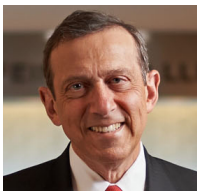
Drafting Client Memos and Emails

A Practical Guidance® Practice Note by Ronald J. Levine, Herrick, Feinstein LLP



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This practice note provides guidance for **drafting client memos and emails** and covers topics such as effective drafting techniques, preserving privileges, and maintaining the security of your client communications.

When you communicate with your client you may decide to speak with the client in person or by telephone or confer by mail or email. Whether you are going to communicate in person, by phone or in writing, you must plan and outline the points you want to share before you sit down in the conference room, pick up the phone, or start typing.

In our world of instant communications, we often text friends and family without a great deal of forethought. As a professional, your words carry great weight, and can have a lasting impact on the client and the course of the legal matter you are handling. Your words matter. How they are chosen and the format in which they are delivered must be given careful consideration. This is especially important when sending an email. Indeed, there should be a warning label on every computer mousepad which reads: "Think Twice, Click Once."

For a practice note on how to perform various litigation tasks, see Civil Litigation Fundamentals Resource Kit (Federal).

Tips for Associates

Often a partner will ask an associate to prepare a research memo that will be incorporated into a memo for the client. Just because the associate's work product will be reviewed by the partner, the associate should not assume that the draft can contain typos or gaps. The associate should always submit the best work possible and leave the partner with the impression that the associate's work can be trusted and that the associate is capable of dealing directly with the client.

Before jumping into any research, the associate should ensure that the scope of the project is clearly understood. When receiving the assignment from a partner, the associate should consider reciting the assignment back to the partner to make sure there are no misunderstandings. This should include confirming:

- The format in which the partner wants to receive the work –and–
- The appropriate scope of research, and the amount of time the partner believes the assignment will require

Confer with the partner if new issues are spotted while researching that could impact the larger case.

Should You Send a Brief Email or a Formal Memo?

In selecting the best way to communicate, you must consider, among other things:

- The client's preferences and needs
- The significance of the message or advice you want to share –and–
- Time efficiencies and constraints

If the advice you want to share can be presented in a concise form, then a short email is appropriate.

A brief email is not the place to discuss a nuanced, complex issue. While it will take less time to draft an email, you

should still make sure it is complete, professional, and well-written.

Indeed, client communications on an issue may well be a combination of a lengthy memo and shorter emails. You may send the client a lengthy research memo, and in reply receive questions via email. You may be able to answer the questions in a brief email, if appropriate.

Whenever you need to provide a complete factual background and a lengthier discussion of the law, consider sending a longer formal memo. Whether a formal legal memo is sent in hard copy, or via email, the client recipient should be told in a cover memo the purpose of the memo so it receives the client's full attention.

When it comes to drafting formal legal memos, it is not "one-size-fits-all." If the recipient is an in-house assistant general counsel, they may require an in-depth analysis of the factual background of the matter, and the legal issues, in order to present a complete picture for the general counsel. On the other hand, a sole proprietor engaging in business negotiations may want a brief email with bullet points that lay out the key legal issues. The sole proprietor may consider a lengthy memo to be overkill, and an unwarranted attempt by the attorney to run up unnecessary legal fees.

When drafting a client memo, you should factor in the client's level of sophistication with the law. An in-house counsel may expect case citations and hyperlinks to authority while the sole proprietor may want a fundamental discussion of legal principles and procedures without cites to authority.

Be Objective and Clear

As a lawyer you often advocate your client's position to an adversary or a court. Client communications, whether in an email or a memo, are different. They must be more objective and balanced. The client will need to appreciate the strengths and weaknesses, and the potential rewards and risks, involved in potential courses of action. You are ethically required to provide the client with information and an explanation reasonably necessary to permit the client to make informed decisions regarding the representation. See American Bar Association Model Rule of Professional Conduct Rule 1.4(b).

In any written communication use an active voice and use simple sentences that are easy to read and understand. Always use short complete sentences, even when typing an email message. Do not ramble. If you want to highlight a point, a bold font is appropriate. Avoid shorthand expressions such as "LOL" and slang.

Client emails and memos are not the right place to share a joke, cartoon, or emoji. Your client may not appreciate your attempt to find humor in its legal matter. And, if your memo or email should ever become a court exhibit, your little joke may not come across as funny.

Always review your work for clarity. You should also check grammar, spelling, and punctuation. Adding a legend such as "Please excuse any typos, sent via iPhone" is not appropriate when sending a professional email to your client.

When Appropriate, Mark the Writing as Privileged

Only certain communications between a lawyer and the client are protected by the attorney-client privilege. See Attorney-Client Privilege and Work Product Doctrine Resource Kit (Federal). In general, the communication must be:

- Confidential
- Between counsel and client –and–
- For the purpose of seeking, obtaining, or providing legal assistance to the client

Mark these privileged communications as "privileged and confidential." And advise the client that they should be kept confidential and not shared with third parties.

