At the end of this study unit you must be able to:

- Distinguish predictive writing from persuasive writing.
- Describe the systematic approach to legal writing.
- Describe the style, format, tone and aim of predictive writing.
- Distinguish between the types of predictive writing.
- Describe the nature, content and purpose of letters of advice, memoranda and legal opinions.
- Adequately draft documents of predictive writing in the context of legal questions.

### PREDICTIVE WRITING vs. PERSUASIVE WRITING

Legal writing in the broad sense may be generally divided into academic writing (for instance, assignments, assessments, and articles), legal drafting (for example, affidavits, contracts, pleadings, wills, etcetera) and legal analysis, which will form the major focus of this module. Legal analysis can be either predictive or persuasive.

### PREDICTIVE LEGAL WRITING

- When engaging in predictive legal writing, the writer must consider legal authority and predict the outcome, should the matter proceed to court.

- It is an objective investigation into law. It does not choose a side but analyses the position on both sides and then renders an opinion on which is most likely to succeed.
Predictive legal writing is done in the form of a legal opinion, office memorandum, or letter to clients.

Traditionally, legal opinions may be drafted by advocates on briefed facts and directed to attorneys. The receiving attorney will then study the opinion and advise his client in accordance with the opinion.

Memoranda are more formal than letters to clients but less so than legal opinions. The purpose of this document is as follows:

- Advising corporate or institutional clients
- Advocates dealing with matters of procedure
- Reporting of junior attorneys to seniors

Letters to clients are informal documents aimed at informing the lay client. These documents are set in much less formal tone and format than legal opinions.

**PERSUASIVE LEGAL WRITING**

In persuasive writing the writer aims to persuade the reader of his client’s case.

Persuasive writing is a subjective approach to legal writing. Here, the writer argues for a specific cause and does not consider the other side.

The most often used types of persuasive legal writing you will encounter in practice are the letter of demand and heads of argument.

Letters of demand are issued prior to the start of litigation, in other words, before summons is issued to prospective defendants.
Why is it vital to issue a letter of demand before proceeding with civil trial against the defendant?

- Defendant may pay, perform or negotiate on the terms set out in the letter and settlement of the case may be achieved prior to litigation.
- The defendant may raise a valid defence on the allegations in the letter.
- The letter and any response from the defendant may provide your client with tactical advantage.
- Where the defendant was bound in a contract without a performance date, a letter of demand may serve to place the defendant *in mora*.
- Where unliquidated damages to be claimed.
- In some cases it is statutorily required that letters of demand be issued, for example, in any matters brought before the Small Claims Court and where a governmental organ is to be sued.

Heads of argument is the document which contains the argument *for your client*. It is the *summary* of main points of counsel’s argument and the authorities you relied on in arguing for you client.

More on persuasive writing in the following study unit.

**SYSTEMATIC APPROACH TO LEGAL WRITING**

**NB! STUDY:**

Study the following extract from *Charrow, Erhardt and Charrow*\(^1\) on the systematic approach to legal writing.

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\(^1\) 2007:92-93.
A Systematic Approach to Legal Writing

Part I of this book was designed to help you learn to read and analyze legal writing. Part II is designed to help you develop your own writing style in a careful and systematic way. It presents legal writing as a step-by-step process that can help you avoid the pitfalls that can destroy clarity and credibility.

It is valuable to begin any writing task by articulating the steps you plan to take. Carefully thinking through each step will help you to construct a complete, well-formed document. It is also worthwhile to place the steps in a workable order, even though you may have to be flexible in the way you carry out various parts of the writing process. As you write, you may end up moving the steps around, adding one or two, or even omitting some of them.

A suggested writing plan, based on the chapters of Part II of this book, appears on page 92. Whether you use this plan, modify it, or create your own, it is important that you have a writing plan and that you are comfortable with it.

A Pre-writing Stage

Before you begin to write any legal document, you need to go through three essential steps. You should clearly identify your purpose or purposes in writing the document and keep them in mind as you write. You must understand your audience: What does it know? What does it want to know? How might it react to what you have to say? Finally, you must be aware of any constraints that circumstances, rules, or customs place on the form or content of your document. Only when you have taken these three steps do you begin to apply your writing skills—writing and rewriting to create a document that does what you want it to do.

