

4 Writing a legal opinion

Susan Blake

NORMAN MANLEY LAW SCHOOL LIBRARY
COUNCIL OF LEGAL EDUCATION
MONA, KINGSTON, 7, JAMAICA

Copy 2

Photocopied from: Learning Lawyers' Skills by Go Id, Mackie & Twining

The skills involved in giving a legal opinion, whether written or oral, have tended to be ignored even in these days when the teaching of other skills such as interviewing is being developed. Because there are no formal legal rules about giving advice to a client, there is the tendency to think there is nothing to learn and anyone can do it, as used to be the case with interviewing. This is very unfair to the client, who may be left confused by the advice he gets, may become convinced that his lawyer does not really understand his case, or may feel that the best is not being done for him. This leads to a bad public image for the lawyer and it really is vital to develop skills in this area to do a proper professional job for the client.

There are two main areas needing work, to be dealt with in slightly different ways. The first is one commonly complained of – that many young people do not now have skills in using words, be it in grammar, the correct use of words or in logical and precise structure of written work. The second is knowing how to approach the task of giving advice in an organised way. Many young lawyers currently advise their first client without having thought much, if at all, about how to set about it, let alone receiving training and practice ... the real client is the guinea-pig!

As to the first problem, the inability of current students to use English well is widely commented on in many professions – grammar is often not coherently taught, vocabulary tends to be limited and used inaccurately, and the importance of structure in written work is rarely emphasised. Although this is widely observed, solutions are not easy to find. Some years ago teaching moved to emphasising the importance of freedom of expression in writing rather than adhering to strict rules, but the time may have come to swing the pendulum back slightly towards the appreciation of formal rules.

There is a tendency to pass the buck back down the line – the professional training institute blames the university, the university blames the school, and the school blames the nursery school. The problem is now such that all levels need to try to find ways of teaching, and of identifying, those who do have problems right up to the level of professional training. There can be a problem in 'selling' this to students – who may feel offended if they are told that they cannot write well as if it were a personal criticism. However, exercises in using words, summarising points and constructing pieces must somehow be introduced, made interesting and taken seriously. Students shown good examples will usually appreciate their merits.

The second problem, of teaching students how to give structured and useful advice, is what I am primarily concerned with here. Experience has tended to

show that how to give a legal opinion is not initially best taught by giving examples. Presented with examples the student will seek to copy them, rather than building an independent strength and style, which is crucial for a good lawyer. The best approach is rather to alert the student to how to prepare and develop style with comprehensive checklists that can easily be learned and used. These checklists, as evolved while teaching, are given to the students, with relatively few examples of actual opinions.

Once the checklists have been understood and absorbed, the student or young lawyer can more usefully learn from example, seeing what established lawyers in practice do, but being able to apply discrimination as to what is good practice that he or she could usefully follow, rather than copying bad practices and mistakes without thought.

Building a successful case in court begins from the earliest stages, so the following lists are central to being a good lawyer rather than peripheral. The lawyer who is really in control of the case from the start is most likely to win, and most likely to get the client returning, because the client has real confidence in the advice that was given and the way his or her case was conducted!

The checklists which follow were developed in teaching students studying for the Bar Examinations at the Inns of Court School of Law in London. Various teaching methods were used by different members of staff, the emphasis always being on building individual skills and style rather than following models, but this sort of checklist approach was quite common. The students worked in tutorial groups of 10–12, dealing with small legal problems in the basic legal areas of contract, tort, trusts and crime, being given a basic factual situation and asked to write a legal opinion as to the merits of the case, as if they were a barrister acting in the case. Students would work on each problem alone and then discuss their work in the tutorial groups. Further examples of the checklist approach suggested here, with further supporting material, are provided in *A Practical Approach to Legal Advice and Drafting* (3rd edition, 1989) published by The Blackstone Press, which is recommended for the Bar Finals Course.

In fact the course at the Inns of Court School of Law is currently being redesigned, with a New Vocational Course commencing in September 1989. This new course will put the writing of legal opinions into an even more practical context, linking it with the other skills of a lawyer, such as advising in conference and conducting a negotiation. The clear objective of this new course is that the skills of the lawyer will be more integrated to put the writing of a legal opinion into the context of managing facts and carrying out legal research. However, the basic approach of providing checklists and encouraging students to build up individual style and confidence rather than following set examples will remain central.

These checklists are designed to be of use to the barrister practising in the legal system of England and Wales, where the provision of a written opinion is a central element of practice. However, similar principles could be used in training lawyers to provide an opinion in any legal jurisdiction. While the checklists relate primarily to giving written advice they could be adapted fairly easily to the provision of oral advice.

PREPARING*

Writing a good legal opinion begins with good preparation!

