

ALSA INDONESIA LEGAL ENGLISH 101

The Usage of Legal English in Writing a Legal Opinion

In collaboration with



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I. Implementation of Legal English in Drafting a Legal Opinion

A. What is a Legal Opinion?

In a law firm, an advocate/lawyer must possess the skill to write a legal opinion, as it is one of the roles of legal workers in providing legal consultations. One way of legal consultation is by writing legal opinions that are both used to avoid disputes and to resolve disputes. In essence, legal opinions are conveyed both verbally and in writing for clients or people in need.¹ To comprehend what a legal opinion is in an Indonesian jurisdiction, it is essential to be aware of structures and methods applicable to constructing a legal opinion as a law student.

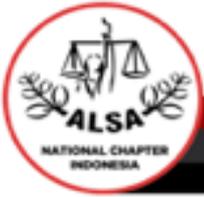
A legal opinion itself is a set of written documents containing an opinion or understanding of the law relating to various legal issues of an advocate's cases. As defined by Black's Law Dictionary²:

“A legal opinion is a written document in which an attorney provides his or her understanding of the law as applied to assumed facts ... a party may be entitled to rely on a legal opinion, depending on factors such as the identity of the parties to whom the opinion was addressed, the nature of the opinion, and the law governing these opinions.”

However, according to Sudikno, *“A legal opinion is a response of a legal scholar to a client's question who is facing a legal problem, a legal opinion contains problems faced by a*

¹ Ery Agus Priyono and Kornelius Benuf, 'Kedudukan Legal Opinion sebagai Sumber Hukum', (Jurnal Suara Hukum Volume 2 Nomor 1, March 2020)

² Black's Law Dictionary 8th Edition.



*client which is presented along with analysis and legal advice from an advocate to solve the legal problem.*³

What is strikingly particular about a legal opinion is that in order to address or bring light to a legal issue, the following must be included: identifying legal problems, identifying legal facts, inventory of legal rules, applying regulations to an issue, conducting legal analysis, and drafting a conclusion so as to answer the legal problems at hand.

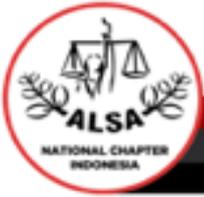
Furthermore, there has been a recent increase of foreign investment in Indonesia, which will simultaneously attract foreign clients to close a transaction with local parties and lead to more disputes against different parties (namely foreign parties). Therefore, there would be frequent usage of English in a legal opinion, as it is natural for an advocate or legal practitioner to also write a legal opinion with a conclusion that incorporates legal English. For example, in a cross-border transaction, a legal opinion may be obtained from lawyers in a foreign jurisdiction that determines whether a transaction document is valid and enforceable in that jurisdiction and complies with the local regulations.⁴

B. What to Prepare and to Learn Regarding a Legal Opinion

A legal opinion serves to provide legal advice or opinion on a client's legal problem to resolve or provide appropriate action on predetermined legal issues. In a professional context, a legal opinion often functions to confirm the parties' legal position to enter into an agreement or contract or confirm the contractual relationship born from contractual documentations. Most frequently, legal opinions are also requested regarding financing or credit agreements between overseas banks and debtors in Indonesia, and regarding ways to meet requirements for registering securities issuance from the Indonesian capital market, which require issuers to

³ Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar*, (Liberty: Yogyakarta, 2008), Page 116.

⁴ Thomson Reuters, 'Practical Law: Glossary', [https://uk.practicallaw.thomsonreuters.com/1-200-1399?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/1-200-1399?transitionType=Default&contextData=(sc.Default)&firstPage=true) accessed on 10 November 2020.



attach a legal opinion. Therefore, having the skill to write a legal opinion is vital as a legal practitioner and lawyer.

In legal opinions, several topics are likely to be included, such as the following:⁵

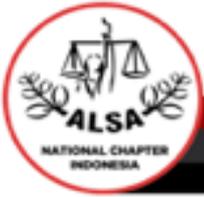
- The corporate existence and good standing of your client, the Company, in its home state and other jurisdictions.
- The Company's legal ability to do the deal at hand under its charter, bylaws, and organic law.
- Investigation of questions regarding corporate formalities, i.e., have all corporate formalities been completed including board approval or shareholder approval? Have signatories been authorised to sign the transaction documents?
- Investigation of questions regarding transaction documents, i.e., will the transaction documents be "legal, valid, and binding" against the Company when these documents are signed and delivered?
- Investigation of the range of legal considerations in legal opinions, i.e., what are the additional legal considerations to be considered?

When drafting legal opinions or reviewing drafts, the following elements and questions should be kept in mind:⁶

- A lawyer only consider matters that are consistent with the scope of your firm's engagement agreement.
- Can a lawyer identify and limit content to extraordinary matters that do not require due diligence? If not, are the due diligence costs for the requested opinions disproportionate to the transactional benefits of the client?
- Are the matters highlighted in the opinions relevant to the transaction in question?
- What forms of due diligence must be established for the opinions to be given?

⁵ Herrick K. Lidstone, Jr., 'The Anatomy of *Legal Opinion*', (Burns Figa & Will P.C., May 2013)

⁶ *Ibid.*



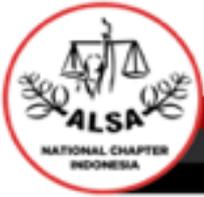
- Do the opinions disclose (or to be more precise, should it disclose) the client's confidentiality; and if so, will the client consent to such disclosure?
- Do the requested opinions include a request for confirmation of facts that are disguised as an opinion?