Begin by asking yourself what the purpose of the document is. What is it supposed to accomplish? How much material should you include to accomplish your purpose? Is there a risk of conflicting messages in the document because you have several purposes and you have not yet thoroughly thought out how to balance them? Are you confused about whether you are trying to persuade or...
FIGURE 7-1

Pre-writing Steps

Define Purpose.
Why do you need the
document?

Define Audience.
Who will use the document?

Determine Constraints.
What limits do you
have on how you can
write?

Writing Steps

Decide on Content.
What should go into the
document?

Organize the document.
What is the most logical
and effective order for the
material?

Use the language
guidelines for effective
prose.
What do you need to
do to make your writing
as clear as possible?

Use persuasive techniques
where necessary.
Which persuasive strategies
make your writing most
effective?

Post-writing Steps

Review, revise, and edit.
How can you improve each
draft of a document?
merely to inform? The more you work out these conflicts before you write, the easier and faster the writing task will be.

Next, ask yourself who will use the document. A single document may have more than one audience: judges, other attorneys, your client, other private citizens. These diverse audiences may have varying degrees of sophistication and varying needs. Finding the proper amount of information and the right level of sophistication to serve these different audiences is not a simple task. Documents should not be so difficult that they seem obscure to some readers nor so simple that they seem patronizing to others. But keep in mind that even highly sophisticated audiences will appreciate a well-organized, clearly written document.

There are usually constraints on what you can do when you write a legal document; you should understand your constraints before you begin to write. Time is a major limitation that attorneys must consider, no matter what legal task they are performing. Practicing attorneys must juggle the affairs of many clients and still meet court and filing deadlines. In law school, too, you will have deadlines, and you must tailor your writing plans to meet them.

There are often other constraints to deal with, such as format, paper size, mailing requirements, and reproduction needs. Many times these are dictated by courts or by a law firm or agency.

**Writing Stage**

Next you must organize your material—arrange what you want to express in a logical sequence. Ask yourself what kind of document you are writing. Is it a basic expository document or something more complex that will require you to present the pros and cons of a particular subject or issue? Once you identify the kind of document you will be producing, you can set up an outline that will help you accomplish your ultimate purpose with the document.

Once you have organized the document and worked out an outline, it is time to begin the actual writing. As you write, you will use sentence structure and style techniques that produce clear and readable prose. Thus, if the purpose of the document is to persuade, there are specific strategies you can use that will make your document more effective. These include using a logical framework to present your reasoning and carefully choosing appropriate vocabulary, grammatical constructions, and forms of discourse that will make your arguments more forceful. In addition, recognizing and avoiding organizational, grammatical, and lexical pitfalls will keep you from inadvertently weakening your arguments.

**Post-writing Stage**

At the post-writing stage, you will have a full draft of a document in your hands. This does not mean your job is finished, however. One draft of a document is
rarely enough, especially in legal writing. After you finish a first draft, read through the document critically. This is the time to edit and revise. Check both content and form to make sure that your document is complete, correct, and presented in the best possible way. Also check your citations to make sure they are correct and complete and in the proper form. In the final draft, you will also want to check for typographical errors.

NB! STUDY:
Study the following extracts on predictive legal writing from Marnewick\textsuperscript{2} and Palmer and Crocker.\textsuperscript{3}

\textsuperscript{2} 2007:25-37.
\textsuperscript{3} 2011:49-51.
Litigation Skills for
South African Lawyers
Second Edition

CG Marnewick SC
Bjur (PU for CHE) LLB (Unisa) Dip Maritime Law (Natal)
LLM (Natal) PhD (Natal)
Advocate of the High Court of SA
Barrister and Solicitor of the High Court of New Zealand
Legal Practitioner of the Supreme Court of New South Wales

LexisNexis Butterworths
DURBAN
2 Advising and counselling clients

2.1 Introduction

Clients approach lawyers for advice and counselling so that they can make informed decisions about their future conduct. The client wants to know, "What can I do?" and "What should I do?" The question, "What can I do?" requires the lawyer to identify and evaluate the available options and the consequences of adopting each of them. It is the lawyer's duty to advise the client of the pros and cons of each option and which option, in the lawyer's view, is the best option. The question, "What should I do?" on the other hand, requires the lawyer to help the client to make the right decision, having regard to those options and consequences. Counselling therefore goes beyond the mere giving of advice. It is the process by means of which the lawyer helps the client to decide what to do. Having received advice and counselling, the client has the responsibility of making the final decision.

