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Traditional Office Memoranda and E-mail Memos, in Practice and in the First Semester

By Charles Calleros

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Is the traditional legal memorandum dead? Should we continue teaching it? Has it been replaced in the iPhone® age with e-mail memos? Or is the body of an e-mail necessarily an inappropriate medium for conveying a legal analysis?

Colleagues have begun to raise questions like these in scholarship and teaching conferences, and many of us have responded with divergent opinions. In this author's view, the traditional office memorandum is alive and well, and it remains an excellent teaching tool. E-mail memos, however, have earned their place as another point on the spectrum of documents that communicate various kinds of legal analyses to an assigning attorney or to a client, and we should consider incorporating them into our curriculum as well.

Defining E-Mail Memos

An e-mail memo is not simply an e-mail that attaches a 15-page legal memorandum; that's just a system for delivering a traditional office memorandum for printing or for viewing on a standard-size computer screen. Instead, to draw a distinction with traditional memoranda, an e-mail memo should be defined as a presentation of legal analysis—or at least the fruits of legal research—set forth in a streamlined format in no more than one or two single-spaced pages so that a recipient on the move can read it without difficulty by scrolling down the screen of a compact hand-held electronic device such as a BlackBerry® or iPhone.

The Issues: Focus and Debate

Our academy focused effectively on e-mail memos in three presentations at the Legal Writing Institute's Fourteenth Biennial Conference in Florida in 2010. The first panel on the topic¹ reacted to an article by Kristen Robbins-Tiscione, reporting her survey of graduates of Georgetown University Law Center and their growing use of simplified office memos, some of which can be easily conveyed in an e-mail message.² The members of this panel explicitly addressed and debated the question whether the traditional office legal memorandum, with overlapping elements built into its most popular formats, was obsolete and should gracefully relinquish its role as a favored teaching tool.

A second panel featured three attorneys engaged in different practices: transactional, civil litigation, and public interest litigation.³ Their fascinating presentations suggested that the preferred format for conveying a legal analysis between associate and assigning attorney varied considerably, depending on the nature of the practice and the complexity of the assignment.

The transactional attorney reported that she is constantly on the move, "making deals," and communicating with staff and associates through an

¹ Doug Godfrey, Richard Neumann (moderator), Kristen K. Robbins-Tiscione, & Mary Rose Strubbe, *Rethinking the Traditional Legal Memorandum as a Teaching Tool*, LWI 14th Biennial Conf., Sess. 3 (Marco Island, Fla. June 28, 2010).

² Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century (hereafter "Snail Mail to E-Mail")*, 58 *J. Legal Educ.* 32 (2008).

³ Carlton Fields, Jim Levy (moderator), Valerie Novales & Margaret Zehren, *What Skills Do Employers Expect Today's Law Students to Have?*, LWI 14th Biennial Conf., Sess. 3 (Marco Island, Fla. June 30, 2010).

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iPhone or similar hand-held device. Her associates typically support her by sending e-mail messages conveying brief research findings in response to questions, limited in scope and requiring quick responses, which pop up during negotiations.

The other two attorneys who regularly litigate substantial cases raising significant issues reported that traditional office memoranda remain valuable vehicles for conveying research and analysis in major cases, when the issues are complex and the stakes justify the cost. In other contexts, oral presentations or e-mail memos could suffice.

A third presentation at the 2010 Biennial Conference, an excellent poster session,⁴ addressed pedagogy. The presenters persuasively advocated for including a substantive e-mail memo assignment at the end of the first semester, as a follow-up to a traditional office memorandum assigned earlier in the course. This position is not so far from Professor Robbins-Tiscione's scholarship, which contains a few strong suggestions of the imminent demise of the traditional office memorandum,⁵ but contemplates its retention as a legitimate teaching tool if supplemented with instruction about less formal memoranda and substantive e-mail memos.⁶

Scholarship and conference discussions since the 2010 Biennial Conference have also warned of the risks associated with a trend toward short and less formal analyses that can fit comfortably in the

body of an e-mail message. First, of course, e-mail can sometimes be forwarded to an unintended audience, particularly if a substantive memo in the body of an e-mail message becomes buried within a string of e-mail messages whose topics and addressees have gradually evolved. Second, at combined presentations on e-mail memos at the 2011 Rocky Mountain Legal Writing Conference,⁷ one member of the audience argued that a legal analysis that could comfortably fit within the body of an e-mail message likely would be oversimplified.⁸

E-mail Memos: Additional Points on the Spectrum of Formats

This author's views are consistent with a rough synthesis of the ideas expressed in previous conferences and scholarship, although I probably believe more strongly than does Professor Robbins-Tiscione that the traditional office memorandum has important pedagogic value and should remain as a central teaching tool in the first semester of legal writing courses. Moreover, I am inclined to frame the issue and the analysis in less starkly binary terms than has been the case in many discussions of this topic.

