IV

MEMORANDUM OF LAW

A. Generally

Just as there is no fixed rule that determines the exact form and content of a trial brief or a trial memorandum, there is no established rule that governs the form and content of a memorandum of law or a "legal memorandum." The nature of the memorandum of law, and the formality of appearance of the final draft, depend upon the purpose for which the memorandum is drawn.

Law students may be more familiar with the memorandum of law than they may at first realize. Many law school essay examinations either expressly ask for a memorandum of law, or the question is phrased in language that requires the submission of a terse memorandum of law. The question might be: "What advice would you give Adams?"; "Does Brown have a good defense?"; or "Should the motion to dismiss the complaint upon the ground that it does not state facts sufficient to constitute a cause of action be granted?" The answer sought is the legal conclusion to an inquiry regarding the application of the law to a specific factual statement.

This *opinion* of the law, or the *legal* conclusion to a similar inquiry, is embodied in a memorandum of law. In practice, the problem will be real. "Adams" or "Brown" will become an actual client—or the examiner may become a senior partner in a law office who wishes to know: "On the above facts does Mr. Farnsworth have a cause of action against the Acme Corporation?"; but the legal problem is essentially the same. Counsel is not asked to write an abstract expository monograph, but is asked to give an opinion of the correct legal solution to the specific legal problem presented.

Knowing the facts, the advocate must examine all the legal factors upon which the answer depends. Once these factors have been considered, and the answer is clear in the mind of the lawyer, the problem is one of transcribing the essential mental steps into the written answer. This written "answer," consisting of an analysis of the legal questions presented together with a "conclusion," expressed in a scholarly and professional manner, is called a *memorandum of law.*

Memoranda of law generally fall into two classes. The first is to be used by the lawyer for the purpose of advising a client on a legal question. The second is to be submitted to a court to assist it in deciding a legal question that may have arisen before or during trial, or as a supplement to a trial memorandum or appellate brief. The specific purpose for which the memorandum will be drawn will determine its form and content.

B. Office Memorandum of Law

1. Nature and Purpose

The memorandum of law that lawyers draw for their own use in advising clients, or at the request of another attorney, is commonly called an *office memorandum of*

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law. Since this memorandum is for office use only, although it may be the basis for an important decision such as whether to prosecute an action, it may be an informal document. It contains an answer to a particular question, together with the legal basis for the answer submitted. The question asked may be broad, such as: "Does Wood B. Client have a valid cause of action against Dawson?", or it may be a specific question of law, such as: "Has Wood B. Client's cause of action been barred by the statute of limitations?" The memorandum is the vehicle whereby a legal researcher conveys the answer to an employer. It is also the means by which the advocate advises the client—either by submitting the memorandum or, ordinarily, by informing the client orally or by letter of its content. The substance of this memorandum may also be conveyed to the client in the form of an *opinion letter.*[1] Generally, only the conclusion is of interest to the client.

2. Form of Office Memorandum of Law

Although no particular format is mandated for an office memorandum of law, the attorney should make certain that the form chosen includes all necessary information. The following outline or form, suggested in prior editions of this book, is widely used:[2]

Memorandum of Law

TITLE:
REQUESTED BY:
DATE SUBMITTED:

QUESTION PRESENTED
* * *
BRIEF ANSWER
* * *
STATEMENT OF FACTS
* * *
DISCUSSION
* * *
CONCLUSION
* * *

Respectfully submitted,
Robert Reeves,
Attorney for Plaintiff

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1 *See* discussion of opinion letter *supra* pp. 13-14. An example of an opinion letter may be found in Appendix H of this book.

