

Document 7

Drafting Client Memoranda

Client memoranda are used for multiple purposes, including the following:

- To describe important business or legal issues that arose when drafting or negotiating and to obtain client input so that the issues can be resolved.
- To describe how drafting or negotiation resolved important business or legal issues.
- To report, in general, on negotiations that lawyers conducted.
- To pose specific questions (transaction structure; negotiation strategy).
- To answer specific questions that the client posed. (Is government consent required?)
- To inform the client of important information that the lawyer learned from the other side. (The other side is having trouble meeting payroll.)
- To describe a problem and to propose a solution.
- To report on the status of the deal.

These memoranda are some of the most important communications you will write to clients. Ethically, you have an obligation to keep a client up to date on the status of negotiations. Equally important is the client relations issue. The client will receive many memos, e-mails, and letters from you and will judge the quality of your work by what you write. Can you write informally without legalese, so that a nonlawyer can understand the salient points? Do you waste her time with minor issues or with long, nonessential, prefatory material? Can you state the law succinctly and, even more important, why it matters to the client as a business matter? She will make these judgments independently of your negotiation success and contract drafting ability.

The following guidelines will be helpful to you as you learn how to write memoranda. Of course, formal memoranda are often less common today because so many people correspond through e-mail. These guidelines apply also to e-mails to clients. After reviewing the guidelines, you can read two exemplar memos that relate to a house purchase agreement.

Guidelines for Drafting a Client Memorandum

1. A formal memo has “To,” “From,” “Date,” and “Re” or “Subject” lines.

To: Sara Nottingham
From: Jake Rice
Date: November 17, 20X5
Re: Revised Trademark Licensing Agreement

2. The introduction should be short so that the reader gets to the substance as quickly as possible. The introduction should state the subject matter of the memo and where the conclusion or action items are (if any). Use language along the following lines:

In reviewing the revised draft of the Trademark Licensing Agreement, please note the following. The memo concludes with three action items for you.

If the memorandum discusses just a few points, it may be helpful to precede the body of the memo with a list of bullet points. This crystallizes the purpose of the memo, facilitating its reading.

This memorandum addresses the two key issues that remain outstanding:

- Whether the Contractor will pay liquidated damages if it fails to keep on schedule.
- Whether the parties will be obligated to mediate a dispute before resorting to litigation.

3. *Number each paragraph of the memorandum.*

Example 1

1. First point
2. Second point

In addition, organize the memorandum in numerical order by section number and section heading to alert the reader to the topic of each paragraph.

Example 2

- 1. Section 3.2 — License Term**
- 2. Section 4.1 — Royalties**

Finally, if you know a topic that particularly interests the client, address its location in the prefatory material, so that the client can immediately find it.

Example 3

In reviewing the revised draft of the Trademark Licensing Agreement, please note that the issues are addressed in the order in which they appear in the agreement. The memorandum addresses the exclusivity issue in Paragraph 6.

4. *Avoid legalese and draft simply.* The client may not be a lawyer, so technical legal terminology only impedes understanding. Often, technical language can be avoided by focusing on what the provision is intended to accomplish from a business perspective. Draft in a conversational tone, but with the recognition that a memo communicates information to the client and requires a degree of formality. It is not an e-mail to a friend.

5. *Draft succinctly.* The goal is a one-page memo—a case on a page. Business people have little time and less patience. The transaction or circumstances may

require a longer memo, but that takes nothing away from the advice to draft succinctly. Should you somehow reasonably end up with a multi-page memo, consider including an *Executive Summary* at the memo's beginning.

6. Don't bury the headline. For each new point included in the memo, tell the reader in the first sentence of the paragraph why it is important. For the client, that's usually the business consequence.

7. The memo should avoid the first person. When describing the contract, do not state what you did as the drafter. Instead, describe what the contract provides.

Wrong

I drafted Section 6.2 so that the Manufacturer is obligated to use first-quality raw materials.

Correct

Section 6.2 obligates the Manufacturer to use first-quality raw materials.

8. If the draft changes the substance of a provision, explain how the redraft changes the provision, describe the business or legal consequences, and summarize the original provision. This three-part discussion can be quite short if the language is focused. If appropriate, consider suggesting alternative language for the client to consider.

Example

Revised Section 4.2 requires the Manufacturer to inform you [the Retailer] promptly if it knows that a production delay is reasonably likely. This early notice should help in making timely merchandising decisions. The original draft had no notice requirement.

The *promptly* standard is vague. Would you prefer to make it more specific by replacing *promptly if* with *no later than three business days after*?

9. Don't provide the client with a detailed discussion of the law unless the client needs the information to understand a business issue or to make a business decision. Explain first what the contract needs to provide from the business/legal perspective and then tie it into the statute.

Wrong

The statute requires that the Corporation give 30 days' notice before it can do X. The initial draft provided for only 25 days' notice. The new date of March 13, 20XX complies with the statute.

Correct

Revised Section 15.2 extends the deadline for receipt of notice from potential claimants to March 13, 20XX—an extra ten days. The new date now complies with the statutory requirement. The time period in the earlier draft was too short.

10. *Don't quote the agreement or a statute.* Instead, summarize the relevant language using nonlegal terminology and explain why, from a business perspective, the client should care.

11. *Do more than spot and list issues and problems.* Propose ways to resolve these matters and move the deal forward.

