

TO GET TO THE “POINT,” YOU MUST FIRST UNDERSTAND IT

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When new associates (or summer associates) write their first research memos for a law firm or department, they often make two related mistakes. It would be unfair, however, to blame them. The rules of the game have changed, and usually without anyone having warned them. Their memos are now being judged by a new standard, one that law school seldom emphasizes.

In law practice, it’s no longer enough that their research is thorough, their analysis thoughtful and precise, their conclusion sound. Their memo also has to “add value,” to use the common jargon, in a very pragmatic way. It has to help the reader avoid a risk, respond to an opportunity, accomplish a goal, or otherwise provide practical help that justifies the cost of writing the memo. And these days, the cost often requires a good deal of justification. Over the past 10 or 15 years, practicing lawyers have come to rely more and more on oral reports or e-mail summaries because, in many situations, formal memos are regarded as too slow and too expensive. Consequently, if a memo fails to show quickly that it can “add value” to justify its cost, its writer is likely to be convicted of bad judgment, no matter how expert the memo’s lawyering.

First Mistake: Missing the Pragmatic Point

In this situation, new lawyers often misunderstand the memo’s “point.” They certainly understand intuitively, as well as through explicit instruction in their writing classes, that the point should be captured in the memo’s “short answer” or “conclusion” section, which should, of course, tell the reader the destination to which the writer’s hard work has led. But they fail to ask the critical question: Whose “destination” should be the focus here?

In law school, most writing is intended to demonstrate to the instructor that the student can analyze a legal issue competently. The focus of the memo is therefore, quite appropriately, “the law,” and the student’s ability to master it. From this exercise, then, students take away the impression that the point to a memo is this “legal” bottom line—the destination to which the law leads.

In law practice, however, the law is seldom its own point. Instead, even when one lawyer is communicating to another about the law, the true point is practical: not what the law *says*, but what the reader can or should *do* as a result of what the law says.

An example is the best way to demonstrate the practical defects that law firm partners often identify in a new associate’s work, defects that are usually quite inadvertent. Here is the opening of a memo written by a first-year associate for a partner, but with the understanding that a version of the memo will eventually be sent to the client:

To: Partner
From: Associate
Re: Jury trial issue in *Jones v. Smith*

Facts

[For this limited purpose, we don’t need the facts, and we are also not implicitly contending that the fact section of a memo must necessarily appear first. Whether it does should depend upon whether the facts help to illuminate the “Question” and “Conclusion” sections that will follow.]

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Question

Is an action for unjust enrichment a legal claim, which is tried by a jury, or an equitable claim, which is tried by the court?

Conclusion

Both. In many cases, an action for restitution based on unjust enrichment may be brought in either law or equity. Jones's cause of action, however, would probably be considered to be brought in law, and therefore would be tried by a jury.

Sadly, new associates too often fail to realize that one way for them to end their careers at a firm early is by writing conclusions that say "both"—even if both is the correct legal conclusion, as it was in this case. In fact, according to the partner for whom the memo was written, the "lawyering" in it was first class. It nailed the legal point of the assignment. But it missed the *practical* point. This is not an easy concept for new lawyers to grasp: After having been so thoroughly trained to think like lawyers, they must now learn to think simultaneously like a lawyer and like something more than a lawyer (or, at least, more than a "book" lawyer).

The comfortable world of law school is now past. The law is no longer a mental exercise; it must be used to do something. And that means that the associate must think differently about the memo's conclusion or "point." Now, it must focus not just on the law, but on how the memo will actually be used—by both its ultimate audience, the client, and its immediate audience, another lawyer higher in the firm's food chain.

New lawyers usually catch on to this real-world standard fairly quickly, but they seldom push the pragmatic analysis far enough. In this instance, for example, the memo will be used to decide whether it's worth trying to avoid a jury trial, as the client hopes. That's obvious enough. But the memo will also have a more mundane, less obvious use. Assuming the client is a company, the in-house lawyer who first reads the memo will probably have to explain to someone else, perhaps a superior, why the company faces the risk of a jury trial. And, certainly, the partner who receives the memo will have to explain to the in-house lawyer

why that unhappy outcome seems unavoidable. In both cases, those explanations will take place first, as a conversation, before the other person reads the memo.

To prepare for the conversation with the in-house lawyer, the partner must take two steps: become comfortable that the memo's analysis is sound, and think through the "script" for the conversation. In its original form, the memo's summary conclusion offers no help with any of this. To push the pragmatic analysis of the memo's point far enough, and then to redraft the conclusion so it works, here's what the associate should imagine: The partner picks up the phone and calls the client to report the result of the research:

Partner: Hey Joe, you know you asked us whether your case was going to be tried by a jury or by the court? Well, turns out it could go either way, but it will probably go to a jury. Talk to you later.