2 For an example of a completed Office Memorandum of Law, see *infra* Appendix G.

a. Title

The "Title" identifies the particular matter in relation to which the memorandum is drawn. If it is drawn for a pending action, or in contemplation of the commencement of suit, the title may be a caption such as is used in an appellate brief, or in the pleadings.

b. Question Presented

The "Question Presented" should indicate exactly what question of law the memorandum proposes to answer. This not only informs the reader of the scope and content of the memorandum but also facilitates the filing and indexing of a copy of the memorandum for future use.

c. Brief Answer

The "Brief Answer" is included as a timesaver for the busy advocate who wishes to know the conclusion or specific answer immediately without the necessity of reading the discussion and conclusion. This "Brief Answer" serves as a ready reference to the law on the question discussed. It is a summary of the conclusion.

d. Statement of Facts

The "Statement of Facts" in the memorandum should include only the facts necessary for the resolution of the question presented. The memorandum is not an abstract monograph; it gives an answer to a specific question based upon a specific set of facts. Superfluous details should be omitted. If the memorandum is drawn pursuant to the request of a senior partner in a law firm, and the author of the memorandum has not interviewed the client, the facts must be stated as given but, again, only to the extent that they are relevant to the resolution of the question.

e. Discussion

The "Discussion" evidences the fruits of counsel's labor and research. Under this heading, counsel should include the relevant portions of any statute that may be pertinent to the answer, followed by an analysis of the cases that have interpreted the statute. If no statute is involved, counsel should proceed to discuss all factors that are pertinent to the answer.

The length of the discussion is determined by its adequacy and completeness. Has counsel overlooked any aspect of the question? If the question is: "Does Pryor state a cause of action?", has counsel examined the requirements for a prima facie case? Are all of the necessary elements present in the facts stated? If not, counsel should indicate what element is lacking. What legal theory has counsel evolved? Does Pryor have several causes of action that may be brought? If so, which will afford the most effective remedy? Are there any differences regarding matters of proof or measure of damages? Considering matters of jurisdiction, venue, and availability of witnesses, can any action be prosecuted?

This discussion should include an analysis of the state of the law. What are the leading cases in point? What do they hold? These cases should be analyzed skillfully so that the reader will have no doubt as to the holding of the cases.

If the question has several facets or points, the discussion may properly be broken down into a discussion of its various points. Counsel must remember, however, that this is not an argumentative document. The form used in an appellate brief in relation to points and point headings may be borrowed, but not the argumentative nature of the brief. The goal of the memorandum is to present, in an orderly, logical fashion, an objective picture of the applicable law. The perspective should not be jaundiced by the partiality of the author.

If the memorandum were to be submitted to a court in support of a motion or counsel's position on a legal question that arose during a trial or an appeal, then, obviously, different considerations would govern. This latter type of memorandum of law is similar to an appeal brief on the limited question presented. While this "court" memorandum is designed primarily to *persuade*, the "office" memorandum must simply *inform*.

The goal of a lawyer drafting an office memorandum of law is not necessarily to emerge with an answer that Pryor or Wood B. Client has an unassailable cause of action. Rather, the lawyer must objectively answer the question: "Based on the facts, does the client have a cause of action?"

The same attitude should prevail if, for example, Mary Donaldson states a "defense" to a claim that someone has made against her. She has received a claim letter advising her that a claim against her has been entrusted to an attorney for appropriate legal action. Ms. Donaldson has stated her reasons to counsel why she has not paid the claim. If a memorandum is drawn, the conclusion may very well be that "under the law of this jurisdiction Donaldson is liable for the full amount."

f. Conclusion

The "Conclusion" should contain a specific and clear answer to the question presented, and a summary of the grounds upon which the answer is based. This conclusion must, in all cases, be supported by the authorities and materials found in the discussion. To submit a memorandum of law based upon inadequate research and faulty analysis is an unprofessional practice unworthy of the advocate.

If the law on a given question is not certain, the uncertainty should be indicated in the conclusion. The conclusion may be prefaced: "Although no cases have been found in this jurisdiction that are controlling, cases in other jurisdictions lead to the conclusion that such and such would be the answer to the question presented." If there is a conflict of authority, or the jurisdictions have reached conflicting conclusions, this, too, should be noted. If no cases can be found in any jurisdiction that are directly in point, counsel should nevertheless state a conclusion as to the likely outcome if the issue were litigated.[3] A treatise or periodical may have indicated the path. In all cases, based upon the available authorities, counsel should state an opinion. Legal training and skill can be demonstrated by the ability to analyze the factors that will influence a court if the issue will ultimately be judicially determined. The conclusion will set forth a prediction of that judicial determination.

