Drafting Legal Opinions

D I Cassidy QC, June 1997


The writing of opinions is an important part of practice at the Bar. Not what one thinks of when one contemplates going to the Bar, perhaps. But the writing of an opinion is often a necessary preliminary to the final appearance in Court. And in some fields, notably Revenue Law and Equity, a large proportion of one's practice and income comes from opinion work. There are just 25 hours a week in which you can earn fees appearing in Court. Opinion work can be squeezed in at odd hours at night and in the weekends. A carefully written opinion can form the basis of the argument that subsequently you are called upon to present in Court.

An opinion, like Gaul, is divided into three parts, sometimes with a fourth on the end.

The first rule is always to commence the opinion by setting out the facts as you have been instructed of them or as, from those instructions, you have assumed them to be. Then if your ultimate conclusion is wrong, or inapposite, because the facts are wrong, the fault will be that of the client or the solicitor for giving you the wrong data. Or at least your error may be veiled by the failure of the client or solicitor to adapt your opinion to the true facts. The author of an opinion may, if it is negligently wrong, be liable for substantial damages: Heydon v NRMA Ltd (2000) 51 NSWLR 1, discussed later. There is no protection under the rule in D'Orta-Ekenaie v Victoria Legal Aid BC200500919; [2005] HCA 12 for negligent advice. It is therefore wise to learn to practice the equivalent of what the doctors call defensive medicine.

Adopting the invariable practise of commencing your opinion by outlining the facts upon which you are advising serves another purpose as well. It crystallises those facts in your mind, visualises any gaps as to which you may need to take further instructions or make assumptions and, where issues of fact are involved, suggests areas which need attention.

The second part of an opinion is to set out the questions that the querist has posed for you or which you see as arising and which you propose to answer. It is useful here if you distil a different series of questions from those which have been asked, considering that some of these were irrelevant or did not arise on the facts, to set out those questions which you are discarding and to explain why.

The third part of the opinion is the reasoned answers of those questions. I will come to this element of the opinion in more detail in a few moments. However first I should make clear that often these three parts may quite properly be telescoped together. Depending on the nature of the case it may make for a sensible opinion to follow through the facts breaking off each stage when a question of fact or law arises to answer it and coming at the end to the final conclusion. But still, hidden though they may be, the three things, facts, questions and reasoned answers, are essential.
The fourth part is the summary statement of your conclusions or, where a series of discrete questions have been asked of you, precise answers to the particular questions asked. If the argument has been properly conducted these answers may well be monosyllabic. "Yes", "no", or "does not arise".

There is no scale for opinion work and the question of fees is always a difficult one. Basically you should set an hourly charge, which will vary with your experience and with your fashionableness, and use this as a base for charging. However one has to temper this basic approach both upwards and downwards. If you are an expert in a particular field you can save an awful lot of time and not all those savings need be passed on to the client. When I write an opinion on a tenancy matter my rate of charge is often double that for other subjects. The opposite side of the coin is where you are writing an opinion on a subject with which you are not familiar, especially if it is one that you would like to develop some expertise in. You may do a vast amount of research, some misdirected and some rather designed to increase your general knowledge than to focus on the particular matter. In such a case it is both unfair and unwise to charge at your normal rates.

The total amount you can reasonably charge must bear a relation to the amount in issue: *NSW Bar Association v Amor-Smith* [2003] NSWADT 239. This may well also control the depth of research that you are prepared to do for the opinion. Cases in the District or Civil Claims Court may involve questions of law much more difficult than those with which the Common Law judges in the Supreme Court used often to deal. Sometimes the amount involved is just not sufficient to enable you to charge an economic fee. One might also be inclined to adjust the fee downwards when it is apparent that one's advice will lead to a court appearance and carry with it a brief on hearing. Much of the research for the opinion will be something that would be subsumed in the brief fee.

The provisions relating to fees agreements apply to opinion work. It is wise, particularly when dealing with a new solicitor or with an opinion that you can recognise will be difficult or time consuming to prepare, to ensure that a fee is marked on the brief when it is received or if not to negotiate that fee after a preliminary reading of the brief and before commencing serious work upon the matter. In this way subsequent disputes and loss of good will may be avoided.

Sooner or later you will be faced with the necessity of giving an urgent opinion or one when the time is not available to allow you to perform the depth of research you would wish. This may occur because the matter is truly urgent or more often because either the lay or professional client has delayed moving for advice until the last possible moment. In such a case you should qualify your opinion with a disclaimer. In other circumstances it is usually not practicable to disclaim liability except by making it clear that the opinion is based upon the facts as you have been instructed of them. Usually a disclaimer negates the very reason your opinion is sought.

This is not intended to suggest that you are not entitled to rely on the professional standards scheme to which I refer later.

Sometimes the reason for urgency will be of your own making. You will have held the brief for an unconscionable time and your solicitor will commence to pester you for your views. Even in these circumstances do not make the mistake of giving a half baked, half thought out opinion over the telephone and promising the written advice at a later date. If you are wrong not only will you face considerable embarrassment in correcting your informal opinion but if your client has
acted on the faith of it you will have no defence to a claim for damages. Further the desire to make your final opinion accord with your interim one will destroy your objectivity.

