forms of property rights, and they are descended directly from the feudal enfeoffments that William introduced into England in order to distribute the country's land among his followers. Even today, these terms appear in the French word order (noun first, modifiers afterward).

The second, and more important, influence concerns the way law is created. It is a comparatively modern invention for a legislature to "pass a law." (Lawyers say "enact a statute.") The embryonic medieval parliaments of England and Scandinavia instead made more specific decisions, such as when to plunder Visby or whether to banish Hrothgar. Although in some countries law might come from royal decree, in England before the Conquest it arose more often from the custom of each locality, as known to and enforced by the local courts. What was legal in one village or shire might be illegal (because it offended local custom) in the next. "This crazyquilt of decentralized judicial administration was doomed after 1066. From the time of the Norman Conquest, . . . the steady development in England was one of increasing dominance of the royal courts of justice over the local, customary-law courts."[4] The reason was that the newly created Norman aristocracy, which now operated the local courts, got into conflict with the Norman monarch over the spoils of power, while the English, defeated in their own country, began to find more justice in the king's courts than in their local lords' capricious enforcement of what had once been reliable custom.

Because communication and travel were so primitive, the "crazyquilt" pattern of customary law had not before troubled the English. Instead, it had given them an agreeable opportunity to develop, through local habit, rules that suited each region and village relatively well. For two reasons, however, the king's courts would not enforce customary law. The practical reason was that a judge of a national court cannot know the customary law of each locality. The political reason was that the monarchy's goal was to centralize power in itself and its institutions. Out of this grew a uniform set of rules, common to every place in the country and eventually known as the common law of England. Centuries later, British colonists in North America were governed according to that common law, and, upon declaring their independence, adopted it as each state's original body of law. Although a fair proportion of the common law has since been changed through statute or judicial decision, it remains the foundation of our legal system, and common law methods of reasoning dominate the practice and study of law.

In a medieval England without a "law-passing" legislature and with a king far too busy to create a body of law by decree, where did this common law come from? The somewhat oversimplified answer is that the judges figured it out for themselves. They started from the few rules that plainly could not be missing from medieval society, and over centuries—faced with new conditions and reasoning by analogy—they discovered other rules of common law, as though each rule had been there from the beginning, but hidden. The central tool in this process has been a rule called

4. Harry W. Jones, *Our Uncommon Common Law*, 42 Tenn. L. Rev. 443, 450 (1975).

IIII

OFFICE MEMORANDA

OFFICE MEMORANDA

7 Office Memoranda

§7.1 *Office Memorandum Format*

Form follows function.

—motto of the Bauhaus school of architecture

This chapter describes the format of an office memorandum and the process of writing one. Chapters 9-14 explain the skills needed to analyze and organize the Discussion part of the memorandum: predicting legal consequences, organizing analysis, selecting authority, and analyzing precedent, statutes, and facts. Chapters 15-17 explain three skills—paragraphing, style, and using citations and quotations—that are particularly important during the rewriting process, as the memorandum evolves into a final draft.

An office memorandum might be read many times over a period of months or years by several different attorneys, including the writer, who may use it as a resource long after it is drafted. A memorandum might be written, for example, after a client has asked whether a lawsuit would be worth commencing. It would be used most immediately for advice to the client. If the result is a suit, some parts of the memorandum might be read again when the complaint is drafted. The memorandum might be consulted a third time when the attorney responds to a motion to dismiss; a fourth time while drafting interrogatories; a fifth time before making a motion for summary judgment; a sixth time before trial; and a seventh time in preparing an appeal.

Who should you imagine your reader to be? When you start working at a job, there will be nothing to imagine because most of the time your reader will be your supervisor. But in law school, your assignments are

hypothetical. Imagine that you are writing to the typical partner or supervising attorney described in §5.1. This person will be busy and by nature skeptical and careful. She or he will be reading your memo for the purpose of making a decision and will probably be under some kind of pressure (especially time pressure) while reading.

Format varies from law office to law office and from case to case, but a typical office memorandum includes some combination of the following, often but not always in this order:

1. a memorandum heading
2. the Issue or Issues
3. a Brief Answer
4. the Facts
5. a Discussion
6. a Conclusion

In some offices and for some purposes, the Brief Answer might be combined with the Issue or Issues. In a relatively uncomplicated situation, the Brief Answer or the Conclusion (but not both) might be omitted.

