cut Dwyer's eye and cheek. She had stitches in both places. Dwyer asked Mann to pay for her doctor bills and for the new contacts. Mann refused and added, "I'm not sorry. I meant to hurt you."

ILLUSTRATION 19-2. ***Continued***

DISCUSSION

The issue presented is whether Mann's intentional touching of Dwyer with a bucket rather than her person is an actionable battery. A battery is the intentional touching of another without consent or privilege, which causes injury or offensive contact. *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St. 3d 82, 671 N.E.2d 225 (1996); *Love v. Port Clinton*, 37 Ohio St. 3d 98, 524 N.E.2d 166 (1988), quoting the Restatement of Law 2d, Torts (1965). A touching can occur directly or indirectly such as when an object or a substance rather than an individual's body contacts the other party. *Leichtman v. WLW Jacoc Communications, Inc.*, 92 Ohio App. 3d 232, 634 N.E.2d 697 (1994). In this case, Mann intentionally struck Dwyer with a bucket without Dwyer's consent and that touching resulted in injuries. Therefore, a battery occurred.

The threshold issue is whether a touching occurred when the bucket struck Dwyer. An indirect contact between a defendant and a nonconsenting party can be a battery. *Leichtman v. WLW Jacoc Communications, Inc.*, 92 Ohio App. 3d 232, 634 N.E.2d 697 (1994). In *Leichtman*, one person blew cigar smoke at another person, resulting in injuries. The court found that the contact from cigar smoke, although not a direct touching by a person, was still battery. In essence, the court found that the smoke was an extension of the person and that contact between the smoke and the nonconsenting person met the requirement of a touching for civil battery. In this case, Mann threw the bucket at Dwyer, and the bucket contacted her face. That was an indirect touching. Following the reasoning in the *Leichtman* case, the bucket contact, although indirect, would be an extension of Mann's body, and the contact between Dwyer and the bucket would be considered a touching under the theory of civil battery.

Next, the question to consider is whether Mann intended to touch Dwyer when she struck her with the bucket. The "essential character" of the conduct will be considered in determining whether a person intends his or her conduct. *Love v. Port Clinton*, 37 Ohio St. 3d 98, 524 N.E.2d 166 (1988). In *Love*, a police officer handcuffed the plaintiff. The court found that the officer must have intended his actions because you could not accidentally handcuff a person. *Love*, 524 N.E.2d at 168. In Dwyer's case, Mann aimed the bucket at Dwyer and purposefully tried to strike her. Mann later told Dwyer that she deliberately threw the bucket at her. The essential character of these acts and Mann's own statements indicated that Dwyer probably will be able to establish that Mann had the intent.

The next factor to consider is whether Dwyer caused injury. A battery occurs only if a plaintiff sustains physical injuries as a result of the touching. *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St. 3d 82, 671 N.E.2d 225 (1996). Dwyer sustained cuts on her face, and the sand flew out of the bucket into her eyes. Dwyer should be able to show that she sustained physical injuries as a result of the contact with the bucket.

1. Heading

In Illustrations 19-1 and 19-2, the first part of the memo is the **heading.** A sample heading also is shown in Illustration 19-3. The first notation in the heading of these illustrations is the word "MEMORANDUM," placed in all capital letters at the top of the page. The next notations in Illustrations 19-1, 19-2, and 19-3 tell the reader who the memorandum is written to and from, the date, and the subject. The regarding line, indicated by "Re:," varies depending on the firm's style. For example, some insurance clients ask that you include claim numbers in the regarding line. Some attorneys prefer court case numbers, and still others prefer clients' billing numbers and file numbers.

ILLUSTRATION 19-3. Sample Memorandum Heading

MEMORANDUM

To: Sarah E. Lillian
From: Kelsey Barrington
Date: July 8, 2021
Re: Negligence Action between Sack and Shop Grocery Store and Rebecca Harris

2. Questions Presented or Issues

The next portion of the memo seen in Illustrations 19-1 and 19-2 is the questions presented section, which is sometimes called the issues section.

The terms **issues** or **questions presented** are synonymous. For our purposes, we will use the terms *question presented* or *questions presented.* The questions presented are the specific legal questions an attorney has asked you to research. The question presented is phrased in the form of a question concerning the legal issue posed, and it includes a reference to the applicable law and some **legally significant facts.** The legal issue shown in Illustration 19-4 is whether the grocery store owner was negligent and whether he owed a duty to the patron. The legally significant facts are that the patron slipped on a banana peel that had been on the grocery store floor for two days. (A detailed explanation of how to draft the questions presented is provided in Chapter 20.) Note the facts included in the questions presented section of Illustration 19-2. These facts are the legally significant facts. They are interwoven with the standard of law applicable to this case.

