

11: Legal Memos - Facts Section

In this chapter, we are going to explore what goes into writing the Facts section of your legal research memo. Remember, although we are writing this section first, this is not the correct order in which this section should appear in your final draft.

FACTS

The legal memo is a neutral, objective, complete discussion of the client's facts and the law as it applies to those facts. You must include all facts – the good, the bad, and the ugly – even if it's not what your supervising attorney or client wants to hear. Attorneys use legal memos to aid in litigation decisions, or sometimes as a precursor to filing a complaint, motion or brief, so it's important that there not be any surprises.

The substantive facts tell us what happened to the persons involved in the client's legal matter; they are the who, what, when, where, why (sometimes) and how of the contract, accident, transaction, etc., that forms the basis of the client's question. As we saw in an earlier chapter, there are generally three different types of facts: legally significant, contextual (background) and irrelevant.

Legally significant facts are those facts that directly lead to or otherwise affect the legal outcome of the case. If the legally significant facts are changed, the outcome would likely change as well. Whether a fact is legally significant depends upon the legal issue in question. For example, the date of an accident would be legally significant if there was a question as to whether the statute of limitation had passed. In contrast, if there is no issue as to the statute of limitation, the date of the accident is merely background information.

Contextual facts provide you some background or “flavoring” of the case. Although such facts do not impact the legal issue, they do help us understand the issue better. Think of contextual facts as similar to supporting characters in a movie or book. Often, they help us to understand the main character and the plot, and their interaction with the main character adds interest.

Irrelevant facts are neither legally significant nor contextual. They really don't add to our understanding and simply take up space. Usually, irrelevant facts relate to minor details, such as the color of the car the defendant was driving, or the name of the hairstylist the plaintiff uses. If you always keep the legal issue in front of you, it's easy to determine which facts are irrelevant. If they don't directly affect the legal issue, or help you to understand it, they are irrelevant.

Writing the Facts Statement for Your Legal Memo

When you are getting ready to write the Facts section of your memo, there are several things you need to consider. You want as much relevant factual information as possible – if you're going to make a mistake when writing this section, it's better to include irrelevant facts than to exclude potentially legally significant facts. It's also better to include details that seem trivial than to exclude potentially important details. You also want to include favorable and unfavorable facts. The facts section should provide a complete and accurate picture of your client's legal matter, such that a person who knows nothing about it will know every fact that is important to the client's legal questions, just by reading your Facts section.

Step 1: Analyze the facts

Before drafting your Facts section, first gather together all of the facts relating to your client's legal matter, from all possible sources (interview notes, documents, discovery, reports, etc.). Then, based on the legal standards established in your micro- and macro-synthesis of the legal authorities relating to the client's questions, categorize each fact in terms of how it relates to each legal standard – is it legally significant, contextual, or irrelevant? Some facts may relate to multiple legal standards; not only that, but facts might be legally significant for one legal standard and contextual for another. Even if it seems repetitive, including the details will make it easier for you to write the Questions Presented section of your memo.

To illustrate, let's use this brief fact scenario: Suppose your client claims she suffered a severe neck injury in a car accident. Her new white Ford Excursion SUV was stopped at a red light. The defendant's old blue Geo Metro was stopped behind the client's car. The defendant admits he took his foot off the brake pedal and his Geo Metro, which has an automatic transmission, moved forward and collided with the client's vehicle. The client brought in pictures of her rear bumper that showed scratches and a small amount of blue paint. Your legal research revealed that a negligence claim has four legal standards (or elements) – existence of a legal duty, a breach of that duty, compensable damages and a causal connection between the breach of duty and the damages. Here's how you might analyze those facts:

Fact categorization – LS = Legally Significant; C = Contextual; I=Irrelevant

Legal Duty	Breach of Legal Duty	Damages	Causation
<ul style="list-style-type: none"> Defendant was driving his vehicle on a public roadway (LS) Defendant was driving an old white Geo Metro (I - color, make and model of vehicle doesn't impact duty) 	<ul style="list-style-type: none"> Defendant's vehicle was behind the client's vehicle at a red light (LS) Defendant's vehicle struck the client's vehicle (LS) Defendant's vehicle has an automatic transmission (C – explains why his vehicle moved forward when he took his foot off the brake pedal) The traffic light was red (LS) 	<ul style="list-style-type: none"> Client suffered a severe neck injury (LS) Scratches and blue paint on the rear bumper of the client's car (LS) 	<ul style="list-style-type: none"> Defendant's vehicle struck the client's vehicle (LS) Defendant's vehicle has an automatic transmission (C – explains why his vehicle moved forward when he took his foot off the brake pedal) The vehicles were fully stopped at a red traffic light (C – may make it less likely the impact caused severe neck injury) Defendant's vehicle is very small (Geo Metro) and client's vehicle is very large (Ford Excursion) (LS or C - may make it less likely the impact caused severe neck injury)

When we write the facts statement, we will include all of the legally significant facts and most, if not all, of the contextual facts. It wouldn't necessarily be wrong to include the irrelevant facts (such as the age or color of the cars involved); keep in mind that later research may end up convincing us that what we thought was irrelevant really isn't (for example, a car's color could be important under certain conditions – it might be harder to see a white car in the middle of a snowstorm). Also, some supervising attorneys will want you to include all of the facts, no matter how trivial, so that they can make the judgment call about what is or is not relevant.