Advising and counselling are complementary, but different, skills. The lawyer acts as an objective investigator during the advice stage but takes on the role of a personal advisor during the counselling stage. Advising and counselling occur in virtually every branch of a lawyer's practice, from property transactions to litigation, from the collection of small debts to the conclusion of international shipping or licensing contracts. Whatever the nature of a lawyer's practice, advising and counselling will be part of it. Attorneys may advise and counsel differently from advocates as they have a more direct, and usually a more enduring, relationship with their clients. Advocates are also usually required to advise or counsel in a far more formal setting.

Advising and counselling are also part of litigation. Indeed, advising and counselling continue through every stage of the litigation process. It can start at the first interview and can continue even after a final appeal has been decided. Nevertheless, the underlying processes and skills to be employed are the same for both branches of the profession and for all types of legal work.

2.2 Advising and counselling generally

2.2.1 Advising the client

Before you can advise a client, you will have to form an opinion or view on the facts and the law. This may only be possible after an exhaustive fact investigation or extensive legal research. Sometimes lawyers will be able to deal with the problem fairly promptly
because they have encountered it before or because it falls within their special field of expertise.

Where the problem needs to be investigated before an opinion could be formed or the problem can be solved, you would rely on your skills in legal research and fact analysis, which are dealt with in Chapters 15 and 14. After identifying possible solutions by using those skills, you should tell the client what the options are and what you think the best option is.

You could do this according to the following scheme:

Table 2.1 Scheme for advising a client

<table>
<thead>
<tr>
<th>Stage</th>
<th>Ask yourself...</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Identify the problem and the client’s objectives.</td>
<td>What is the problem? What does the client want to achieve?</td>
</tr>
<tr>
<td>2. Investigate the facts to ensure you can identify the available options.</td>
<td>Against what factual background does this problem exist?</td>
</tr>
<tr>
<td>3. Identify the legal issues and consider their application to the facts.</td>
<td>What legal principles apply to the facts? What is the effect of those legal principles on the problem and on the client’s objectives?</td>
</tr>
<tr>
<td>4. Identify the consequences of each option by considering the likely legal and non-legal consequences of each option.</td>
<td>What are the options? What are the likely consequences of each of them? Which is the best option? Why do I think so?</td>
</tr>
<tr>
<td>5. Discuss the options and their consequences fully with the client.</td>
<td>What can the client do? What are the advantages and disadvantages of each option?</td>
</tr>
<tr>
<td>6. Tell the client which option you regard as the best option and why you think so.</td>
<td>What should the client do?</td>
</tr>
</tbody>
</table>

The counselling phase is not entirely separated from this process and is prominent during the next stage when the client, after having received your advice, makes the decision. The different stages of the process should also not be applied in too strict a sequence as it may become necessary to return to prior stages before the whole process is finally completed. For example, when you have identified the legal principles and have considered their effect, it may become necessary to re-investigate the facts or even to reconsider the true nature of the problem. A confident lawyer will move between the different stages effortlessly while the solution to the client’s problem becomes ever clearer. Like most processes used for solving legal problems, advising and counselling cannot be confined to a straitjacket. However, it is doubtful whether any of the stages identified earlier can be skipped. Each stage constitutes an essential step towards the finalisation of the process.

2.2.2 Counselling the client

The purpose of the counselling process is to empower the client to make an informed and correct decision. This is far easier said than done.

What the counselling process involves can best be explained by an analogy. When a patient who is suffering from a life-threatening disease consults a specialist physician, the physician will conduct various tests and examinations to determine precisely what the problem is and what different treatments are available for the condition diagnosed.
These will all be explained very carefully to the patient so that the patient will know what the options are. The physician will go further than that. It is not enough that the patient knows what different options are available - the physician also has the duty to help the patient to make the right decision. The patient may not know or understand enough to make a correct decision on his or her own. Thus, while the physician has to explain what he or she thinks the appropriate treatment is, the advice to the patient should be given in such a way that the patient is empowered to make the right decision. Lawyers have the same duty.

