



The Trial Court Bench Memorandum¹

Trial court clerks sometimes draft bench memos for their judges. These memos typically focus on research question(s) for pending cases; unlike appellate bench memos, they do not evaluate the decision of a lower court. Instead, their purpose is to consider arguments on both sides, determine which side should prevail, and indicate which arguments succeed, which fail, and why.² For example, the trial judge may ask a clerk to provide an analysis on whether a defendant before the court is entitled to qualified immunity.

When writing a bench memo, it is important to remember that it is the judge's job to neutrally apply the law to the facts. The bench memo must help judges get past the advocacy of the parties' filings so that they can reach the decision that the law requires.³

I. LENGTH OF THE BENCH MEMO

The length of a bench memo can greatly vary. Some bench memos are single issue memos, in which a judge may request that you write a short memo on an individual issue that attorneys have not explained adequately. This single issue memo may be as short as two or three pages. More typically, though, as a trial court clerk, you will write longer memos, which could span many pages if there are multiple issues that the court needs to decide. Ultimately, each case will dictate the length of the bench memo. The writer should ensure that the bench memo is concise but thorough.⁴

II. AUDIENCE OF A BENCH MEMO

When writing a bench memo, it is critically important that you clarify the expectations of your judge before starting to write.⁵ Knowing your audience also requires knowing how your judge will use your writing. Some judges use the bench memo early in the process to help them

¹ This handout was created in 2019 by Alexandra Skinnion, based off a 2011 version by Jessica Klarfeld.

² FEDERAL JUDICIAL CENTER, LAW CLERK HANDBOOK 91–93 (3d ed. 2017).

³ See MARY DUNNEWOLD, BETH A. HONETSCHLAGER & BRENDA L. TOFTE, JUDICIAL CLERKSHIPS: A PRACTICAL GUIDE 126 (2010).

⁴ Jennifer Sheppard, *The "Write" Way: A Judicial Law Clerk's Guide to Writing for the Court*, 38 BALTIMORE L. REV. 114 (2008) ("A bench memorandum must not only be impartial and critical, but must be thorough enough to summarize the issues in the case without being so thorough that the judge would have been better served by reading the briefs and the record him or herself.").

⁵ LAW CLERK HANDBOOK, *supra* note 2, at 94.

develop an overall picture of the case or specific issues within the case; others read the bench memo last, once the facts and arguments are clear in their mind.⁶

III. LARGE-SCALE ORGANIZATION

Trial court bench memos closely mirror the [large-scale organization of a traditional legal memo](#). They consist of (1) a heading; (2) the question presented; (3) the brief answer; (4) the facts before the court; (5) a discussion of the legal analysis; and (6) the clerk’s ultimate conclusion and recommendation on how the judge should rule.

IV. DIFFERENCES BETWEEN A TRIAL COURT BENCH MEMO AND A TRADITIONAL LEGAL PRACTICE MEMO

A key distinction between a trial court bench memo and traditional practitioner’s memo is in the tone. Whereas traditional memos strive to predict and/or advise what the likely outcome of a legal question will be, the clerk is recommending a course of action for the judge. Therefore, the trial court bench memo should be more authoritative in both the discussion and conclusion:

	TRADITIONAL LEGAL PRACTICE MEMO	BENCH MEMO
DISCUSSION	Like the departing employee in <i>Perry</i> who made valuable client connections, Ms. Skinnion gained knowledge of Hanson’s Farm’s clients’ and developed close relationships with them. Her perspective will likely induce clients to follow her to Davis Farmland.	Ms. Skinnion closely resembles the employee in <i>Perry</i> who left the antique shop after years of making close, personal connections with clients. During her employment at Hanson’s Farm, Ms. Skinnion gained knowledge of clients and developed a strong rapport with them. These connections will induce Hanson’s clients to follow her to Davis Farmland.
CONCLUSION	A court will likely uphold the non-competition clause because Hanson’s Farm can demonstrate that the clause does not restrict Ms. Skinnion any more than necessary to protect its business. The clause is crucial to preserve the Farm’s client base and business strategy from manipulation by an employee in whom it invested and trained. Moreover, because the scope of the covenant’s time and location restraints does not impede Ms. Skinnion’s ability to earn a living,	This court should enforce the non-competition clause against the Defendant, Ms. Skinnion. The clause does not restrict Ms. Skinnion any more than necessary to protect Hanson’s Farm’s business. The provision is crucial for the preservation of Hanson’s Farm’s client base and business strategy against employees in whom it invested and trained. Moreover, because the scope of the covenant’s time and location restraints does not impede Ms. Skinnion’s ability to earn a living, Hanson’s Farm can show the clause