There may of course be occasions on which an interim opinion is necessary. This is particularly so where you have not been provided with all the facts and there is not time to delay until they are to hand. The reason you are not provided with all the facts may be the fault of your lay or professional client or that the facts are still developing or are not yet known. In this event you may have to advise on alternate bases of fact or in the hypothetical mood, making clear that you are doing so.

Often you will be required to advise in conference. This may occur because the facts can only be obtained in conference or it may occur because the time is too short to enable a written advice to be given. All the suggestions given above apply but two additional ones should be observed. First not only is it unethical but it is also unwise to advise the lay client in the absence of the attorney. Secondly try to ensure that the brief is delivered to you long enough before the conference to enable you to get some grasp of the matter and use the conference merely to fill in the missing bits. If necessary put off the conference to give yourself time to read the brief. If this is not possible then make it clear early in the conference that you are at a disadvantage and why. Do not leave the client to conclude that you are ill prepared and have not read the brief. The client may not know that it has only recently been delivered to you as the solicitor, to cover his/her own dilatoriness, may not have disclosed this. Thirdly it is a good rule to confirm any advice that you give in conference in writing as soon as you are able. Even if you do not forward the written confirmatory advice to the attorney and even if all you do is have written or typed up some notes or summary of what you have said this will form a useful aide memoir in the future.

There are, in broad terms, three types of opinion. The first is where you are asked to advise on a question of law. The second is where you are asked to advise on the facts. The third is an advice on evidence.

**Advices On The Law**

Such an opinion can vary from one that will take weeks of research to one the answer to which is almost self-evident and which one suspects is only posed by an attorney or client desiring the protection of your opinion as a novus actus or to wave under the nose of some taxation or other official as evidence of lack of mens rea. Opinions of this kind are in precisely the same category as judgments of appellate courts on serious questions of law. It was a common practice of the promoters of bottom of the harbour schemes to obtain as many opinions from different counsel as it took to find one which was favourable and then use that one, often heavily edited, as bait to attract investors to the scheme. (The advent of Ss 51A and 52 of the Trade Practices Act has made the non disclosure of adverse opinions in these circumstances very dangerous.) Frequently I am asked to write an opinion as to the construction of a rent review clause in a lease with the express object of using it to present to the valuer who is conducting the review.

There are as many ways of approaching the writing of an opinion as there are problems to be solved. In theory the proper way is to start with the cases and work through to reach a deduction as to the principle of law that covers the situation. Quite often however one forms a value judgment as to what the conclusion ought to be from first principles and moral feelings and then searches for the authorities to support this conclusion. Mr Justice Mason had described this as top down reasoning: What is Wrong With Top-Down Legal Reasoning (2004) 78 ALJ 574. You
will find that Top-Down is the way that most judges reason and it makes allowance for the tendency of the courts to twist the law to fit abstract concepts of justice. However to use this method one requires a sound grasp of principle and one needs to retain one's objectivity; it is only with experience, both of the law and of human nature as represented by litigants and judges, that this method can be used with any pretence to accuracy. The tyro should use the former method. In any event it is a good way to widen one’s knowledge of the law.

When advising on fact or law do not be too positive. An example is given below in relation to advices on quantum where one never specifies a precise figure but always gives a range. Where the law is in a state of flux or doubtful always draw attention to this explaining why one cannot be more positive. In Heydon v NRMA, referred to above, the trial judge held that counsel, very experienced in the field, was negligent in failing to draw attention in his opinion to the fact that a decision on which he relied was the subject of application for leave to appeal to the High Court. Although the defendant's appeal was allowed the danger is still there. Even though there may be House of Lords authority upon which you can base your opinion always remember that this is only persuasive in Australia and that examples are proliferating where the High Court has refused to follow English authorities.

Particularly with serious opinions on questions of law one must develop some form of filing system so that when the same, or a related problem, faces you again you do not have to start at square one. Undoubtedly the best is some form of information retrieval system on your PC customised to your own way of thinking. David Hunt, when at the bar, and the late Roy Stonham, author of the classic text book on Vendor and Purchaser, both in the days before computers, each kept an elaborate card index system for the subjects in which they had an interest. It is necessary to discipline oneself to keep whatever system one does adopt up to date. As soon as one finishes the opinion or comes out of court one must, no matter how busy, make the necessary entries. Like preparing your tax returns, if you let the task get on top of you, it becomes impossible.

It is useful to know the peccadillos of the solicitor who seeks your advice. Some are keen and experienced lawyers who find relief from the drudgery of conveyancing in considering serious legal problems. Such a one will be interested in reading a well formed and a well expressed opinion and may wish to debate it with you. Be careful about this, judge the solicitor's quality before you allow him to influence you and particularly recognise that, through his close association with the client, he is unlikely to retain that objectivity which is the raison d'être for a separate bar.

Other solicitors are far too busy to bother with the convolutions of your opinion and simply want to read the bottom line. You may have to put the same amount of work into an opinion for one of these but you may choose not to burden the document with too much argument. But, unless you are one of the Roddy Meaghers of this Bar, there is likely to be some resistance to a high fee charged for a short opinion. The work that you have done may not be obvious.