ILLUSTRATION 19-4. Sample Question Presented

Is a grocery store owner liable for injuries sustained by a store patron who slipped on a banana peel that had been left by a grocery store employee on the grocery store floor for two days, even after the employee and the store manager had been told to remove it by a patron?

3. Conclusion or Brief Answer

You should follow the questions presented section with a **brief answer** or a **conclusion.** Brief answers and conclusions differ in format, although their purposes are similar. A brief answer is a short statement that directly answers the question or questions presented. See Illustration 19-5. A conclusion is similar, but it is usually longer. In Illustration 19-1, you will find an example of a conclusion. If there were two issues presented, you would include two conclusions, placed in the same order as the issues that they answer.

ILLUSTRATION 19-5. Sample Brief Answer

Probably yes. Sack and Shop, a grocery store, likely breached its duty of care to a store patron, Rebecca Harris, who was injured when she slipped on a banana peel that the grocery store had allowed to remain on the grocery store floor for two days after both the store employee and manager knew about the peel.

▼ What Is the Difference Between a Conclusion and a Brief Answer?

Some attorneys prefer a brief answer immediately following the question or questions presented and a formal conclusion at the end of the memo. The brief answers should be presented in the same order as the questions they answer.

For other attorneys, a conclusion without a brief answer is sufficient. A conclusion is an in-depth answer to the question presented. There is no set length for a conclusion; it should be a succinct statement that summarizes the substance of the memo. See Illustration 19-6. As you can see in Illustration 19-6, the conclusion is more in-depth than the brief answer. However, note that both the conclusion and the brief answer include references to the legally significant facts: the failure to remove the banana peel from the grocery store floor. In the conclusion, you provide your opinion concerning the case. However, a paralegal should refrain from telling

an attorney how to proceed. For example, do not say "I think that we will lose this case, so we should settle it." Instead, say "This case is not likely to be won." Allow the attorney to determine whether the case should be settled. (Drafting conclusions and brief answers is explained in detail in Chapter 20.)

ILLUSTRATION 19-6. Sample Conclusion

A grocery store owner owes a patron a duty of reasonable care. The store owner is likely to be found to have breached that duty of reasonable care because he failed to remove a banana peel from the grocery store floor two days after an employee had dropped the banana peel and after a patron had told the employee and the store manager to remove the peel. The injuries the patron sustained were directly caused by a slip on a banana peel. Therefore, the grocery store owner is likely to be found liable to the patron.

4. Facts

Following the conclusion or brief answer, you should include a **facts statement** that explains the status of the case and all the facts that might have a bearing on the outcome of a client's case. These facts are called legally significant facts. You should include facts that cast your client's dispute or transaction in a good light and those that shade it in a negative light. See Illustration 19-7. The presentation of facts should be balanced rather than slanted.

ILLUSTRATION 19-7. Sample Facts Statement

Rebecca Harris is suing our client, Sack and Shop Grocery Store, for negligence.

Harris went to the store to purchase groceries on July 8, 2021. While she was in the produce section, she slipped on a banana peel that a grocery store employee dropped on the floor. The employee had dropped the peel on the floor two days earlier. The employee had failed to clean it up, even after a patron, who saw him drop it, asked him to clean it up. The patron also told the store manager about the banana peel and the manager asked an employee to clean it up. The employee still failed to clean up the peel and the manager failed to ensure that the employee removed the peel.

Harris sustained a broken arm and head injuries as a result of the slip and fall.

5. Discussion

Following the facts, you will include your **discussion,** in which you will explain the current state of the applicable law, analyze the law, and apply the law to the legally significant facts noted in the facts statement. Any problems posed in the client's case and counterarguments should be presented here. This should not be an exhaustive review of the history of the law but should be focused analysis of the current state of the law. The law should be applied to each of the legally significant facts. Note if the law is primary binding or merely persuasive authority. Use only highly persuasive secondary authorities if primary authorities are not available.

Finally, following the discussion, you should include a conclusion if a brief answer rather than a conclusion has been used earlier. Review the discussion sections in Illustrations 19-1 and 19-2. Note that Illustration 19-2 contains multiple issues, and they are discussed separately within the memo.