Rather than asking whether the traditional office memorandum is dead and should be replaced by shorter, less formal e-mail communications, I believe that familiar formats are just shifting in their positions a bit to make room for another member of the club. The growing practice of conveying legal analyses in e-mail correspondence is simply a technologically spurred extension of long-standing diversity in law office communications.

For decades, associates have communicated the fruits of their research in formats ranging from oral presentations to formal legal

“The growing practice of conveying legal analyses in e-mail correspondence is simply a technologically spurred extension of long-standing diversity in law office communications.”

⁴ Stephanie Hartley & Jenny Carey, Poster Presentation, *Reality Check: Giving Students Real World “E-mail Memo” Assignments to Make Legal Research and Writing More Current and Practical*, LWI 14th Biennial Conf., Sess. 5 (Marco Island, Fla. June 28, 2010).

⁵ E.g., Robbins-Tiscione, *Snail Mail to E-Mail*, *supra* note 2, at 36 (using the heading “*The Traditional Legal Memorandum May Be Obsolete in Legal Education As Well As Practice*”). In a summary of her earlier reported findings, Professor Robbins-Tiscione chose a title with a dire tone: *Ding Dong! The Memo is Dead*, 25 *The Second Draft* (Off. Mag. of Leg. Writing Inst.) 6 (Spring 2001) (hereafter “*Ding Dong!*”).

⁶ See Robbins-Tiscione, *Snail Mail to E-Mail*, *supra* note 2, at 49 (traditional office memoranda may still have a place in the curriculum, but “at a minimum” courses should also “acknowledge the newer modes of composition being used by practicing attorneys”); Robbins-Tiscione, *Ding Dong!*, *supra* note 5, at 6-7 (assuming that traditional legal memoranda will still be taught, while recommending supplementary instruction on “both the advantages and the disadvantages to using these shorter forms of analysis”).

⁷ Charles Calleros, *(Still) Teaching Traditional Office Memoranda in an Age of E-mail Memos*, and Ellie Margolis, *Incorporating Electronic Communication in the LRW Classroom*, Eleventh Ann. Rocky Mt. Leg. Writing Conf. (Las Vegas, Nev. Mar. 26, 2011).

⁸ See also Robbins-Tiscione, *Ding Dong!*, *supra* note 5, at 7 (e-mail memos may “fail to preserve the writer’s detailed thought process”).

“Against the backdrop of this longstanding flexibility and diversity in formats for office memoranda, e-mail memos simply show up as additional points on this spectrum of formats, holding positions between oral presentations and traditional office memoranda ...”

memoranda of varying length and complexity. The scope, length, and formality of each communication depend on the nature of the assignment and the needs of the audience.

The most popular format is the one that includes Issues, Brief Answers, Facts, Discussion, and Conclusion. If the memorandum addresses a single, simple issue, however, the “Conclusion” can be moved forward to replace the “Brief Answer”; the reader will not regret the absence of a Conclusion at the end, which is helpful in a multiple-issue memorandum to tie together the subsidiary conclusions stated in various sections of the Discussion. Indeed, if the issue is adequately conveyed implicitly in the Conclusion, a simplified format could drop the separate Issues section as well. Similarly, we have long recognized that a shorter, less formal version of a traditional office memorandum can serve as an effective advice letter to the client.

Against the backdrop of this longstanding flexibility and diversity in formats for office memoranda, e-mail memos simply show up as additional points on this spectrum of formats, holding positions between oral presentations and traditional office memoranda:

- Oral Presentation
- E-Mail Memo to Attorney or Client
- Simplified Office Memo for Formal Client Letter
- Traditional Office Memorandum (various formats)

If an assignment calls for more than an oral report but can be analyzed effectively in a memorandum of one or two pages, sending the analysis to an assigning attorney or client in the body of an e-mail makes it readily accessible through a few clicks of a BlackBerry or iPhone.