- Getting full and clear information from the client in an interview.
- Getting all supporting evidence that is available, be it from documents or witnesses.
- Getting all other relevant information, be it factual or technical.
- Carrying out appropriate legal research.

This must all be done in the right frame of mind:

- The decision as to what type of case the client has should not be taken too early (or there is the temptation to make the case fit the preconceived idea).
- All material relating to a case should be read for the first time when the lawyer is in a receptive state of mind rather than tired, or concerned with some other matter.
- All material relating to a case should be read carefully to avoid any misunderstanding.
- The lawyer must approach the case from the point of view of his client, not as the judge of the case!

These points will now be broken down into more detailed work plans.

BEFORE WRITING THE OPINION

The opinion should be the polished final product rather than a rambling set of notes. First stages are separate from, and as important as, the final product. It is as necessary to develop good habits in preparatory skills as in wording the final result.

The main stages in this are as follows:

- 1 The client's specific instructions and objectives must be obtained and kept clear in the mind at all times.
- 2 All material that may be relevant to the case must be collected.
- 3 The material in the case must be ordered.
- 4 The material in the case must be attentively read.
- 5 Clear and thorough notes must be made from the materials.
- 6 Any gaps must be identified and dealt with.
- 7 A specific decision must be taken about the future of the case.

To explain each point in more detail:

1 The client's instructions and objectives must be kept clear The client is the reason for the whole action, and must come first:

- He or she must be interviewed in a way that will get all relevant details.
- Everything said should be written down and checked with the client for accuracy and omissions.
- The client must be asked specifically what he or she hopes to achieve in the case.
- If there are alternatives in how to pursue the case, these must be explained to the client, who must decide.

2 It is important to collect all relevant information The following should be available while the opinion is being prepared:

- The written statement of the client, including all the facts and the client's objectives in the case.
- All other relevant written documents, such as contracts.
- Statements from any witnesses.
- Statements from experts if appropriate.
- Pictures, plans, photos, diagrams etc to understand fully the situation (where this is vital as in a road accident, a plan should always be where it can be seen).
- Any existing correspondence should be read for relevant matter.

3 The material must be ordered It should preferably be ordered even before it is read so it can be properly understood and does not give a false impression, but this is not always possible if some information is not yet available.

- All material should be collected together in one place at one time.
- Each item of material should be identified.
- A suitable basis for ordering should be decided on (most important documents first, chronological etc).
- Every document should be put in order with the chosen system.

* Checklists on pp 120-127 copyright © 1987 Susan Blake.

4 The material must be read

- The material should be read when the lawyer is attentive.
- The material should be read without preconceptions as to fact or the likely cause of action.
- Each item should normally be read personally by the lawyer.
- The lawyer should keep his or her mind open right to the end of reading as to the type of case and the strength of it.
- Each item should be read twice, after some interval, to avoid misunderstanding or missing anything.

5 Thorough notes should be made, then checked and ordered A good clean copy of these notes should be retained for easy reference while writing the opinion or giving oral advice. It may also be useful if the case comes back for further advice, or for easy reference when presenting the case in court.

- Notes of all times and places should be made from all relevant material. These should then be sorted and ordered.
- Basic notes of all material facts should be made, with any relevant detail.
- Any discrepancies in the information given should be noted and checked.
- Anything that is unclear or ambiguous should be noted and checked.
- Notes should be kept of references to relevant points so they may be found again easily.
- Possible causes of action should be noted.

6 Any gaps in information should be identified and dealt with If anything major is missing it must be got or checked before proceeding.

- Think through the factual situation – is it realistic? are there any gaps in it?
- Notes should be made of any further document or information that needs to be sought.
- Notes should be made of points where further evidence is needed.
- Notes should be made of points that need further legal research.

7 A decision must be taken about the future of the case This needs a clear and specific decision with a structured time scale.

- Immediate action may be necessary, such as seeking an injunction. If so, get on with it!
- If further information is needed, can you proceed without it or should you wait for it? If you need to wait, decide exactly what is needed and who will get it, and when by.
- If you do not need to wait, take the next step, eg issue proceedings.
- If there are further decisions to be taken, they should be clearly put to and taken by the client.

WRITING THE OPINION

The main stages in writing the opinion are:

- 1 Notes for the opinion should be made.
- 2 The opinion is written or given.
- 3 Professional polish.
- 4 Practical polish.
- 5 The opinion should be read and/or checked.

1 Notes for the opinion should be made

- Each possible cause of action should be noted, with the elements it will be necessary to show to succeed.
- The facts and evidence in support of each should be noted.
- The potential weaknesses of each should be noted.
- Every possible remedy should be noted, with relevant facts (especially relating to quantum of damages).
- The potential contents should be ordered before beginning to write. The opinion should not ramble (especially to the extent of possibly contradicting itself!).