Step 2: Organize the facts

The order in which you present the facts in your Facts section definitely impacts the other portions of your legal memo. In most cases, you'll receive facts over time in a piecemeal fashion and it may be disjointed in terms of how each fact that comes in is related to facts you obtained previously. You must account for and keep track of clarifications, explanations, corrections, and disputes in the facts. You want the order of presentation in your Facts section to flow well and to logically lead toward how you will analyze each legal standard that forms the basis of the client's legal question(s).

There are basically three ways to organize facts: chronologically, by claims made, or by parties involved. Most of the time you'll write the facts as a chronological story about what happened. For simple car accidents, breach of contract cases, criminal cases, or simple transactions, it makes sense to present the facts chronologically, telling the story from beginning to end. One variation of the chronological presentation that some attorneys prefer to use starts with the "culminating fact" (the collision, injury, aftermath of the crime, etc.) and then goes back to the beginning of the story.

In some legal matters, one person makes several claims against the same party, involving different legal standards but arising from the same set of facts. For example, someone buys a house and discovers that the basement leaks. The seller failed to disclose the leaks. There are several causes of action against the seller arising from the failure to disclose: negligent misrepresentation, fraudulent misrepresentation and strict liability misrepresentation. Each claim has different elements, so different facts are legally significant (and you would have categorized the facts under each claim, as demonstrated above). One way to organize the presentation of facts for this type of case would be to start with the seller listing the house for sale and the buyer attending the open house. From there, you would write about all of the non-disclosures and other factual circumstances that you categorized under the negligent misrepresentation claim; after that, those that you categorized under the fraudulent misrepresentation claim, and so on. If there are a lot of facts, you could even use a subtitle in your Facts section for each claim.

Other times, one person makes claims against several different parties involved in a complex transaction. For example, someone hires a general contractor to build a house. The general contractor hires subcontractors for framing, plumbing, electrical, etc. There are lots of problems with the house, so plaintiff sues the general contractor and all the subcontractors. Different facts relate to each party, and each party was working on the site at various times throughout the project. In that instance, it makes sense to start with facts related to the broad transaction (that is, to the contract with the general contractor) and write about everything relating to the claims against the general contractor. From there, you would choose a subcontractor (perhaps the first one to work on the house) and detail the facts relating to the claims against that subcontractor. All of the facts relating to the claims against each subcontractor would be detailed separately. Again, you could use subtitles in your Facts section for each party against whom the person is making claims.

Organize the facts section with separate headings (not numbers) for facts relating to each party being sued.

Step 3: Draft your Facts section

Now that you have a plan, it's time to start drafting! Use your own words and take care to use neutral and objective language throughout. Remember, the purpose is to tell the whole factual story and not to persuade anyone about the credibility, weight, or impact of the facts. Some pitfalls to avoid:

- ☹ using unnecessarily “emotionally charged” language. For example, going back to the car accident described above, it would be unnecessarily “emotionally charged” to describe the accident as having occurred with “great force and violence” (this is a favorite phrase of some personal injury lawyers with whom I’ve worked).
- ☹ overuse of adjectives and adverbs. Similar to “emotionally charged” language, adjectives and adverbs can result in an overstatement or exaggeration of what really happened. For example, describing the car accident described above as “a horrific (or tragic) accident” or describing the defendant as “callous” because he took his foot off the brake pedal. One way to avoid this pitfall and the one above is to ask yourself, “Is my bias showing?”
- ☹ including inferences and assumptions drawn from the facts. They may be perfectly logical, but inferences and assumptions don’t belong in the statement of Facts. Inferences and assumptions are not facts – they are opinions or perceptions; moreover, inference and assumptions can be completely wrong, despite being logical. One way to avoid this pitfall is to look for documents or testimony to establish the existence (or non-existence) of each “fact” in each sentence you write. If you can’t find any, the “fact” is likely an inference or an assumption.
- ☹ including legal conclusions drawn from the facts. Avoiding this pitfall can be particularly tricky because you’ve likely formed an opinion about how the legal authorities you’ve synthesized will apply to the client’s facts and how you would answer the client’s legal questions. One way to avoid this pitfall is to keep the legal standards in front of you as you write (or revise) your Facts section and make sure the word(s)/phrase(s) in the legal standard don’t appear there. So, for the car accident case, we wouldn’t want to find words such as “negligent,” “breach of legal duty,” or “cause” in our Facts statement.
- ☹ over summarizing the facts. Remember, you want as much relevant factual information as possible. It’s better to include irrelevant facts than to exclude potentially legally significant facts. It’s also better to include details that seem trivial than to exclude potentially important details. One way to avoid this pitfall is to have someone who knows nothing about the client’s legal matter read your Facts statement and then describe to you what happened. If that’s not feasible, pull out your fact analysis and make sure every single fact you listed there is included in your Facts statement.