The precise format of the e-mail memo can also depend the nature of the assignment and the needs of the audience. In most cases, the writer should provide a bottom line very early in the e-mail memo, followed by a summary of the supporting analysis, as well as advice or

recommendations, if appropriate. Because—unlike a traditional office memorandum—it must be short and simple enough to be easily read on a hand-held device, it necessarily will dispense with the more complex format and overlapping elements of a traditional office memorandum.

For example, an e-mail memo might begin with the Conclusion or a similar heading, which implicitly suggests the issue, followed by a Discussion or Analysis that analyzes the law and facts without having first stated the facts in a separate statement. In some cases, the writer may provide helpful orientation at the outset by summarizing the assignment, which substitutes for an issue statement, as in “You asked me to determine whether any city ordinances appear to prohibit or restrict the operation of a musical venue at ...” Other e-mail memos might simply present a bullet-point list of statutory or case citations, followed by parenthetical explanations, if that content best responds to the assignment.

Appendix A sets forth a sample e-mail memo that I provide to students. It follows a sample traditional office memorandum that analyzes whether a lender’s purported promise to a third-party guarantor is illusory, thus making the guarantor’s promise gratuitous and unenforceable under the consideration doctrine.

The follow-up memo in Appendix A, however, covers only three paragraphs and is perfectly suitable for an e-mail memo that an attorney on the move could easily read on a hand-held device. It responds to a query from the supervising attorney about whether an argument unaddressed in the initial memorandum could be helpful to the guarantor. Because the e-mail memo is an addendum to an earlier submitted office memorandum, it appropriately begins by referring to the assignment to supplement the office memorandum and by referring to the facts of that memorandum, followed quickly by a bottom line and legal analysis, and finally ending by repeating the associate’s earlier conclusion and recommendation. Because the proposed argument is easily rejected in a couple of sentences with citations, a short e-mail memo does not reflect oversimplification.

Opportunities for such concise presentations may arise in a number of contexts, such as:

- Brief follow-up research on a previously submitted traditional office memo, as described in the previous paragraph;
- Preliminary analysis of case intake;
- Quick research to support negotiations or other transactional work;
- A short, simple office memo assignment, such as the effect of a new statute on prior law, without the facts of a new dispute; or
- A client advice letter summarizing analysis from a traditional office memo, if short, if client prefers e-mail, and if security concerns are addressed.

Avoiding the Pitfall of Oversimplification

An assignment will normally lend itself to discussion within a couple of pages only if it raises a single relatively simple issue without the need to recite and analyze a complicated set of facts. In litigation, perhaps this frequently will be the case if an assigning attorney requires some additional research on a simple matter to supplement an earlier submitted legal memorandum that thoroughly addressed the issues, law, and facts. In a transactional practice, an attorney on the move might need a quick e-mail report on the text of a statute or the holding of a single case that may help the deal proceed or that may send a warning signal that further analysis is warranted before proceeding.

On the other hand, if an assignment raises two or three substantial issues governed by ambiguous statutory text and case law, all applied to complex facts, the author will most effectively convey a thorough analysis in a traditional office memorandum.

An associate might risk oversimplification if an assigning attorney is frequently on the move, is overly fond of her iPhone, and requests a short and pithy e-mail memo on a complex matter that merits much fuller analysis in a 15-page traditional office memorandum. In such a case, at the very least, the associate should warn the assigning attorney that a shorter e-mail memo can serve only as an

executive summary of a complete analysis, which necessarily would be longer and more formal in format. The associate can offer to present that more complete analysis in a traditional office memorandum or directly in a draft of a pleading or brief that the firm will file. If the assigning attorney requests a traditional office memorandum, the associate can prepare the 15-page office memorandum, attach it to the e-mail, and type an executive summary into the body of the e-mail message. The assigning attorney can read the executive summary on her iPhone in the taxi ride from the airport, begin developing her strategy accordingly, and read the full analysis on her laptop or iPad in her hotel room after dinner.