APPENDIX G:
Form of Office Memorandum of Law

FORM OF OFFICE MEMORANDUM OF LAW*

TITLE: Tenant's Compensation for Fixtures upon Condemnation of Leased Premises

(Re Inquiry of Client R. W. Smith)

REQUESTED BY: James Kinson

DATE SUBMITTED: June 1, 1992

QUESTION PRESENTED

Whether tenant would be entitled to compensation for trade fixtures in event of condemnation of the leased premises?

BRIEF ANSWER

In the State of New York the tenant's right to compensation for fixtures is recognized notwithstanding paragraphs 19 and 24 of the lease.

STATEMENT OF FACTS

Client operates a machine shop at the premises known as 34 Main Street, Borough of Brooklyn. He is in possession under a 20-year lease executed on May 15, 1991. He has, since 1991, installed valuable machinery in the leased premises. The machinery is bolted to the concrete floor. It now appears that there is a reasonable likelihood that the premises will be condemned in the near future for highway purposes.

Paragraph 19 of the lease provides: "If all, or substantially all, of the leased premises are condemned, then at the option of the Landlord this lease shall become null and void and the estate of the Tenant shall terminate. No part of any award, however, shall belong to the Tenant."

Paragraph 24 of the lease provides: "If after default in payment of rent or violation of any other provision of this lease, or upon the expiration of this lease, the Tenant moves out or is dispossessed and fails to remove any trade fixtures or other property prior to such said default, removal, expiration of lease, or prior to the issuance of the final order or execution of the warrant, then in that event, the said fixtures and property shall be deemed abandoned by the said Tenant and shall become the property of the Landlord."

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*The memorandum of law may also serve as the basis of counsel's opinion letter to the client.

DISCUSSION

It is well established in New York that the machinery would be characterized as trade fixtures and could be removed at any time before expiration of the term provided the fixtures can be removed without material injury to the realty and provided they are removed prior to expiration of the term. *Matter of the City of New York*, 192 N.Y. 295, 84 N.E. 1105 (1908). The rule is very liberal in favor of the tenant. Apart from common law rights, an examination of the lease indicates that, under paragraph 24, the tenant's continued ownership and right of removal is clearly agreed upon as to any machinery installed by the tenant during the term. The tenant's sole liability is for any damage caused to the leased premises in removing the machinery.

It is also well established that the State must pay compensation for "fixtures," which, although removable by a tenant, would be considered real property if they had been installed by the owner of the fee. *In re Allen Street and First Avenue,* 256 N.Y. 236, 176 N.E. 377 (1931). *See* 51 *N.Y. Juris.,* Eminent Domain §252 (1986). The tenant's right to compensation for fixtures, as against the State, survives the termination of the estate. *Matter of City of New York*, 256 N.Y. 236, 176 N.E. 377 (1931); *Marraro v. State*, 12 N.Y.2d 285, 189 N.E.2d 606 (1963).

Although no New York State Court of Appeals case has been found, it is also clear that paragraph 19 will not defeat the tenant's right to compensation for the machinery in spite of the language employed in the lease. As between the tenant and the State, the machinery is considered realty and just compensation must be paid. However, as between tenant and landlord, the compensation belongs to the tenant in recognition of the continued ownership and in order to avoid unjust enrichment on the part of the landlord. *McClusky v. State*, 16 Misc. 2d 920, 184 N.Y.S.2d 986 (Ct. Cl. 1959); *Antonowsky v. State*, 180 N.Y.S.2d 966 (Ct. Cl. 1958). The cited cases involved leases with virtually identical provisions governing condemnation.