Here are some additional tips for writing your Facts section:

- Confirm that you have checked all possible sources of facts – make sure you leave no stone unturned. Of course, you will interview the client and any other witnesses having knowledge about the case. Don’t forget to review documents, reports, photos, videos, statistical data and other physical evidence that might relate to your case. Follow up on all information provided by witnesses. Sometimes seemingly irrelevant facts can lead to the discovery of relevant facts.
- For each source of fact, be mindful of the logical limits of the information that source can provide. Remember, people sometimes make assumptions that are logical, but incorrect. Ask yourself
 - What are the logical limits of the eyewitness’ ability to see, hear, or otherwise perceive the circumstances or events involved?

- What are the logical limits of a person's ability to know about facts or documents (for example, the person's access to documents or other information, or the person's area of expertise)
- What are the logical limits of documentary evidence to which you are referring? Documents and reports are limited by all sorts of things, including the purpose for which they were created or the ability to include details. For example, weather condition reports provide information about weather conditions in a general area; that doesn't mean the weather at the accident site was exactly the same as that described in the report (I've had the experience of watching pouring rain across the street from my house while my house stayed completely dry).
- Differentiate between uncontested and contested facts. If there is a dispute as to how something happened or whether something is true, state that the fact is "asserted" or "claimed" by one of the parties (and identify that party). Other words that show facts might be unclear include "apparently," "allegedly" and similar words.
- Note the source of each fact (a deposition, pleading, interrogatory answer, etc.) on a rough draft of the memo that you will keep. This will be helpful if the attorney is contemplating filing a motion, trial brief or appellate brief based on the issues discussed in your memo. Motion and appellate briefs require you to provide a citation to the official court record for each fact contained in the brief; keeping a draft of the memo that identifies the source of each fact means that you won't have to re-create this information months or even years down the road.

Step 4: Review and revise your Facts section

Once you've got a good first draft of your Facts section, set it aside (if you can) before reviewing and revising it. Things to consider when revising:

- Proofread carefully for grammar, punctuation, spelling, capitalization, and other writing mechanics
- Check for accuracy, especially when writing about dates, times, numbers, weights, or measurements
- Make sure your Facts statement is internally consistent in terms of names (including acronyms and "short forms" of names) and verb tenses (past or present tense)
- Determine whether you should include the current procedural status of your client's case. Some supervising attorneys want a description of the current status at the beginning or at the end of the Facts section. Has a complaint been filed? What discovery has taken place? Are we considering filing a motion? Including a detailed procedural status puts the rest of the memo in context. It can also provide a progressive history of the case, especially if several memos are written at different points in the case.

✓ Example of a Rough Draft Facts Section

Let's apply these skills to the Wonka arson case we've been discussing. Previously you saw a bulleted list of facts about an arson question. Following is that list, a fact analysis worksheet and a rough draft of the Facts section in a memo about Mr. Wonka's arson question:

Fact list:

- Fire set at the Chocolate Factory on January 30 at 1 a.m.
- Factory had been closed since 5 p.m. previous evening
- Factory unoccupied at time of fire
- \$1 million damage
- Factory is insured by Safeco Ins. Company (policy number FA6660297-SW)
- Fire occurred at factory owned by Wonka and Charlie Bucket (joint tenants)
- Fire inspector found accelerants at several sites at factory
- Witness (Mary Worth) saw a man dancing across the street from the fire
 - Wearing camouflage
 - Shouting "burn baby burn"
 - She identified Willy Wonka from a photo lineup
- Bucket told police he didn't know about a plan to set a fire and wouldn't have consented to such a plan
- The investigating officer who first contacted Bucket about the fire testified that Bucket expressed "disbelief" that the Chocolate Factory had been set on fire and that Wonka was accused of setting it