The rest of this chapter is easier to follow if you look to the memorandum in Appendix C for illustration as you read the description below of each of these components.

The memorandum heading simply identifies the writer, the immediately intended reader, the date on which the memorandum was completed, and the subject matter.

The Issue (or Issues) states the question (or questions) that the memorandum resolves. The Issue also itemizes the inner core of facts that you think crucial to the answer. You can phrase the Issue either as a question about whether a legal test has been satisfied or how the law treats a particular problem ("Is driving at twice the speed limit the crime of reckless endangerment as well as the traffic offense of speeding?"). Or you can ask a question about how the courts would rule in a particular dispute ("Will the client be convicted of reckless endangerment for driving at twice the speed limit?").

The Issue includes a short list of crucial facts. The Issue printed in Appendix C asks about how the courts will rule in a case that is especially fact-sensitive. (Equity often is.) The one below asks how the law will treat a matter that is less fact-sensitive:

> Under the Freedom of Information Act, must the FBI release its file on the song *Louie, Louie?*

List real facts, not legal conclusions. (See §14.1 for the difference.) The following Issue wrongly includes a legal conclusion, rather than a fact (compare it to the one above):

> Under the Freedom of Information Act, must the FBI release files that do not qualify for the law enforcement exception?

We will find out in the Discussion whether the file in question qualifies for the law enforcement exception.

The Brief Answer states the writer's prediction and summarizes concisely why it is likely to happen. This usually involves at least an allusion to the determinative facts and rules, together with some expression of how the facts and rules come together to cause the predicted result. (The complete analysis occurs in the Discussion.)

For the reader in a hurry, the Brief Answer should set out the bottom-line response in the most accessible way. Compare two Brief Answers, both of which respond to the following Issue:

Issue

> Did the District Attorney act unethically in announcing an indictment at a press conference where the defendant's criminal record was recited, an alleged tape-recorded confession was played, ballistics tests on an alleged murder weapon were described, and the defendant was produced for photographers without the knowledge of her attorney?

Brief Answer (example 1) good

> Under DR 7-107(B) of the Code of Professional Responsibility, it is unethical for a prosecutor before trial to publicize, among other things, any criminal record the defendant might have, any confession she might allegedly have made, or the results of any tests the government might have undertaken. Under DR 1-102(A)(5), it is also unethical to engage in conduct "prejudicial to the administration of justice." That has occurred here if the press confe-rence—and particularly the presentation of the defendant for photographers—created so much pretrial publicity that the jury pool has been prejudiced. Therefore, the District Attorney violated DR 7-107(B) and may have violated Dr 1-102(A)(5).

Brief Answer (example 2) better

> Yes. Except for the production of the defendant for photographers, all the actions listed in the Question Presented are specifically prohibited by DR 7-107(B) of the Code of Professional Responsibility. In addition, if producing the defendant for photographers tainted the jury pool, it was unethical under DR 1-102(A)(5), which prohibits conduct "prejudicial to the administration of justice."

Example 1 is closer to the way you might think through the Brief Answer in a first draft. But to make it useful to the reader you would have to rewrite it into something like Example 2, which can be more quickly read and understood.

If the Issue and Brief Answer have been combined, the result might look like this:

> Under the Freedom of Information Act, must the FBI release its file on the song *Louie, Louie?* Yes. That file probably never qualified

for the law enforcement exception, and it almost certainly does not now.

The Facts set out the events and circumstances on which the prediction is based. Usually, the Facts are a story narrative, but sometimes organizing them by topic works better (for example if different things happened in different places at the same time). Include dates only if they are determinative or needed to avoid confusion. A date could be determinative if the issue is based on time (such as a statute of limitations). See §14.2 on how to identify determinative facts.

One way to begin the fact statement is to introduce the most important character or characters (as in the example below). Another is to summarize the most important event or events ("Mr. Goslin deeded his home to his nephew, assuming he would be able to continue living there, and now the nephew is trying to force him to leave"). A third way of beginning is to state why the memo is being written. ("Mr. Goslin wants to know whether he can regain ownership, or at least exclusive possession, of his home"). Choose the method that would be most helpful in the case at hand to the reader who will probably make the most use of the memo.