Gristede Bros. v. State, 11 App. Div. 2d 580, 200 N.Y.S.2d 755 (3d Dep't 1960), is especially relevant in the event of the condemnation. The tenant of premises appropriated by the State for thruway purposes entered a claim for compensation for the value of fixtures. The lease contained the typical form clause denying to the tenant any part of a condemnation award. The court indicated that such a provision "serves only to deprive the tenant of any compensation for value of the *leasehold.* 'Even so, the tenant retains the right to compensation for his interest in any annexations to the real property which, but for the fact that the real property has been taken, he would have had the right to remove at the end of his lease. . . . '" 200 N.Y.S.2d at 756. However, the Court of Claims had dismissed the tenant's claim because the lease provided that any fixtures not removed prior to termination of the lease were to be deemed abandoned by the tenant and were to become the property of the landlord (paragraph 24 in client's lease is identical). The Appellate Division reversed and remanded to determine classification of the property and damages, ruling that the clause providing for abandonment should be restricted to

voluntary abandonment of the fixtures and should not govern termination because of condemnation. There was no opportunity for removal, and therefore the tenant was entitled to an award for whatever fixtures constituted true annexations to the realty. The *Gristede* decision is clearly sound in that it protects the tenant in the event of vesting of title in the sovereign without opportunity for removal. Further, it is supported by the common law doctrine recognizing a tenant's right of removal after termination of the estate if the estate was of an indefinite duration or terminated unexpectedly.

It should be noted that the valuation of fixtures in condemnation proceedings is usually measured by the so-called "Unit Rule," under which the leasehold and the improvements are valued as a unit and not separate items. *See generally* 51 *N.Y. Juris.*, Eminent Domain §§ 225, 257 (1986). However, that rule need not be applied in exceptional circumstances. *Cooney Bros.* v. *State,* 24 N.Y.2d 387, 248 N.E.2d 585 (1969); *Marraro* v. *State,* 12 N.Y.2d 285, 189 N.E.2d 606 (1963). These decisions should be reviewed if the fear of condemnation materializes.

CONCLUSION

In the event of condemnation of the leased premises, available authorities recognize tenant's right to compensation for the machinery, provided tenant has no opportunity to remove the machinery prior to condemnation. Tenant's lease with landlord is no bar to compensation in the event of condemnation nor does it prevent tenant from removing the machinery prior to condemnation.

Respectfully submitted,
Robert Reeves

APPENDIX H:
Form of Opinion Letter

FORM OF OPINION LETTER*

CARLTON, DAVIDSON & ROMANO
280 Broadway
New York, NY 10007

May 10, 1991

Abbott & Baker,
Clothing Manufacturing Company
1234 Madison Avenue
New York, NY 10028

Attorney-client confidential communication

Dear Mr. Abbott:

In your letter of May 1st, 1991, you state that you wish to register the mark "Executive Brand" for men's suits manufactured by your company. You indicate that "for the past year or so" you have been sewing labels on certain suits that contain the name "Executive Brand." Specifically, you ask for our legal opinion as to whether the words "Executive Brand," which you refer to in your letter as your trademark, may be registered with the U.S. Patent and Trademark Office (P.T.O.).

As a result of our research, we have concluded that an application for the registration of the mark "Executive Brand" is likely to be refused.

The United States Court of Customs and Patent Appeals has decided an appeal that dealt with a mark consisting of the words "Executive Model." The case appealed a decision of the Trademark Trial and Appeal Board, which had affirmed the action of the Examiner of Trademarks in refusing to register the mark "Executive Model."

The question before the court was whether the mark "Executive Model" so resembled previously registered marks, to wit., "The Executive," "Executive Group," "Young Executive," and "Junior Executive," as to be likely to cause confusion, mistake, or to deceive. The mark "Executive Model" was applied to men's shorts and slacks, whereas the previously registered marks were used for a variety of clothing, including men's suits.