- Bucket, as Chief Financial Officer for the Chocolate Factory is currently under investigation for improper business practices
 - Factory operating at a loss for 3 years
 - \$1 million missing from the books
 - audit by Weegocha Auditing Company
 - both Bucket and Wonka have Preferred Player's cards at LaCasino (\$1 million dollar players only)

Wonka "intentionally" damaged the factory with fire	The factory was "owned by another"	Damage occurred "without the other owner's consent"
<ul style="list-style-type: none"> • Sometime after 1:00 a.m., a fire occurred at the factory (legally significant) • Fire inspector's report revealed use of accelerants in several different sites (legally significant – shows intent) • A witness saw someone celebrating across the street from the fire (legally significant – shows intent) • The man dancing was dressed in camouflage clothing and yelling “burn baby burn” (contextual, possibly legally significant – shows intent) • The celebrating man was identified as Mr. Wonka • Corporate records reveal financial losses (contextual – shows motive or intent, if factory is insured) • Wonka has a preferred players card at the casino – may be related to intent if he has significant gambling losses that can be tied to missing \$ at factory (contextual – shows motive or intent) 	<ul style="list-style-type: none"> • Factory is jointly owned with Mr. Bucket (legally significant) 	<ul style="list-style-type: none"> • Bucket's statement to police states he did not consent (legally significant) • Bucket denied prior knowledge of the fire (legally significant) • The investigating officer who first contacted Bucket about the fire testified that Bucket expressed “disbelief” that the Chocolate Factory had been set on fire and that Wonka was accused (legally significant; perhaps contextual) • Factory was operating at a loss (contextual) • Bucket is under investigation for financial irregularities (possibly legally significant – may show that Bucket did consent and may have helped plan it) • Damage to factory is equal to amount of \$ missing at the factory (possibly legally significant, possibly coincidental – may show Bucket's consent to a plan) • Bucket has a preferred player's card at the casino – may be related to intent if he has significant gambling losses that can be tied to missing \$ at factory (contextual – may show consent)

FACTS

Sometime after 1 a.m. on January 30, 20xx, a fire occurred at the Chocolate Factory (Police Report). The factory had closed at 5 p.m. the evening prior to the fire, and no one occupied the factory at the time of the fire (Client interview, Bucket statement to police). The fire caused \$1 million worth of damage (Insurance claim filed by Bucket).

The fire inspector's report revealed the use of accelerants at several sites around the factory (Fire Inspector Report). A witness came forward (Mary Worth) and stated that at approximately 2 a.m., she was awakened by the sirens from fire trucks responding to the fire (Police Report). She went outside her home, which is across the street from the Chocolate Factory, to watch the firefighters put out the fire (Police Report). At that time, she noticed a man dressed in camouflage clothing dancing near the curb, about 25 yards from where she was standing (Police Report). She could hear the man shouting, “Burn, baby, burn!” (Police Report) From a police photo lineup, Ms. Worth identified Mr. Wonka as the man she saw dancing across the street from the fire (Police investigation file, lineup report).

The Chocolate Factory is jointly owned by our client, Willy Wonka, and Charlie Bucket (Client interview, Bucket statement to police, Incorporation records, Real estate records). Bucket claimed in his statement to police he was surprised and upset by the fire and did not consent to someone setting a fire (Police Report, Bucket statement to police). The investigating officer who first

contacted Bucket about the fire testified that Bucket expressed “disbelief” that the Chocolate Factory had been set on fire and that Wonka was accused of doing so. It does not appear that Bucket was present at the scene of the fire. Further investigation of Bucket and the Chocolate Factory reveals that Bucket is currently being audited by Weegocha Auditing Company for alleged improper business practices (Client interview, records from auditing company). Weegocha states that \$1 million is unaccounted for in corporate record books (Audit report). Corporate record books also reflect that the factory has been operating at a financial loss for the last three years (Chocolate Factory financial records).

Both Willy Wonka and Bucket have Preferred Player’s Cards at LaCasino (Client interview; LaCasino Preferred Players roster). LaCasino policy is to issue Preferred Player’s Cards only to regular customers gambling at least \$1 million (interview of LaCasino manager; LaCasino pamphlets). Both Wonka and Bucket admit that they have lost a substantial, though unknown, amount of money gambling at LaCasino over the last five years (Client interview, Audit report). However, Wonka and Bucket deny using corporate monies to gamble (Client interview, Audit report).

Willy Wonka has been charged in Brown County Circuit Court with arson. An arraignment is scheduled on [date], at which time Wonka must enter a plea to the charge. A request for a copy of the investigative file has been sent to the Brown County District Attorney and a response is pending.

With a detailed description of the facts that form the basis of the client’s legal matter, we are ready to move on to the next step, drafting the Questions Presented.

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