12. *Use formatting to enhance clarity.* For example, if five business issues remain, set them out indented with bullets. Then address each of the issues in turn.

13. *Remember that you are not the decision maker with respect to business issues.* Issues of fairness are ultimately business issues and for the client's approval. That said, as you become more senior, some clients may turn to you for business and strategic advice. Wait until you are asked.

Wrong

I think that Section 6.7 as revised is fair to both parties. Mr. Sanchez will be deemed disabled if he cannot work because of illness or injury for 60 consecutive business days. This reflects an equitable number of days missed from work to warrant termination. It will cover most ailments that have a long recovery, but still allow the Company to replace Mr. Sanchez reasonably quickly if necessary.

Correct

Section 6.7, as revised, provides that Mr. Sanchez is deemed disabled if he is absent for 60 consecutive business days because of illness or injury. At that time, you could replace him. Please let me know if this time frame works from your perspective.

14. *Do not refer to a provision without providing details of why it is important.*

15. *Do not recite every change made to the contract.* Include only what is important as a business or legal matter. The client is not your professor. Even your professor probably doesn't want that detail.

16. *Single space the memo and insert a blank line between paragraphs.*

17. *Do not discuss formatting or other drafting matters.*

18. *Spend time editing the memo and proofreading it.* Neatness counts. Glaring spelling errors suggest inattention to detail, calling into question all that you have done.

19. *End the memo by addressing action points.* What are the next steps? Does the client need to do something? Is there a critical deadline that the client must meet?

Matters requiring attention:

- Please provide the unaudited quarterly financials for the last fiscal year.
- Consult with the other side to determine whether they will agree to mediation before beginning litigation.

Client Memorandum — Exemplar 1

To: Bob Buyer
From: Attentive Lawyer
Date: August 15, 20X5
Re: House Purchase Agreement

Attached is the first draft of the House Purchase Agreement. Please review the noted sections. Paragraph 4 of this memo discusses the mold inspection and its consequences.

- 1 **Section 2.1 — Assets Purchased.** As you requested, window treatments are included in the schedule of household items also being purchased. As we did not previously discuss this with the other side, I will mention it in my cover memo to them.
2. **Section 2.2 — Purchase Price.** This section provides for the following two adjustments to the purchase price:
 - (a) The purchase price will increase or decrease based on the amount of oil in the tank on the closing date.
 - (b) The purchase price will decrease to reflect an allocation between the parties with respect to county taxes that you previously paid.

If the seller agrees to your request with respect to the carpet cleaning, the purchase price provision will also need to include an adjustment for the related costs. The carpets are discussed in the next paragraph.

3. **Section 5.2 — Carpets.** In this section, the contract provides that the seller is obligated to have the carpets professionally cleaned no later than the closing date. If they are cleaned, the purchase price will be reduced by the cost of the service, but no more than \$500.
4. **Sections 5.3, 7.2, and 9.1 — Mold Inspection.** These sections permit you to have the house inspected for mold and give you the right not to close if the inspector finds the house is not mold-free. If you do not purchase the house because of mold, you are entitled to the return of your \$5,000 down payment.

The other side has asked that we get them the first draft of the House Purchase Agreement no later than Friday. Accordingly, I would appreciate any questions or comments about this draft no later than Thursday, 5:00 p.m. If this timing is problematic, I will arrange for a later delivery to the other side. Just let me know.

A.L.

Client Memorandum — Exemplar 2

To: Bob Buyer
From: Attentive Lawyer
Date: August 23, 20X5
Re: Revised House Purchase Agreement

Enclosed is a draft of the House Purchase Agreement, marked to show changes from the first draft and reflecting yesterday's negotiation. The two key issues are proposed purchase price increases (discussed in Paragraph 1) and the Seller's refusal to delay the closing date. Paragraph 2 discusses her counterproposal.

1. **Article 2 — Purchase Price.**

- (a) **Window Treatments** (First draft, Section 2.1). The Seller wants you to pay an additional \$500 for the window treatments. You may, of course, make a lower counteroffer or choose not to purchase the window treatments.
- (b) **Carpet Cleaning** (First draft, Section 5). The Seller has agreed to have professionals clean the carpets, but will pay no more than \$300, not the \$500 you requested. Are you willing to pay the difference as part of the purchase price? Do you want to stipulate the carpet cleaner to be used?

2. **Section 2.4 — Closing Date.** The Seller has refused to extend the closing date to November 30th to give you time to obtain financing. She wants to close no later than September 15th, but has offered short-term seller financing of \$150,000 at 5%. (That means you must pay \$50,000 of the purchase price at closing.) The borrowing, plus accrued interest, would be due no later than the date of your closing with a lender. If you do not pay the Seller before November 30th,

- (a) the full amount of the financing, plus accrued interest, is due on November 30th;
- (b) ownership of the house reverts to the Seller on November 30th; and
- (c) the Seller is obligated to repay you \$40,000 by wire transfer on November 30th, meaning she is entitled to keep \$10,000 of the \$50,000 paid at closing as liquidated damages.

3. **Termite Inspection — new.** Local law requires that the house be professionally inspected for termites. The Seller has requested that we include the standard provision requiring a buyer to pay for the inspection. The usual cost is about \$750.

Please let me know if you have any questions or comments and how you would like to address the purchase price and closing date issues.

A.L.