

Legal Writing and Drafting

ATP 103

Mugambi Laibuta



Drafting Legal Opinions



Purpose of a legal opinion

- The primary purpose of a legal opinion is communication of advice to either a lay or professional client. It is therefore of the utmost importance that it is clear and in plain, understandable English. Every word of the legal opinion should be chosen by the writer because it communicates precisely the advice which the writer intends to convey.
- A legal opinion provides options
- Always remember a legal opinion is giving advice

Format

- F – Facts
- I – Issues
 - Legal
 - Factual
- R – Rule of Law
- A - Analysis
- C - Conclusion

Factors to Consider

- Nature of issues
- Why a legal opinion is needed
- Audience/client
- Format – letter or brief
- Language to be used – technicalities/plain English

Process

- Legal opinions should represent the view of the firm/institution
- Reputation and professional standing is at risk
- Need to internal procedures for opinions
- Have review mechanisms

What is a legal opinion?

- A legal opinion is traditionally in letter form but may be in form of a brief with a forwarding letter
- Any writing can contain a legal opinion. For example, written memoranda often contain legal opinions
- An email can be a legal opinion

Email v Letter

- Conclusions of law stated in an e-mail may rise to the level of an opinion, but may not be rendered with the care and procedures that should be applied to an opinion.
- The informality of drafting and sending an e-mail may lead the sender to make statements that would not be made in letter form.
- Take greater care in determining the content of an e-mail, particularly if it contains a legal opinion, because of the ease and informality with which e-mail is circulated.

Facts

- Legal opinions involve conclusions of law as applied to facts that are either known to or assumed by the law firm.
- Legal opinions usually should not contain representations of fact by the law firm.
- Opinions should not be given if they are outside the expertise of the law firm.
- Attention should also be given to adequate due diligence and documentation in the file to support the representation of fact.

Signing Legal Opinions

- Individual?
- Law firm?

Unwritten Legal Opinions

- A legal opinion can also be delivered verbally. Care should be taken in verbally expressing legal opinions.
- It is often difficult to document later the precise nature of a verbal opinion, because memories will differ and fade, and notes may be inaccurate.
- When a particularly sensitive matter is being discussed, it may be appropriate for an Advocate to confirm the advice in written form, to minimize disagreements regarding the nature of the advice.

Unwritten Legal Opinions

- When discussing a matter with a client, it may be appropriate to verbally advise the client whether, and to what extent, you are giving a legal opinion.

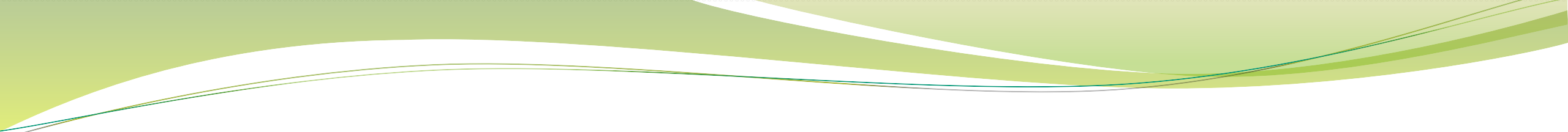
In-House Legal Opinions

- These are basically internal memos
- But – consider whether the audience is a third-party



Case Briefs



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- A case brief is a dissection of a judicial opinion -- it contains a written summary of the basic components of that decision.
 - Case briefing helps you acquire the skills of case analysis and legal reasoning. Briefing a case helps you understand it

Briefing a Case

- Read through the opinion first so you will understand the overall story and identify important facts, etc., before beginning to brief the case on paper

Heading

- a. Case name (to identify the parties)
- b. Court name
- c. Date of the decision
- d. Page number where the case appears in the law report

Statement of Facts

- Identify the relationship/status of the parties
- Identify legally relevant facts, that is, those facts that tend to prove or disprove an issue before the court. The relevant facts tell what happened before the parties entered the judicial system.
- Identify procedurally significant facts.

Procedural History

- Courts
- First time before the courts?
- Appeal?

Issues

- Substantive issue
 - the point of law in dispute
 - the key facts of the case relating to that point of law in dispute (legally relevant facts)
- Procedural issue

- Judgment

- This is the court's final decision as to the rights of the parties, the court's response to a party's request for relief

- Holding

- This is a statement of law that is the court's answer to the issue. If you have written the issue statement(s) correctly, the holding is often the positive or negative statement of the issue statement.

Rule of Law or Legal Principle Applied

- This is the rule of law that the court applies to determine the substantive rights of the parties. The rule of law could derive from a statute, case rule, regulation, or may be a synthesis of prior holdings in similar cases (common law). The rule or legal principle may be expressly stated in the opinion or it may be implied.

Reasoning

- This is the court's analysis of the issues and the heart of the case brief. Reasoning is the way in which the court applied the rules/ legal principles to the particular facts in the case to reach its decision.
 - Textual
 - Intent
 - Policy

- Concurring/Dissenting Opinions
- Additional Comments/Personal Impressions
- What are your reactions to and critique of the opinion? Anything you like? Dislike? How does this case fall in line with the other cases you have read? Do not accept the court's opinion blindly. Assess the reasoning in each case. Is it sound? Is it contradictory? What are the political, economic or social impacts of this decision?