One line opinions will seldom suffice when you are asked to advise for the purpose of satisfying some third party of the wisdom of underwriting proceedings, to advise a dissatisfied litigant as to the prospects of success on appeal or to satisfy S347 of the Legal Profession Act 2004. In the first case the legal aid authority will review counsel's opinion and reject a conclusion which appears to be unsubstantiated.
I find writing an opinion on the prospects of success of an appeal in a case in which I have appeared at first instance to be so difficult that I usually advise the attorney to seek a third party's opinion. I have usually lost my objectivity along the way.

**Opinions On The Facts**

The second type of opinion is one which is predominantly related to facts. One is given a series of statements and documents and asked whether on that material there are reasonable prospects of prosecuting or defending the claim. The matter may be a simple personal injury case in which the law is well settled. The real question is whether your side's witnesses will be believed or not. The first problem about this sort of opinion is that seldom does one have any real knowledge of what the other side's witnesses are going to say. Further one often has little idea of the quality of one's own witnesses and none at all of that of the opposition's. And often one has to guess at evidence that can only be known after discovery or the return of subpoenae. Here one has to search amongst the material one is provided with for objective material to point the way and one has to examine the probabilities.

It is appropriate to include in an opinion of this kind the advice required by Bar Rule 17A as to the availability of alternative dispute resolution.

A special kind of factual advice is on quantum in personal injury cases. To a large extent this is a mathematical exercise. The adviser should make the usual divisions into past and post-trial losses, out of pockets, loss of earnings and general damages. In addition some unusual heads may have to be considered, *Griffiths v Kirkemeyer*, again past and future and *Brindle v McDonald*. A discount may have to be allowed for contributory negligence or, against future economic loss, for vicissitudes. Interest on those elements that carry it is accurately calculated to an assumed date of trial.

It is only possible to write this kind of opinion with any pretence of accuracy given proper and detailed material upon which to base it. Every element should be properly documented. Past out of pocket expenses should be supported by accounts and receipts and by the Health Insurance Commission's certificate under S 18 of the Health & Other Services (Compensation) Act (medico-legal ones being separated out). The necessity for future medical treatment should be covered in the reports and the amount of them will be proved by the estimations given by the Doctors (they hate doing this and need to be pressured into doing so) or, failing that, the Medicare scales, in each case discounted for the time lag before it is anticipated the expense will be incurred. Documents from the plaintiff's employer will establish the wages to date of comparable earners. Dial-An-Angel will provide the base figures for future home care both, paid and voluntary. One can get life expectancies for males and females from published tables and the discount rate to be applied from the same source. In complex cases you may advise to employ an accountant, such as Howarths, experienced in litigation.

Although a precise looking figure can be calculated in this way invariably one's final conclusion is expressed as a range, being the maximum and minimum that on the material available the plaintiff or defendant could hold on appeal.

This sort of opinion is a good illustration of my earlier point that one can adjust the fee to allow for the probability of receiving a brief on hearing. Indeed very often the same brief will instruct you to appear on the hearing and to advise on quantum. In such a case the very work that you
do this advice will be necessary properly to present the case and particularly the closing address for the plaintiff.

A particular type of opinion, usual factual but sometimes involving a serious question of law, is that required by s 347 of the Legal Profession Act 2004. This section provides that court documentation on a claim or defence of a claim for damages cannot be filed without a certificate that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success. Of course you as a barrister will not be filing court documentation, but solicitors will frequently seek the protection of your advice before they provide the necessary certificate. Note that the restriction on the fees that can be charged where a small verdict is recovered in such cases does not apply to opinions written for this purpose: Section 346.

The Act contains no useful definition of reasonable prospects of success. The seminal word on the meaning of this phrase is a paper delivered to the Bar Association on 23rd March 2004 and reprinted in 79 ALJ 814. I presented a paper on this subject to a conference of the Bar Association on 30th April 2005 and no doubt a copy of that paper could be made available to readers who were interested.

**Advices On Evidence**

A special type of opinion is a brief to advise on evidence. It is becoming a rara avis nowadays as attorneys seem to expect junior counsel to advise informally for friendship's sake or as part of the brief on hearing. Nonetheless in any case of complexity, unless the attorney is particularly experienced, it is most useful. Again it is my habit to commence by outlining the issues that one has to prove not just as bare legal propositions (duty of care, breach of duty and damage) but as applied to the particular circumstances together with those issues which, though the onus of proof is on the other side, you anticipate you will need evidence to answer (eg contributory negligence).

**The Professional Standards Scheme**

You will be required as a condition of obtaining and maintaining your practicing certificates to carry professional indemnity insurance. If, upon your admission, you join the Bar Association, you will be entitled to limit your liability, and your insurance cover, to $1,000,000 in accordance with the Bar Association's Professional Standards Scheme.

It is a condition precedent to this limitation that all your publications bear the following endorsement:

> Liability limited by a scheme approved under Professional Standards Legislation

Any opinion which you write must be so endorsed. So also should your fees agreements and memoranda of fees. You will hear more about this scheme elsewhere in the readers' course.