2 The opinion is written, based on the notes made

- Choose a suitable order for the material and overall structure for the advice. This may differ with different types of case.
- Choose a suitable line of approach, building up arguments to assist the client rather than writing a judgment.
- Choose a suitable layout – subheadings and numbered paragraphs are easier to read.
- Choose a suitable style of writing to communicate properly, and in which you feel comfortable. Should you write at length or briefly? Do you tell jokes or not? In any event, the opinion is NOT an academic thesis.
- Choose a suitable vocabulary – you do not communicate with a confused old lady in the same way as with the managing director of a new company. Who are you writing or speaking to? There is no magic in long words, or unnecessarily obscure terminology!
- Choose a suitable level of legal content – some have to have detailed argument, many need relatively little. Also choose carefully the necessary level for quotation of statutes and cases. Anything that is particularly authoritative, close on the facts or recent should be there. Long quotes may be boring unless they are really helpful!
- Choose a suitable length – you are not paid by length and there is no merit in repetition.
- Summarise conclusions at the beginning or the end for clear and easy reference.

3 The importance of the professional approach

- Be careful to take the tone of the legal adviser, not of the judge.
- Keep legal argument clearly separate from personal views.
- The opinion should not be too strongly phrased in the first person – the case is the client's, not the lawyer's.
- Don't be unjustifiably optimistic or pessimistic as to the likely success of the client's case.
- Never force your own decisions on the client – it is his case!

4 The practical approach makes the good lawyer

- Think of your case practically to work out what exactly might have happened and what evidence might be available.
- Pretend you are the lawyer for the other side to imagine the weaknesses in your own case and the possible arguments for the other side.
- Read your own advice critically as if you were the client – does it really help and cover everything, or is it vague and leave you with unanswered questions?
- Beware of making any assumptions, of fact or attitude.
- Don't develop clever legal arguments that do not have a realistic chance of success, which the client ends up paying for.
- Deal with potential remedies thoroughly.

5 Read and check the opinion If you are talking, check your notes to see you have covered everything. If you are writing, set the opinion aside and come back to it later to check:

- Does it cover all the facts?
- Does it make clear what the possible causes of action are, and the strengths and weaknesses of each?
- Does it make as clear as possible what the client may hope to gain from any action?
- Does it put the choices to be made clearly to the client, and make it clear that the choices are for the client, although it may also make clear what the lawyer recommends.
- Is it clear and concise in the way it is set out, the words it uses, what is covered and what is referred to? (Go through it with a pencil crossing out what is unnecessary!)

NEVER LOSE SIGHT OF THE FACT THAT THE OPINION'S MAIN AIMS ARE:

- (1) **TO COMMUNICATE**
- (2) **TO HELP THE CLIENT.**

SUGGESTED BASIC OUTLINE FOR AN OPINION IN A CIVIL CASE**OPINION****1 Introduction**

The facts of the case are summarised briefly to give context, and the main issues to be dealt with identified.

2 Summary of advice

The main elements of the advice the lawyer is giving can usefully be summarised, so they can be easily and quickly grasped, and followed through the opinion.

3 Cause of action

Each possible cause of action in the case should be set out and analysed. Identify all the legal elements of each, and assess if each is present in the case. Identify any legal, factual or evidential difficulties for each element. If there is more than one possible cause of action, analyse strengths and weaknesses of each and possibly suggest which is best. All possible arguments in the client's favour should be examined.

4 Defences

Examine every possible defence to the client's claim. This should include anything specifically raised in the papers in the case, and any other possible defence the lawyer feels could arise. Include full and partial defences. Examine the factual, legal and evidential difficulties of each, whether it is considered likely to succeed, and what the effect on the case might be.

5 Remedies

All possible remedies that might be available to the client if he or she succeeds should be explained. If there is a choice of remedies, that choice should be put to the client.

If damages are sought, the lawyer should try to give as close an estimate as possible of the sum likely to be recovered, with some estimate as to the likely chances of success. Investigate fully all possible loss the client has suffered, and all possible deductions.

6 Other points

These are things that may be dealt with in the course of the opinion, or at the end.

- (a) Any point which the client has specifically asked the lawyer to deal with because it is important to him.
- (b) *Evidence* The best argument can fail if you cannot prove your case, so deal with what evidence there already is with any appropriate comment, and what further evidence is needed, with clear directions where it should be sought.
- (c) *Procedural points* The lawyer should explain appropriate legal procedure to the client, and should deal with any particular procedural step that may be of use to the client in the case.

7 Conclusions

Any conclusions, and any future steps to be taken in the case, and any decisions that the client has to take should be set out clearly. Some indication of chances of success may be appropriate. Don't leave any questions unanswered.

Dated

Signed by the lawyer