The process of counselling is both personal and dynamic. It is personal because the style of counselling depends on the individual personalities of the lawyer and the client. It is dynamic because its course depends on what happens during the counselling process itself. Some clients need more help than others before they are ready to make a decision. Some clients make the right decision; others make the wrong decision and the process then may have to continue for a while longer. Sometimes a decision can be made quickly, while in other cases it may take time. For these reasons one cannot be too dogmatic about the exact process or style to adopt. Vary your style and the procedures you adopt within the counselling process according to the demands of each individual case.

Generally you have to ensure that:

- the client has a sufficient opportunity to evaluate the advice;
- the particular client, having regard to his or her individual make-up, is given sufficient help in making the right decision;
- all the client’s questions are answered; and that
- you intervene when the client makes a mistake or is about to make the wrong decision.

Clients often make mistakes even after receiving the best advice because they do not judge the likely consequences of a proposed decision correctly or choose the option that accords with what they want to do rather than with what they should do. Their decisions are often based on the wrong ‘faits’ or values. Sometimes their decisions can simply not be reconciled with an understanding of the risks involved or may result in a clash with the ethics of the legal profession. While clients should be allowed to make their own decisions, this cannot be taken too far. In a country like South Africa, for example, there are many clients with worthy causes who are unable to make an informed or correct decision because they are simply incapable of coping with the issues involved. In such cases a lawyer’s task to ensure that the right decision is made is more difficult. The client has to be empowered to make the right decision, even if it means that the counselling process has to be extended in time and scope. In some cases the assistance and support of a family member or an elder in the client’s community or a shop-steward may be necessary.

2.3 Oral advice and counselling in litigation

Oral advice can be given during a formal interview, over the telephone or even at court during a trial. There are so many different circumstances under which a lawyer would give advice in a face-to-face situation that it is difficult to lay down any specific procedures for doing it. Nevertheless, there are some pitfalls to avoid.

Lawyers are often in a situation where they are expected to give oral advice in circumstances of varying degrees of urgency. Sometimes they do not have all the facts on which
sound advice would ordinarily depend. Furthermore, they may not be given the opportunity to research the facts or the law before they have to advise on the question posed. This is not a healthy situation. On the contrary, it is fraught with danger for both the client and the lawyer as the advice may be based on insufficient or incorrect information or on an incorrect interpretation of the facts or the law. The advice may also be misinterpreted by the client or even be forgotten and a dispute may later arise about what the advice had been.

It is therefore important to remember that it is risky to give oral advice. Take steps to eliminate the dangers that may be present in a particular situation. Advise the client that it is undesirable to make decisions on the strength of advice given as a matter of urgency as the advice may be based on insufficient or incorrect information or an incorrect interpretation of the facts and the law. If the client wishes to proceed, the advice should be qualified and both the advice and the facts upon which it is based should be clearly recorded. Do not be rushed into giving advice you have any doubts about.

If pressed to continue, you would be entitled to require the client to sign a disclaimer absolving you from liability for incorrect or negligent advice.

If advice has to be given under circumstances where it is not feasible to record the facts and your advice, confirm the advice and the facts upon which it was based in writing at the first opportunity.

Advising the client at court under the stress of the trial or hearing should be done with a special degree of circumspection. A common complaint by clients about the litigation process is that they were forced into a settlement. Care should be taken that the client does not feel pressured into making any decisions during the hearings. Ask the judge for time. It will be given if there is a reasonable prospect of a settlement. Go back to the office or counsel’s chambers, if necessary. Consider the pros and cons carefully and give the client objective advice on the options. Then make your recommendation. If the client is still uncertain about what he or she should do, start all over again. Make a note of the advice you have given. Advocates often record any advice they give on the brief and ask the client to sign it. It is a practice worth adopting.