Teaching Both Traditional Office Memoranda and E-mail Memos

This author strongly believes that we should continue to teach formal office memoranda in full traditional formats. Some assignments in law offices will continue to require such memoranda. Moreover, a traditional format provides an excellent tool for developing each student's ability to express an analysis in a careful, deliberate fashion. As recommended by the poster session at the 2010 LWI Biennial Conference, we can end the semester with a follow-up assignment that lends itself to concise analysis in an e-mail memo. A student who has mastered the traditional office memorandum in full format should not find it difficult to simplify the format to suit a more limited assignment, such as an e-mail memo or a slightly simplified office memorandum.

Moreover, students must learn to transfer the formality and polish of a traditional memorandum to an e-mail memo. A "streamlined" format does not mean a "casual" one. Unfortunately, students are accustomed to texting and e-mailing in exceedingly casual styles and formats. Accordingly, students should remember that the recipient of an e-mail memo will have high expectations and may print or forward the memo. Therefore, the memo, albeit exceedingly concise, should look polished

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“[T]he question presented an opportunity for students to summarize the essential points of the case and its positive effect on negotiations, and to present that information under time pressure in a well-organized, well-written essay ...”

in style and structure.⁹ This lesson is more easily imparted if students have first mastered the detailed formality of the traditional office memorandum.

Follow-up E-Mail Memo as an In-Class Final Exam

Spurred by the ideas in the poster presentation at the 2010 Biennial Conference, I added an e-mail memo assignment as part of an in-class final examination. I told my students well in advance that the exam would include an e-mail memo assignment and that it would supplement their closed-universe office memorandum, which they had prepared early in the semester and which they could bring to the exam.

That closed-universe assignment was based on a real case in which a tailor had ruined a young Latina's Quinceañera mass and reception—her “coming out” ceremony and party—by failing to sew the gowns for the celebrant and her fourteen maids of honor, while misleading them about the state of completion of the gowns. The dispute raised an issue about whether the plaintiffs could recover damages for their emotional distress if the arbitrator found a breach of contract but no tort. Two precedents in the jurisdiction both denied such damages, but dictum in each of those precedents supports a strong argument for damages for emotional distress in the Quinceañera case. An Arizona Supreme Court opinion explains a helpful legal rule, in which a couple could suffer emotional distress over the economic losses caused by breach of contract. The facts of the case did not satisfy this rule. An Arizona Court of Appeals opinion similarly denied damages for emotional distress for breach of an employment contract, but it took pains to distinguish an Alabama case that awarded such damages for breach of a contract to transport a wedding party to the church on time.¹⁰ In discussing the

problem with students early in the semester, I encourage them to synthesize the two precedents to formulate a rule that would be helpful to the plaintiffs, albeit one that is supported only by dicta.

As shown in Appendix B, part of the in-class final examination presents a two-page excerpt from a fictitious late-breaking opinion from the Arizona Court of Appeals, which awards damages for a bride's emotional distress against a hotel that breached a contract to provide a ballroom for a wedding reception for 400 guests, forcing cancellation of the reception. Like the students' earlier submitted office memoranda, the new opinion derived support for its rule from the dicta of the two earlier precedents. The exam question gives students 30 minutes to compose the body of an e-mail message, of no more than three paragraphs, summarizing the import of this new case to the assigning attorney, who is on the move: He has been participating in a hearing, he will engage in settlement negotiations at another law firm later in the afternoon, and he has been alerted by text message that he will receive an important e-mail about those negotiations within the hour.

I was pleased with the results. The students had little trouble understanding that they should alert the assigning attorney to the good news that the analysis conveyed in the earlier submitted office memorandum was now supported by a holding of an appellate decision. For the most part, then, the question presented an opportunity for students to summarize the essential points of the case and its positive effect on negotiations, and to present that information under time pressure in a well-organized, well-written essay that the assigning attorney could quickly and easily read on the screen of his iPhone. A sample answer appears in Appendix C.

This final exam e-mail memo worked well because it relied on each student's experience with a previous assignment, and because the supplemental analysis in the e-mail was quite limited. One might assign an e-mail memo as an introductory assignment early in

⁹ Patricia Shepard, Small-section Discussant, LWI Teaching Workshop 2010 (San Diego, Cal. Dec. 3, 2010) (recounting assigning attorney's demands for formal structure and format in e-mail memo).