> *PRACTICE POINTER*
>
> Review memos prepared previously for the attorney who assigned the memorandum. Follow that format or ask the assigning attorney what format he or she prefers.

D. STEPS IN DRAFTING A MEMORANDUM

▼ What Steps Should You Take in Drafting a Memo?

1. An attorney will assign a research problem to you. Discuss the problem thoroughly with the attorney. Be certain to ask the attorney questions to clarify the legal issues and the facts of a dispute or transaction. Ask for guidance concerning possible topics to research and resources to consult.
2. Immediately following your meeting, draft a preliminary statement of the legal issues and the relevant facts.
3. Begin your research. To develop an understanding of the issues and the general legal rules applicable to your problem, and to provide you with some search terms, read secondary authorities such as encyclopedias and *American Law Reports.* During your research, you often will discover other issues that may be relevant, and you will find additional facts that are important. If you are uncertain whether to pursue these additional issues, ask the attorney who assigned the case whether the issues are relevant.
4. If you have additional questions about the facts of a case, ask the attorney or the client for additional facts to assist you in determining what authorities are relevant to your research.

5. Find primary binding authorities. If you are unable to find those, locate persuasive primary or secondary authorities.
6. After you find relevant authorities, validate the authorities and review the citators for more current, valuable authorities. If necessary, review these additional authorities.
7. Prepare case briefs of the relevant cases. (See Chapter 18 for a detailed discussion of case briefing.)
8. After you have completed your research, rewrite the questions presented.
9. Rewrite the facts and then draft the brief answers or conclusions (or both).
10. Next, outline the discussion section. (See Chapter 24 for a discussion of outlining and organizing the memorandum.) While you are preparing your outline, you should synthesize the legal authorities. (This process is explained in Chapter 23.) You should formulate your discussion and paragraphs in a special format called IRAC, which is an abbreviation for the formula Issue, Rule, Application, and Conclusion. (This format is discussed thoroughly in Chapter 22.) You can now begin to write your memorandum.

E. MEMO DRAFTING TIPS

You should be careful to guide your reader through each section of your memo and from issue to issue. To do this, introduce the legal issues in the facts section and again in the discussion section. Also, use headings and transitions to guide your reader into the new sections. Your memo should be clearly written, accurate, concise, and thorough. Use everyday language rather than legalese. Write the memo as if the reader is unfamiliar with the law, but do not be condescending.

CHECKLIST FOR DRAFTING A MEMORANDUM

1. Discuss the case with the attorney.
   a. Discuss the legal issues presented.
   b. Discuss the known facts.
   c. Determine whether additional facts should be investigated.
   d. Determine what law governs.
   e. Check the memo bank to determine the firm's style and to learn whether the issue has been researched previously.
2. Draft a preliminary statement of the facts.
3. Draft a preliminary statement of the legal issues or questions presented.

4. Research the legal issue or issues.
   a. If you find additional relevant issues, discuss them with the attorney.
   b. Determine whether additional facts should be considered in light of the new issues; ask the attorney or client about additional facts.
   c. Research the new issues, if necessary.
5. Rewrite the issues or questions presented after your research has allowed you to focus them better.
6. Draft a brief answer or a conclusion (or both).
7. Rewrite the facts statement of the memo.
8. Draft an outline of the discussion section of the memo; organize the discussion.
9. Draft the discussion section.
10. Reevaluate the facts and rewrite the facts statement to include only legally significant facts.
11. Rewrite the conclusion.

Your memo should not trace the legal history of the law. Instead, it should be a statement of the current state of the law.

When you approach a legal rule, start with the rule rather than the citation for the authority. Doing so makes your discussion stronger.

Be certain that your discussion supports your conclusions. Incorporate the relevant facts into your discussion.

CHAPTER SUMMARY

The legal memorandum is composed of issues, conclusions and brief answers, facts, and a discussion section. These are written for attorneys and clients. Memoranda are designed to assist them in determining the current state of the law regarding a legal issue and how that law applies to the facts presented in a particular case.

In the next few chapters, you will learn about each one of the components of a memorandum: the questions presented, the facts, the conclusions, the brief answers, and the discussion.

KEY TERMS

brief answer
conclusion
discussion
facts statement
heading
issues
legally significant facts
memo banks
office memorandum
questions presented
work product doctrine