

The Whys and Hows of Legal Opinions

1. What are legal opinions?

A legal opinion is a reasoned prediction of how the client's legal rights or obligations will play out.

The value of the opinion lies not so much in the prediction of the outcome (although that is important), but in the reasons for the prediction.

I say that the reasons are more important because, having understood them, the client can then appreciate how her legal position might improve or deteriorate.

2. Why write them?

In providing the prediction, the question that the client wants answered is:

Is it worth her expending resources (time, legal fees, energy, man-hours, etc.) on this problem till it goes away?

Put another way, what does the cost-benefit analysis look like in solving this problem?

In providing an opinion, I therefore take into account the events giving rise to the claim (or defence), the law, commercial considerations, and any preference that the client may have for a particular route.

3. Can an opinion be sought on any aspect of a claim?

Yes.

But mostly, opinions are on the merits of the claim. This is where I evaluate the strength of a client's claim to say whether it will succeed and what can be done to improve its chances of succeeding.

In fact, I try to provide a written opinion on the merits *and quantum* of a claim as soon as possible when working on a new brief. This is because an opinion on both these aspects flushes out unwanted surprises and provides the client (and I) with a roadmap on how the claim may progress.

Other types of opinions may be on the particular jurisdiction that is most apt for the claim to be fought in, whether a particular procedural application might be helpful, or the types of enforcement mechanisms that might encash a judgment.

4. Are there different forms of opinions?

There are perhaps two main forms of opinions, the 'single-document' opinion and opinions delivered in dribs and drabs.

'*Single Document*' opinions are usually sought when all (or most) of the considerations needed for a particular decision is available, say, for instance, when evaluating the merits of a claim prior to filing a writ.

Opinions are rendered in dribs and drabs (usually via emails) when the client is not yet engaged in any proceedings but foresees that disputes may surface in the future. This usually means that the events giving rise to the claim are fluid and that the client's strategy is (as yet) unsettled. Examples of these situations may be where a subcontractor client is facing problems with the main contractor in an on-going project, or where receivers and managers are dealing with creditors in the course of selling assets belonging to a company.

The '*Dribs and Drabs*' opinions are harder to write because (i) they can run over months (or years); and, (ii) events occurring later in the day may prompt a revision of an earlier advice.

Consequently, I re-read any number of prior emails before writing the latest instalment. And if I deviate from a previous stand, I explain the reasons for the deviation.

Also, if there is a change of tact on the client's end, I must be prepared to re-visit issues.

5. What are the segments that make up a legal opinion?

Again, there is no one method to it.

The '*Dribs and Drabs*' opinions usually consist of numbered paragraphs (numbered for ease of cross-referencing in future emails) or answers set out (in a different coloured type) against the client's queries.

I usually do not recite the facts, unless necessary. My opinions therefore consist of me discussing issues, setting out options to deal with the issues and explaining the pros and cons of each option.

The '*Single Document*' opinion consists of the following segments:

- The setting out of the scope of the opinion.

This segment will set out the scope of the advice (say, whether the advice will address both the merits of the claim and the quantum recoverable, or if it is confined only to the merits).

The recital of the scope here is to alert the reader to the contents of the ensuing opinion. I would have first applied my mind to the scope of the advice well before this stage, when quoting the fees for the advice.

- A summary of the client's legal position.

This is set out upfront (especially in lengthy opinions) to save the client the hassle of finding out her position only after digesting the discussion of the issues.

- A recital of the events (or facts) giving rise to the claim or defence.

This is where the facts are explained, but only in so much detail to give context to the discussion of the issues.

I guard against the tendency to go to town on the facts. This is because the client is usually aware of the key facts.

- A discussion of the issues.

This will require me to spot the issues, set out the routes available to deal with the issues and to explain the pros and cons of each route.

Just like when discussing the facts, I break down the discussion using headings and sub-headings.

I also explain the law in layman terms, no matter how much of a legal scholar the client may be. This means that I paraphrase acts, judgments and contractual clauses (as far as possible) in my own words. I do this so that (i) the opinion is reader-friendlier, devoid of legalese; and, (ii) a summary in my own words checks my understanding of the law and clauses.

- The next steps that might be taken.

Here, I set out the next immediate steps that might be taken and perhaps the fees involved.

- The clarifications or further information needed.

Inevitably, having gone through the facts in detail, there will further information and clarifications sought which may change the complexion of the opinion. These are set out here.

I set out the request for further information and clarifications, firstly, when I discuss the issue that needs the information or clarification. This is so that the client is aware of the context in which the request arises.

I then reproduce those requests, secondly, in this segment (with cross-references to the paragraphs where it was first mentioned). I do this to collate all the requests in a single segment.

6. What is the best manner in which to go about drafting '*Single Document*' opinions?

There are perhaps two key steps.

Firstly, I would make a preliminary assessment of the materials available. This is done even before I quote the fees for the opinion.

I would make this preliminary assessment to ensure (as best I can) that there is sufficient material available to draft the opinion. The question I ask myself is: when the client receives the opinion, will she have got her money's worth?

Making this preliminary assessment helps me unearth major stumbling blocks at the outset. For example, that the documents provided do not evidence the losses suffered when the opinion is meant to address both the merits and quantum of the claim. Or, where the client is keen on an opinion on the merits but the law governing the contract is not Malaysian law.

Making this preliminary assessment will help me avoid embarrassing situations down the road.

Secondly, I would identify the issues to be addressed.

This is the most mentally-exhausting of the tasks.

But this step is important because only once the issues have been identified, can I (i) identify the facts to be stated; and (ii) conduct the legal research necessary to identify options and the pros and cons of each option.

If (like me) you find it difficult to identify issues until you've set out the facts fully, I suggest that you make it a point to come back to trim the facts (leaving only as much as to give context to the issues), prior to concluding the opinion.

7. How do you quote fees for opinions?

I quote fees for '*Single Document*' opinions by setting one lot of fees for the opinion itself plus one (or two, or three) rounds of questions plus (perhaps) a discussion.

I do it in this way to (i) cater for the client's questions arising from my analysis of the issues; (ii) the tendency by clients to have an oral discussion, on top of written explanations; and, (iii) to set boundaries on the further analysis that may be provided within a fee quote.

I quote fees for '*Dribs and Drabs*' opinions by giving the client quotes for the more substantial instalments of advice, and by billing on an interim basis. This is my preferred method, relative to billing on a time-cost basis. I say this because I find that clients prefer to have an idea beforehand (as far as possible) of the fees that might be incurred.