¹⁰ This closed-universe assignment is set forth in Charles R. Calleros, *Legal Method and Writing* 578-85 (6th ed. 2011).

the semester, but only if the analysis is exceedingly simple, such as applying the clear holding of a precedent to the slightly different facts of a new case.

Where Do We Go From Here?

I recommend that the legal writing academy continue to employ traditional office memoranda assignments, with their overlapping elements, as the primary vehicle for students' introduction to legal analysis and writing. I also recommend, however, that we introduce students to the more flexible, less formal presentations of legal analysis that attorneys or clients could conveniently read in the body of an e-mail from a hand-held device, while warning students of the risks of oversimplification.

To educate ourselves about the realities of practice, the academy should also collect examples of both successful and problematic e-mail memos from practicing attorneys. To facilitate a collaborative effort, perhaps one of the established legal writing organizations could set up a website on which examples could be uploaded and viewed by others.

In addition, Doug Godfrey reminds us that we should pay attention to readability on the small screens of handheld devices,¹¹ which depends on factors other than the manageable length of an e-mail memo. Although each of the sample e-mail memos that I set forth in the Appendixes are only three conventional paragraphs in length, they are dense with text and may require more white space and more frequent breaks for maximum readability by an attorney on the move. The academy should experiment with nontraditional spacing and paragraphing to see if it enhances readability on the screens of handheld devices. An example of such an experiment appears in Appendix A, immediately after the illustration with conventional spacing and paragraphing.

Appendix A¹²

From: [Associate]

Sent: Monday, September 26, 2011 6:02 PM

To: [Supervising Attorney]

RE: Follow-up to Memo in File #11-127

Attachments: Green v Day.doc (25 KB)[Open as Web Page]

ASSIGNMENT:

This morning you asked me to: (1) assume the facts as stated in my legal memorandum dated September 16, 2011, and (2) determine whether Guarantor's promise to guarantee payment of Borrower's debt lacks consideration because Lender's "return" promise provided no benefit directly to Guarantor.

ANALYSIS:

The absence of a direct benefit from Lender to Guarantor does not undermine a finding of consideration. Lender's promise to delay collecting a debt from a third party, such as Borrower, can be exchanged for Guarantor's promise to Lender. *See Green v. Day*, 175 Calz. 32, 37, 865 P.2d 1204, 1209 (1993) (finding consideration in similar guarantee context). If Guarantor sought Lender's promise in exchange for her own, it is irrelevant whether she received a direct benefit from Lender's performance of the promise. *Id.* at 38, 865 P.2d at 1210 (citing to [Restatement \(Second\) of Contracts §§ 71\(2\), 79 \(1981\)](#)).

CONCLUSION AND RECOMMENDATION:

The additional research does not change the conclusion of the September 16 memo. On the facts currently known to us, Guarantor's best argument remains her claim that Lender's promise is illusory. It remains a relatively weak argument, because the phrase "until Lender needs the money" is not easily interpreted to leave Lender's performance to his unrestricted discretion. However, it may introduce

“I ... recommend ... that we introduce students to the more flexible, less formal presentations of legal analysis that attorneys or clients could conveniently read in the body of an e-mail from a hand-held device ...”

¹¹ Comment during discussion segment of Charles Calleros, *E-mail Memos in Context and in a First Semester Final Exam*, Second Ann. W. Regional Legal Writing Conf. (Eugene Ore. Aug. 11, 2012).

¹² This sample e-mail memo is taken from Calleros, *supra* note 10, at 230-31.

enough uncertainty regarding consideration to convince Lender to compromise his claim against Guarantor in a reasonable settlement.

Alternative Presentation with nontraditional spacing and paragraphing:

From: [Associate]

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ANALYSIS

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See *Green v. Day*, 175 Calz. 32, 37, 865 P.2d 1204, 1209 (1993) (finding consideration in similar guarantee context).

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* It remains a relatively weak argument, because the phrase "until Lender needs the money" is not easily interpreted to leave Lender's performance to his unrestricted discretion.

* However, it may introduce enough uncertainty regarding consideration to convince Lender to compromise his claim against Guarantor in a reasonable settlement.

Appendix B

Final Exam Instructions and Question 1

Total exam time is 50 minutes. The exam will be administered in two parts: Part I, consisting of 30 minutes for one essay question in the form of an e-mail memo, and Part II, consisting of 20 minutes for 20 true-false questions. After the time has expired for Part I, you will turn in your essay answer and then await instructions for Part II. The exam is worth 40 raw points, 20 points for each part of the exam.