C. Tips on Drafting a Strong Legal Opinion

- Considering that most clients are non-legal practitioners, it is best to avoid archaic⁷ language and legal jargons, as it will create a barrier between the lawyer and the client. Thus, the legal opinions itself will lose the primary purpose to communicate with the client. However, the legal opinions should still be formal and not oversimplified for that purpose. Therefore, it is best to use plain English for a legal opinion to be understandable. The draft itself has to be clear and straightforward. The dynamic aspects of plain English will easily reach the clients, as it avoids foreign expressions and uncommon words, as well as phrases frequently found in legal jargons, including archaic phrases.⁸
- A legal opinion will often contain a complicated set of facts, which will have to be sorted into specific legal issues and defined in legal terms. A clarity of expression is, therefore, vital. Such clarity of expression can only be achieved through thorough planning and thought. A thorough plan will lead to a logical structure. A legal opinion will be conveying a particular point, but that point will inevitably need to be broken down into sections.
- The first thing to do is to digest and organise the facts. There will be facts in any case which are relevant and pertinent to the case and facts which are not. A **legal opinion** must focus on the relevant facts, but it may also be necessary to advise that certain matters are not relevant and are specifically addressed in the contents.

⁷ Archaic words are words that were once widely used, but are no longer part of the English language. Many archaic words were used during the Middle Ages

⁸ Robert P. Charrow and Veda R. Charrow., 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions', (Columbia Law Review, vol. 79, 1979), Page. 1324



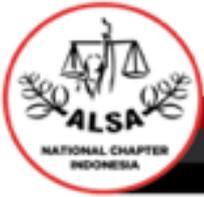
- Once the facts are at your fingertips, a legal framework needs to be constructed to determine which of these facts can be logically slotted. A legal opinion on a personal injury action, for example, will be based on negligence. Therefore, it will usually be structured along the lines of duty, breach, damage, causation, foreseeability, and contributing negligence. It will be vital to assess the level of damages that the client can expect to receive or pay out in a legal opinion covering negligence. This will be at the forefront of the client's mind.
- The opposing case should also be kept in mind throughout the planning stage. A legal opinion will be useless if it considers the client's case in isolation. Evidential issues must also be considered. A reasonable legal opinion will always address how a particular factual situation can be proved.

D. Assumptions and Qualifications in a Legal Opinion

Firstly, the role of assumptions in a legal opinion is to form a scope for which the issuer (i.e., the lawyer or advocate) can rely on making the opinion⁹ (which assumed factual and legal matters are useful) and sometimes serves necessary ways to allow a counsel to deliver opinions that are cost and time effective. Assumptions, which may be expressed or implicit, are routinely used by a counsel rendering legal opinions. Assumptions may be made about factual matters, such as actions taken, or actions which will or may be taken, by parties other than the client of a legal opinion.

Assumptions may also be made about legal matters, particularly legal issues outside of the legal expertise of a counsel who provides an opinion or relating to law of jurisdictions where a counsel who provides opinion is not admitted. By its use of assumptions, a counsel limits the need for the diligence that cannot be performed cost effectively or which is more appropriately undertaken by a counsel for a legal opinion recipient (for example, the legal existence and

⁹ Narada Kumara & M Ghiffari, Basics For Writing Legal Opinion, (Budijaja, November 2020)



power and authority of authorisation, execution and delivery by, and enforceability of transaction documents against, parties to the transaction other than the client of the opinion giver), or by local counsel who retained the transaction documents for that purpose.

Secondly, in order to protect the issuer from any liability so long as the opinion is still within the scope of the assumptions and qualifications, a counsel typically will disclaim obligation to investigate the validity of any assumptions made. Assumptions may not be made that may lead to inaccuracy. Alternately, assumptions may not be made leading to circumstances wherein a counsel reasonably would question such assumptions unless there is disclosure to the opinion that indicates such assumptions are inaccurate or may not be entirely accurate despite existing consent for usage. An example in this regard is an “as if” opinion on the laws of a jurisdiction outside of the expertise of a counsel providing an opinion.

II. The Essentials of a Legal Opinion

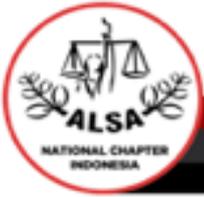
A. Common Structures of the Legal Opinion

In general, structures used in writing legal opinions are legal writing structures of IFRAC (Issues, Facts, Regulations, Analysis/Arguments, Conclusions), FIRAC (Facts, Issues, Regulations, Analysis/Arguments, Conclusions), FINAC (Facts, Issues, Norms, Analysis/Arguments, Conclusions), and IRAC (Issues, Regulations, Analysis/Arguments, Conclusions) methods.

Common Structure¹⁰

- **Heading and Preamble**
 1. Who is the recipient?
 2. What is the subject matter?
 3. When is it made?

¹⁰ Ibid.



4. What is the purpose?

- **Facts**

Facts contained in the legal opinion must be valid data/facts considering that the facts will affect how law/regulation will be applied to the legal opinion. This includes:

1. What are the facts? What are the steps to obtain the facts?
2. Where does it come from? Is it credible or accurate?

- **Regulations**

Regulations shall be relevant with the facts and valid at the date of the writing, which include the following considerations:

1. What is the relevant legal basis?
2. What are the steps to take if there is no legal basis?

- **Analysis**

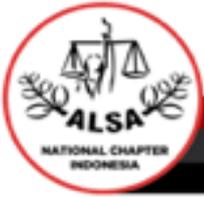
Analysis shall be derived from implementation of rules towards facts. There shall be legal reasoning towards legal issues/questions, which will include the following considerations:

1. What are the pertinent legal issues/questions?
2. How to analyse and deliver it?

- **Conclusions**

In this section, there will be a summary and brief answer to a legal issue, which includes the following considerations:

1. What is the summary of the analysis?
2. How to conclude the analysis?



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