Marking communications as privileged will be helpful if the client ever has to produce its documents to an adversary or third parties. In that event, you will need to segregate privileged communications, and the privilege legend will help identify them. See Privilege Log Checklist (Federal).

That said, not every communication you send is privileged and should not be marked as such if it is not. For example, the privilege will not apply when a lawyer is acting as a

- A public relations consultant
- An accountant –or–
- Another non-lawyer role

Even when acting as a lawyer, not every communication will involve legal advice. If you improperly invoke the privilege designation (say in an email to a client about a golf outing), and a judge later reviews your privilege log *in camera*, the judge may lose confidence in your privilege designations.

Organize the Writing

If you share legal advice with the client, whether by a brief email or in long form memo, keep in mind that your client is busy, and will be eager to read the "punchline." Accordingly, the conclusions should be clear, concise, and upfront.

One common approach in a formal memo is to utilize "question presented" and "answer" after the introduction. After the introductory summary, the memo should include a

statement of the facts which you considered. You should then provide the relevant legal principles, and how they apply to the facts.

Use headings and sub-headings throughout the memo to highlight the key points. Any memo should end with a conclusion that includes any items for follow-up or further analysis.

If you are sending an email, make sure that the subject line of the email reflects the purpose of the email. All too often emails are sent as a reply to a prior unrelated email, and the sender does not adjust the subject line to reflect the purpose of the new email.

When sending an email, always include a standard signature block that includes:

- Your full name, firm, title, postal address, email address, telephone number –and–
- A confidentiality disclaimer

Your client should not have to fish around for your contact information if they have questions or want to contact you.

Do Not Criticize the Judge

You should always keep in mind the possibility that a judge may someday read an email or memo. Thus, be careful about writing something negative about the judge, such as when asked by outside counsel to include an assessment of the judge in your case evaluation. That report might appear on the privilege log. If opposing counsel later challenges the privilege designations in the log, and the judge asks to review the underlying documents *in camera*, the judge could read the memo containing the negative comments.

Put Your Writing to the Test

Ask a colleague to read your memo and tell you what the colleague has taken away from the memo. Hopefully, your colleague's summary will be in line with the conclusions and advice you wanted to share. You should also solicit suggestions on how to clarify or tighten up the memo. The insights from a second set of eyes can go a long way in making sure that the written words reflect what you wanted to say.

That said, the most important set of eyes are your own. Make sure that you have read and re-read your client communication before it is shared with anyone—whether it is a colleague or the client.

Avoid Transmission Disasters

After having spent considerable time and energy drafting the perfect client email or memo, you do not want it to wind up in the wrong hands. If a communication is transmitted electronically, it should be sent securely via a secure law firm messaging account. Do not use your personal email account. This is an ethical mandate. Under American Bar Association Model Rule of Professional Conduct Rule 1.6 (c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

When sending an email to an adversary, it is not wise to copy or blind copy your client. If your client decides to send you comments on your email, the client might inadvertently "reply to all" and unwittingly share the client's thoughts with the adversary and waive any privileges.

For any email, insert the recipient's address as the last step. If you click "send" prematurely, an incomplete email could be sent. When you eventually insert the recipient's email address, turn off autocomplete. You do not want to send the email to the wrong recipient who may have a similar name.

If the email is part of a chain, be sure to review the emails that are in the chain below your new email. You may not want to share a purely internal email as an attachment when you send the client the email.

Text with Great Care

Lawyers and clients are increasingly using more informal avenues for electronic communications, such as text messages and social media applications. All of the above advice for emails would apply to text messages and other messaging tools. There are additional concerns. It is difficult to provide clients with informed and thorough advice in short bursts and on the fly. In addition, the messages may not be preserved as part of the client file. A law firm's email system, on the other hand, will undoubtedly have a records preservation protocol, but it may not incorporate text messages. Messages sent outside of the firm's system would not be included in the requisite client record preservation system.

Also, as discussed above, any confidential messages to clients must be sent via a secure network. A text sent via a personal cell number may not have any of the security features which are employed in law firm's email system. For all of these reasons, and others, you should be cautious when sending electronic messages outside of their firm's sanctioned systems. Further, caution clients against sending communications to you via informal systems which do not comply with the required security parameters.

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Ron Levine is an accomplished litigator with 35 years of experience advising consumer products companies in complex commercial litigation, with a focus on class actions and other multi-party litigation. A pragmatic advisor who helps clients anticipate, minimize and resolve the financial and reputational damage arising from litigation, Ron regularly counsels clients on crisis management strategies, social media and privacy issues, and professional responsibility concerns.

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