Both portions of the exam are "open book." You may bring with you into the exam room any of the books required for this course. You may also bring a hard copy of your closed-universe memo, addressing the breach of the Quinceañera contract, because the e-mail memo in Part I will relate to the Quinceañera memo.

Part I

In Part I, you will study a two-page excerpt of a recent (fictitious) opinion, published online in *Arizona Advance Reports*. You just discovered it today, and it is relevant to your previously submitted office memorandum on Trina Araiza's claims arising out of her Quinceañera celebration. Your supervising attorney, Charles Calleros, is at a hearing downtown and will meet at 3 p.m. with the attorney for Ramona Udave to try to negotiate a settlement, in an effort to avoid arbitration of Araiza's claims. He has your earlier submitted office memo in his possession.

You have texted Calleros and alerted him that you will be e-mailing him a short memo on a recent case relevant to his upcoming negotiations. When you receive instructions to turn the page, read the recent opinion and compose a short e-mail message to Calleros, suitable for quick reading on a handheld device such as an iPhone or BlackBerry.

In your *Bluebook* exam pages, or on your laptop computer with Examsoft, compose the body of your e-mail message to Calleros, in no more than three paragraphs, along with any headings that you choose to include. Keep it short and concise, providing Calleros with just a summary of the essential information to allow him to use this new case in negotiations, along with any insights that you might offer about the significance of the new case. You need not write down the heading lines that appear in an e-mail, such as To:, From:, Re:, and Date:. Just write the body of the e-mail.

You have a total of 30 minutes for Part I. You might allocate your time roughly as follows: 10 minutes to study the opinion and plan your answer, 10-15 minutes to write out your e-mail message, and the remaining time to polish your writing.

When instructed to do so, turn the page, where you will find the opinion on which to base your e-mail message.

* * * *

***Roberts v. Grand Hotel*, 614 Ariz. Adv. Rep. 12 (Ct. App. Nov. 1, 2011)**

....

[pg. 15]

FACTS

On February 5, 2008, Jenna Roberts entered into a contract to rent all three sections of the Grand Canyon Ballroom at the Grand Hotel in Phoenix for her wedding reception for 400 guests, scheduled for 6-10 p.m. on Sunday, June 8, 2008. The fee for rental of the Ballroom, not including the cost of paying for the food and beverages that would be served to guests, was \$10,000.

To Ms. Roberts's shock, when the wedding party arrived at the Grand Hotel at 6:30 p.m., after taking wedding pictures at the separate site for the wedding ceremony, the Grand Hotel was in a state of chaos. The Grand Canyon Ballroom was in use for the entire evening for a gala party scheduled on short notice by a national conference of financial advisors. The band hired by Ms. Roberts had long since left the site after being denied access to set up their equipment anywhere in the Grand Hotel; other caterers and wedding guests were left milling around in a state of confusion and frustration, waiting for instructions. Because the wedding party was unable to make arrangements for a suitable alternative location for their wedding reception, Ms. Roberts and her parents sent everyone home and asked them to wait for invitations to another reception. They never scheduled a substitute reception, and Ms. Roberts suffered great emotional distress as a result of the events.

Ms. Roberts brought several claims against the Grand Hotel in tort and for breach of contract. The trial judge granted summary judgment for Ms. Roberts on the issue of breach of contract, and she set the case for trial on the tort claims and on the issue of damages on the contract claim. The jury found for the defendant hotel on the tort claims but awarded damages to Ms. Roberts on her contract claim in the amount of \$100,225, which included damages for economic loss and damages for emotional distress. The only issues raised on this appeal relate to the damages for emotional distress, and the trial judge's rejection of the Grand Hotel's proposed instructions on mitigation of damages.

ANALYSIS

I. Damages for Emotional Distress

The jury awarded \$50,000 for Ms. Roberts' emotional distress. The trial court had provided the jury with the following instruction on this issue:

If you find that the defendant breached its contract with the plaintiff, you may additionally award the plaintiff damages for her emotional distress, but only if you find that the contract had a special nature known to both parties at the time of contracting, so that the

defendant could reasonably contemplate that a breach would cause the plaintiff to suffer emotional distress for reasons other than monetary loss stemming from the breach.