⁶ See DUNNEWOLD, HONETSCHLAGER & TOFTE, *supra* note 3, at 127.

	Hanson’s Farm can show the clause does not unreasonably restrict her interests. For these reasons, a court will likely rule the clause is enforceable and reasonably necessary for Hanson Farm’s protection.	does not unreasonably restrict her interest. For these reasons, this court should hold that the clause is enforceable and reasonably necessary for Hanson’s Farm’s protection, ruling in favor of the Plaintiff.
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The discussion section of a trial court bench memo operates differently than a traditional legal memo in two more mechanical ways: use of quotation and the structure of addressing each party’s arguments.

A. Explanation of Case Law

Depending on the judge’s preferences, it may be more appropriate to liberally quote case law throughout the discussion section of a bench memo than in a traditional legal memo. Whereas reader-friendly paraphrasing is often appropriate for case explanations in a traditional memo, the purpose of a trial court bench memo is to inform the judge of pre-existing case law and how it informs the question before the court. Therefore, it may be helpful to include more quotations to include key language from various sources in one memo for the judge:

	TRADITIONAL MEMO	BENCH MEMO
QUOTATION EXAMPLES	In <i>Wood</i> , the court upheld a covenant that prevented a farrier from leaving his post and setting up a competitive practice. The court emphasized that the farrier should not be able to take advantage of his employer’s training and become a competitor, as the employer tutored him from an apprentice to a near expert.	In <i>Wood</i> , the court upheld a covenant to prevent a farrier from establishing a rival horseshoeing practice. The court reasoned that the apprentice “progressed rapidly from the apprenticeship stage” during his employment, because the “appellant did indeed teach respondent the trade or art of horseshoeing.” Accordingly, the court wrote that the farrier “should not be able to capitalize on his employer’s tutelage to become a primary competitor.”

B. Structure of the Discussion

The discussion section of a bench memo will depend on the issue before the court, but in general should take the following steps. First, it should roadmap the overarching issue(s) to be analyzed, and indicate a high-level recommendation from the beginning. For each issue, it should then include a detailed section on the applicable legal standards, explanation of the case law, and an application of that law to the facts of the case.

The discussion section should also thoroughly address each party’s arguments. This is a deeper dive than the recognition and anticipation of possible counterarguments made in a traditional memo. Using the parties’ pleadings to frame this section can be helpful. There are multiple ways

to incorporate this component into the bench memo. First could be in a detailed “issues” or “arguments” section that comes before or after the clerk’s detailing of the legal standards. Alternatively, the clerk could weave the party’s arguments into the application of the case law to the facts before the court. Placement is a judgment call to make based on the preference of the judge, the complexity of the parties’ arguments, and the clerk’s own writing style.

FOR FURTHER REFERENCE

JILL BARTON, *SO ORDERED: THE WRITER’S GUIDE FOR ASPIRING JUDGES, JUDICIAL CLERKS, AND INTERNS* (2017).

CALVERT G. CHIPCASE, *FEDERAL DISTRICT COURT LAW CLERK HANDBOOK* (2017).

REBECCA A. COCHRAN, *JUDICIAL EXTERNSHIPS: THE CLINIC INSIDE THE COURTHOUSE* (2d ed. 1999).

MARY L. DUNNEWOLD, BETH A. HONETSCHLAGER & BRENDA L. TOFTE, *JUDICIAL CLERKSHIPS: A PRACTICAL GUIDE* (2010).

FEDERAL JUDICIAL CENTER, *LAW CLERK HANDBOOK* (3d ed. 2017).