



# DRAFTING LEGAL OPINIONS

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# DRAFTING OPINIONS

- Opinion writing is persuasive – it is fact based and therefore most of the facts will be need to be established and understood at the client interview.
- An opinion however must set out the correct legal position therefore there is need to conduct comprehensive legal research before rendering one.
- The legal research aids the advocate to identify the laws that apply to the problem presented.
- In the Kenyan context, the following may be the conventional starting points when writing a legal opinion:
  - a) The Laws of Kenya – Always start off with the supreme law of the land, the Constitution
  - b) Case law (i.e. common law)
  - c) Customary law
  - d) Commentaries by authoritative writers

# WAYS OF RENDERING LEGAL OPINIONS

## 1. BY WAY OF A LETTER

- This is applicable when dealing with a client or with a different law firm
- When drafting an opinion by way of a letter to the client, keep it simple – written communication must consider the reader
- When drafting an opinion for a fellow advocate, it is advisable to use a covering letter forwarding the opinion

# WAYS OF RENDERING LEGAL OPINIONS

## 2. BY WAY OF OFFICE MEMORANDUM

- A memorandum must at the very beginning contain the following:
  - a) “To: [insert name]”
  - b) “From: [insert name]”
  - c) The date
  - d) The subject line
- Following this there is the body of the memorandum. The first thing to include in the body of the memorandum is a narration of the facts as you understand them from the instructions.
- After this, proceed to answer the legal issues arising - ask yourself the following questions: what are the legal questions arising? Is there a cause of action, and if so, what is the cause of action?
- This reflects your understanding of the facts and the law, as well as how you apply the law to the facts

- At times, people break down memorandums into short answers. When this is done, you must explain it in substance thereafter. There must be evidence of application of the law to the facts
- The final stage is to summarise the factual analysis, the application of the law, and to make a recommendation. This forms the conclusion and it is critical, since it should persuade the person you are writing to.
- It is advisable also to number the paragraphs for ease of reference/understanding
- At the end of the memorandum, sign off with your name and signature

## CONTENTS OF AN OPINION/MEMORANDUM

- The element of identifying the facts and the legal principles, then identifying the applicable law and applying those legal principles to the facts, is critical when drafting a legal opinion
- The writing process is ordinarily referred to as FIRAC, that is:

**a) FACTS**

**b) ISSUE**

**c) RULE (LAW)**

**d) ANALYSIS**

**e) CONCLUSION**

# CONTENTS OF AN OPINION/MEMORANDUM

- It is wise to break a legal opinion into headings – however, this approach would not work in a letter
- When dealing with a multi-faceted problem, each issue should be broken down under each section
- In as far as rules of law apply, one must attend to his using the correct hierarchy – the principle first and then the application
- Be very clear on the rules of law, e.g. if you are applying customary law, state this and explain why it is applicable
- When drafting an opinion to your client, it is important to strike a delicate balance between providing accurate advice and keeping the opinion as simple as possible, i.e., avoid loading it with statutory provisions and case law

# PREPARING TO WRITE AN OPINION

(i) What is the purpose of the opinion? – this will help you determine what language to use

(ii) Understand the facts of the case and the issues arising – what is the (relevant) subject matter?

(iii) Understand the legal rules/principles governing the subject matter

(iv) Look at how similar situations have been considered by the courts in Kenya

Consider the client – whom are you advising and what do they want out of the opinion?



# FORMAT OF A LEGAL OPINION

- Always commence the opinion by setting out a brief summary of the facts as presented before you. This will help you to understand and crystallise the issues that need to be dealt with
- Identify and set out all the issues arising. In other words – what are the issues that you are proposing answers to?
- Set out the answers to the issues raised. Bring out the legal discussions you rely on and distinguish the issues the need arises.
- Discuss all the issues separately and in manageable paragraphs (which advisably should be numbered). For continuation of paragraphs, use transitions so as to have a logical sequence
- Set out a summary statement of your conclusion
- Remember that opinions take different forms and each has its own structure and format

# FORMAT OF A LEGAL OPINION/MEMORANDUM

- HEADING Identify the client or give the case number
- INTRODUCTION Identify the client, and state why the matter was referred to you. Set out the basic issues arising, and possibly a short summary of the answers to those issues.
- BODY Start with a detailed statement of the facts. All relevant facts, including facts in dispute and facts relevant to the case, should be included. The facts must be presented in a chronological manner- you may number the paragraphs or use subheadings in different paragraphs

# FORMAT OF A LEGAL OPINION/MEMORANDUM

- PRECEDENTS

Undertake a survey of the pertinent statutes involved. Identify and briefly describe the statutory provisions relevant to the issues in question. If there are decisions arrived at relating to the facts, use these (and start with the most recent).

- DISCUSSION

Undertake a discussion of the issues raised – remember to discuss each issue separately. Discussion of issues is the central part of the memorandum. Do not only give the strong points of your case, bring out the weak points too. Give a dispassionate opinion of the case

- CONCLUSION

Remember, you are not making a decision. This is a summary of your predictions about the state of the law and how it applies to the case before you. You should never give an affirmative position

- RECOMMENDATIONS

What do you propose to your client?

◦ QUESTIONS???