[pg. 16] The trial court's instruction is consistent with the opinion of this state's highest court that damages for emotional distress are available for breach of contract if the nature of the contract puts the parties on notice that a breach "would cause mental suffering for reasons other than the pecuniary loss." *Farmers Ins. Exch. v. Henderson*, 82 Ariz. 335, 343, 313 P.2d 404, 409 (1957) (finding that breach of an insurance contract did not meet this standard).

We have previously ruled that damages for emotional distress are not available for breach of a routine employment contract, one that did not present special reasons to depart from the normal measure of damages based on the difference between the unpaid salary and sums earned by the employee during the contract term through substitute employment. *Fogleman v. Peruvian Assoc.*, 127 Ariz. 504, 622 P.2d 63 (Ct. App. 1980). Even in that case, however, we suggested that a different issue would be presented by "a special situation," and we cited a contract for transportation of the groom to his wedding as an example of one that put the parties on notice that "failure of performance would, under the circumstances, expose plaintiff to particular consequences . . . for which the plaintiff was allowed damages." *Id.* at 506, 622 P.2d at 65 (distinguishing *Browning v. Fies*, 58 So. 931 (Ala. Ct. App. 1912), which awarded damages for mental suffering and humiliation).

We reject the Grand Hotel's argument that the contract in this case failed to meet the *Henderson* standard as a matter of law; therefore, the trial court appropriately instructed the jury on damages for emotional distress. Moreover, the evidence in the record amply supports the jury's award of emotional distress damages. When faced with four hundred frustrated guests and the complete ruination of her wedding reception, one would be shocked if Ms. Roberts did not suffer emotional

distress. The responsible scheduling supervisors at the Grand Hotel would certainly understand that a contract for a major wedding reception—so large that an alternative location would not be available on short notice—presented a situation unlike that of a routine commercial contract, where the damages are appropriately limited to economic losses.

We find no error either in the trial court's instructions or in the jury's award on this issue.

II. Mitigation of Damages

. . . .

[pg. 18] Affirmed.

End of Part I

Appendix C

Sample Answer

From: [Associate]

Sent: Monday, Nov. 14, 2011, 2 PM

To: Charles Calleros

RE: Urgent News on Araiza's Claim for Damages for Emotional Distress

Attachments: Roberts v. Grand Hotel.doc (25 KB)[Open as Web Page]

[The exam instructed students to omit the e-mail heading and to focus on the body of the e-mail, but I include it above to emphasize that this is intended to be an e-mail message.]

NEW DEVELOPMENT IN ARAIZA'S CASE: Roberts v. Grand Hotel

Mr. Calleros, a late-breaking case has strengthened our hand in the negotiations this afternoon over Ms. Araiza's claim for damages. *Roberts v. Grand Hotel*, 614 Ariz. Adv. Rep. 12 (Ct. App. Nov. 1, 2011). *Roberts* confirms our analysis of precedent in the October 4 office memorandum, except that it provides a positive holding rather than merely helpful dictum.

In *Roberts*, the Arizona Court of Appeals approved a jury award that included \$50,000 for a bride's emotional distress when the hotel breached a contract with the bride to provide a large ballroom for her wedding reception. The reception was canceled when the wedding party and its 400 guests arrived at the hotel, only to find that the hotel had committed the ballroom to another group. The court applied the dicta of *Henderson* and *Fogleman* to allow damages for emotional distress because the contract "was unlike that of a routine commercial contract," creating special circumstances that put the hotel on notice that breach of the contract would cause distress for reasons other than pecuniary loss. *Id.* at 16.

IMPLICATIONS FOR OUR CASE

The facts of our case are not as strong as those of *Roberts*, because Araiza's Quinceañera did take place in some fashion. Still, witnesses can effectively paint a picture of a "ruined" Quinceañera ceremony. Moreover, like the contract in *Roberts*, Araiza's contract was far from a routine commercial deal, and it fits nicely within the Arizona standard for damages for emotional distress for reasons discussed in the memo dated September 5, 2011. By analogizing a Quinceañera ceremony to a wedding reception, you can persuasively argue that a contract to supply a critical element for either event provides ample notice of special circumstances that make emotional distress easily foreseeable if the supplier breaches.

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Accessing Perspectives

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