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* The case relied upon by counsel in the opinion letter that follows is *In re Farah Manufacturing Co.*, 58 CCPA 829, 435 F.2d 594 (1971).

Pursuant to the applicable statutory provisions of law, the P.T.O. shall not refuse registration unless an applicant's mark so resembles a registered mark as to be likely, when applied to the goods of the applicant, "to cause confusion, or to cause mistake, or to deceive as to the source of the goods." The court consequently affirmed the decision, which refused registration of the proposed mark.

The court agreed with the Board's findings that words such as "The" and "Junior" merely emphasize the word "Executive" and that "Executive" was "the dominant feature" of the mark "Executive Model." The court attached little or no importance to the additional word "Model" in the trademark in view of its obvious meaning in the clothing field.

It is clear that the words "Model" and "Brand" convey the same meaning. Therefore, because of the great similarity of the mark and its application to identical goods, men's suits, the holding and reasoning of the court pertaining to "Executive Model" apply equally to your proposed mark "Executive Brand." This assumes that all prior registrations are still in force.

In view of the foregoing, we are of the opinion that you would probably not be able to register the mark "Executive Brand" for the suits manufactured by your company.

This letter deals exclusively with the rights of registration and not with your right to use the mark.

If you are still interested in using this mark, we suggest that the following action be taken:

1) Verify that the prior registrations are still in force; and

2) Investigate the companies that own the registrations to determine whether they are currently using the marks shown in those registrations.

Please call me if you have any questions.

Very truly yours,

John J. Romano

CARLTON, DAVIDSON & ROMANO
By: John J. Romano

Part Two

OPINION LETTERS AND CLAIM OR DEMAND LETTERS, TRIAL AND POST-TRIAL BRIEFS, AND MEMORANDA OF LAW

This part of the book will introduce a variety of important documents that are essential in the practice of law and in the trial of cases. As in other parts of this book, the purpose is to illustrate the importance of effective writing in the drafting of all legal documents. In this part, the documents relate to pretrial and trial practice.

II

OPINION LETTERS AND CLAIM OR DEMAND LETTERS

A. Opinion Letter

The opinion letter is an informal memorandum of law in letter form. It sets forth with professional objectivity and candor the answer to the specific question that must be answered. In the practice of law, it is addressed to a client and, in clear and understandable language, states the specific answer to the legal question asked by the client.

There is no limit to the types of questions that counsel may be asked to answer in the opinion letter. The client may ask a very specific legal question, or may seek advice and counsel. For example, may the client follow a certain course of action or conduct? What is the legal meaning of certain words, phrases, or clauses in a legal document? On the particular facts stated, does the client have a cause of action? On the particular facts stated, is the client violating a particular clause or paragraph of a lease? On the particular facts stated, is the client's tenant violating a particular clause or paragraph of the lease?

The opinion letter, notwithstanding its informality as a legal document, is very important and of great value to both client and attorney. It is of value to the client because it is responsive and offers the client reasonable certainty and confidence. It is of value to the lawyer because it states the precise factual basis for counsel's legal opinion. Hence, there can be no misunderstanding as to the basis for counsel's answer or advice.

Clients are generally not interested in the citation of authority or other documentation for counsel's opinion. Accordingly, legal citations should not be included in the letter. Clients wish to know the answer to the specific question that has been asked. The letter, in clear and understandable language, must set forth counsel's answer.

In the sample opinion letter, reproduced in Appendix H of the text, counsel answers the question whether the words "Executive Brand" may be registered with the U.S. Patent and Trademark Office as a trademark for men's suits. The opinion letter answers the question directly and succinctly: "As a result of our research, we have concluded that an application for the registration of the mark 'Executive Brand' is likely to be refused."

Although the letter reproduced in the appendix contains a reference to the case upon which counsel relies, and explains its pertinence to the inquiry, neither the name of the case nor its citation is included. The client is primarily interested in counsel's opinion that the client "would probably not be able to register the mark 'Executive Brand.'"