Include all facts you consider determinative, together with any explanatory facts needed to help the story make sense. If your reader is already familiar with the factual background, this part of the memo might be abruptly short—much shorter than the fact statement in Appendix C—because your purpose will be to remind the reader about the essential facts, rather than to make a detailed record of them. For example, if over the past few days you and your supervisor have spent several hours working together on the Appendix C case—and your supervisor therefore is already familiar with the facts—you might use a condensed fact statement something like this:

> The client is elderly, retired, arthritic, and a widower. His only asset is his home, and he has no other place to live. His only income is from social security.
>
> Last year, when the client could no longer pay his mortgage, his nephew offered to make the remaining $11,500 in payments as they became due. Seventeen years ago, the client contributed $3,200 to the nephew's college tuition, but the nephew did not say he was now reciprocating.
>
> The client, without stating his purpose to anyone, then gave a deed to the house to the nephew. The client has told us, "At the time, it seemed like the right thing to do. He was going to pay the mortgage, and after a certain point—maybe after I'm gone—the place would become his. I didn't think it would end up like this." The nephew did not ask for a deed.
>
> A few weeks ago, the nephew unexpectedly moved into the house and ordered the client to move out. The client refused, and the nephew has become verbally and physically abusive.

For the reader who already knows the background, you can describe facts generically. For example, the fact statement above merely says that the client became unable to pay his mortgage, while the memo in Appendix C explains why and how that happened. The reader who is not intimately familiar with the case would want to know the facts in detail as they are given in Appendix C.

The Discussion is the largest and most complex part of the memorandum. It proves the conclusion set out in the Brief Answer. If the discussion is highly detailed or analyzes several issues, it can be broken up with sub-headings to help the reader locate the portions that might be needed at any given time. When writing a Discussion, you will use rules to predict what a court will do; organize proof of your conclusion; select authority to back up your conclusion; work with precedent, statutes, and facts; and use citations and quotations. Chapters 9-14 and 17 explain how.

The Conclusion summarizes the discussion in a bit more detail than the Brief Answer does. The Brief Answer is designed to inform the reader who needs to know the bottom line but has no time to read more. The Conclusion is for the reader who needs and has time for more detail, but not as much as the Discussion offers. The Conclusion or Brief Answer can also provide an overview for the reader about to plunge into the Discussion.

Here and in the Brief Answer, choose carefully the words that will tell the reader how much confidence to ascribe to your predictions. Attached to many of your predictions will be the words "probably," "probably not," "likely," or "unlikely." If you think the odds are very high that you are right, you can say something like "almost certainly." If the Issue is framed as a question about whether a test has been satisfied ("Did the District Attorney act unethically . . . ?"), a simple "yes" or "no" will be understood as the equivalent of "almost certainly yes" or "almost certainly no," and you do not need to add the extra words.

Prediction can be expressed ("the client will almost certainly lose a lawsuit") or implied ("the client does not have a cause of action"). But make a prediction, not a guess. "May," "might," and "could" are words of guessing and waffling. (See question 9-B on page 86.) "May," "might," and "could" do, however, have a use where you need to point to opportunities or risks based on variables that cannot yet be precisely known ("depending on how many people used this product, the client's liability could reach several million dollars"). If you make a firm prediction conditioned on a fact not yet known, specify the condition ("if producing the defendant for photographers tainted the jury pool, it was unethical").

Although the Brief Answer is limited to answering the Question Presented, the Conclusion is an appropriate place to explain what lawyering tasks need to be done next, to suggest methods of solving the client's problem, or to evaluate options already under consideration. If any of these things would be complicated, they can be accomplished in a **Recommendations** section added after the Conclusion.

§7.2 *Writing an Office Memorandum*

Some lawyers tend to write the Discussion before writing anything else; their reason is that the other components of the memorandum will be shaped in part by insights gained while putting the Discussion together. Other lawyers start by writing the Facts because they seem easier to describe. (Lawyers who write the Discussion first would say that they cannot start by writing the Facts because, until they have worked out the Discussion, they do not know which facts are determinative.) Another group of lawyers are flexible. They start with whatever component begins to "jell" first, and they often draft two or more components simultaneously.

As you put the memorandum through its final drafts, you will need to pay particular attention to paragraphing (see Chapter 15), style (Chapter 16), and citations and quotations (Chapter 17). Ask yourself the questions in the checklists in each of these chapters.