Any partner knows that the actual conversation with the client will have to go much further. This, then, from the partner's perspective, is the *practical* point of the memo: What should I say to the person who must make a decision based on your work? Faced with the memo in its original form, to prepare for that conversation, the partner first has to do all the work of extracting the more complete picture that the client seeks, and then summarizing that picture into a script for the phone call. For this very practical goal, the memo is quite useless.

Here is the summary conclusion, rewritten to focus on the pragmatic as well as the legal point:

Conclusion

In many cases, an action for restitution based on unjust enrichment may be brought in either law or equity. Jones's cause of action, however, would probably be considered to be brought in law because his complaint requests only money damages—a remedy at law—and because that remedy would be adequate restitution for his alleged loss.

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To persuade a court otherwise, we would have to argue (1) that the case is too complex for a jury’s understanding; or (2) that the underlying issue is a breach of fiduciary duty of a kind (such as breach of constructive trust) that is a matter of equity rather than law; or (3) that the court should follow a minority line of cases that hold any action for “disgorgement” of excess profits to be a matter of equity rather than law. None of these arguments is likely to succeed.

This conclusion still says “both.” And it still delivers bad news: We’re probably faced with a jury trial. But, in the face of that bad news, the conclusion offers the partner some help: a way to show the client that every legal rock was turned over in the search for a better answer, but none could be found. That extra step is reflected in the (1), (2), (3) in the second paragraph. Now the partner can pick up the telephone and have a complete conversation with the client just on the basis of the memo’s conclusion. From the partner’s perspective, that is one truly “practical” point of the document.

Here is another example of the difference between a “book” lawyer’s summary conclusion and a fully pragmatic one.

Original

Success Worldwide: Project X

Facts

[A page and a half, which we spare you.]

Question presented

Will a liquidated damages provision contained in the Building Lease between Excel and Owner which provides for Excel to pay off the entire Project Loan upon the occurrence of an Event of Default be valid and enforceable under New York law?

Conclusion

New York courts will likely deem the liquidated damages provision contained in the Building Lease valid and enforceable, especially if it is modified as will be indicated below.

Revision

Success Worldwide: Project X Enforceability of liquidated damages provision under New York law

You have asked us whether New York courts will deem valid and enforceable the liquidated damages provision of a draft building lease between Excel Enterprises and Success Corporation of America, a wholly owned subsidiary of Success Worldwide, Inc. The property to be leased will be constructed by Success Corporation, and the construction will be funded by a construction loan provided by Success Worldwide. The liquidated damages provision provides that, under certain circumstances, Excel would be required to pay off the entire loan.

We believe that New York courts are likely to deem the provision valid and enforceable if it is modified in the following two ways:

1. It should state that only Events of Default that are considered material shall trigger Excel’s liability for liquidated damages. If this modification is not made, the provision could be voided in its entirety.
2. It should recite the factors considered by Excel and Success Corporation in arriving at the settled amount of damages.

The following pages describe the facts and analysis upon which our conclusion is based.

Second Mistake: Concluding with a Conclusion

The second common defect in the law firm memos of new associates is also primarily a carryover from law school. Because the function of the law school memo is to force students to present their reasoning and demonstrate the thoroughness of their research and analysis, it is not surprising that they often put *two* conclusions

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in the document: a “short answer” in the beginning and a “conclusion” at the end. As reasonable as this second conclusion seems—doesn’t it make sense to wait until the end of the analysis to state the full-fledged result?—it is in fact a mistake.

Memos in law firms almost never *end* with a conclusion of any sort. If the memo’s short answer or conclusion has been well drafted, it is so full and so practical that the analysis section does not *develop* to a conclusion—it instead *defends* the initial conclusion, continually referring back to it. As a result, there should be no work for a conclusion to do at the document’s end. In fact, any conclusion there ought to be a waste of the reader’s time. If it is actually doing any work, then the initial conclusion was probably defective. For example, in the revised jury-trial memo, what more would you expect from an additional conclusion at the memo’s end?

A practical conclusion at the memo’s start—as opposed to a merely legal one, whether it comes at the start or the finish—is not only more efficient from a reader’s perspective, it is also more forceful and confident. The powerful opening changes the character of the document profoundly. Rather than building to a close like a detective story, the memo demonstrates total mastery over its analysis from the start, and therefore commands more respect. It announces, as an associate’s work must, that the writer has dominated the law rather than been a victim of it, and has thought beyond the law to the world of action in which the memo’s readers must live.

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