There are a few other matters to keep in mind:

☐ You should make a concerted effort to maintain your neutrality. Counselling is not advocacy. Here the client is entitled to objective advice. The process should therefore have as its aim that the client, after receiving objective advice, is able to make the decision. Nevertheless, there is an element of persuasion involved because the lawyer has the duty to help the client arrive at the correct decision. That may, in certain cases, require a degree of persuasion. The facts, options and consequences may have to be presented in such a way that the client is led to the right decision. However, this approach cannot be taken too far. The client has the ultimate right to make his or her own decision.

☐ If the client makes the wrong decision, but still a decision which could reasonably be made on the facts, by all means point out the consequences of that decision, as you see them. You may go as far as advising the client again of the other options and how they compare to the one chosen by the client. Once the client has made a decision, after receiving all the help you can give, accept the decision and implement it. Do not undermine the client’s confidence by telling him or her that the decision is wrong. You’ve done your duty when you advised the client of the consequences and how the decision compared to the other options, provided, of course, that you have made sure that the client has been empowered to make the decision.
Don't rush the client, especially at court when things may not have gone according to plan. The client is probably under severe stress already and needs more assistance, not more stress.

Keep in mind that the client is an individual, with his or her own levels of intelligence, experience, sophistication, emotional involvement, and support (or lack of it) from family and friends. The problem may range from the simple to the extremely difficult. Adopt an approach to counselling that takes account of these factors.

Let us now revert to our client from Chapter 1, Mrs Smith. During the initial interview we can give Mrs Smith the following advice:

There are several potential claims. She and her children may have personal injury and loss of support claims against the RAF depending on whether negligence on the part of the insured driver can be proved. There may be a claim for the damage to the car, also depending on proof of negligence but only if the car belonged to our client. There may also be claims for the proceeds of insurance policies, depending on who the owner and beneficiaries of the policies are.

The personal injury and loss of support claims may take between 18 months and 5 years to resolve if they are disputes. The claim for the damage to the car could be resolved in the Magistrate's Court in less than a year if the damage is less than R100 000-00. It is not possible to say how long the insurance policy claims will take to resolve but it could be a relatively short period if the insurers concerned accept the claims and the policies fall outside the deceased estate.

It may be possible to make claims for her and the children's maintenance against the deceased estate. This will be investigated immediately. In the meantime, she should provide a list of her weekly or monthly expenses as soon as possible.

It may be possible to negotiate an agreement with the hospital to the effect that they would wait for the finalisation of any action against the RAF before they demand payment. The RAF may be persuaded to make interim payments with regard to medical and hospital expenses, funeral expenses and loss of support, depending on whether liability is accepted.

It is not possible to advise on the strength of the claims before the facts have been fully investigated.

So far as fees are concerned, there are various options available. These include an application for legal aid, an agreement that the case be undertaken on a contingency basis, and an agreement by the firm to carry all disbursements and to defer payment until the RAF claim has been finalised. It may be too soon to make decisions in this regard but the matter can be discussed and a decision taken at the next interview.

Give the client an undertaking to supply her with more detailed advice in a letter within a week after you have done some initial research and investigations. (The promise has to be kept!) Advise her not to act until she has had an opportunity to consider the advice you give in the letter and has had a follow-up meeting with you.

2.4 Advising by letter

Attorneys often advise their clients by letter. Even when they have given oral advice, they would usually confirm that advice in a letter. Sometimes the letter confirming the oral advice goes further than the original oral advice, which may have been given in circumstances of some urgency or without an adequate opportunity to gather additional
information or to do legal research. In cases where attorneys have briefed counsel for a written opinion, they frequently convey the substance of counsel's opinion to the client by way of a letter which explains what counsel's opinion is and what the ramifications of the opinion are for the client. In short, they advise the client what he or she can and should do, having regard to counsel's opinion.

However, it is rather unusual for an advocate to give advice by letter. The usual form of counsel's advice, when it is not given face to face during a conference, is by way of a memorandum or a written opinion. Legal advisors employed by concerns such as municipalities, insurers or other companies also give advice to their councillors or directors by way of a letter or a memorandum.

Advice given by letter differs from advice by way of a memorandum or written opinion in one crucial aspect: While memoranda and written opinions are usually aimed at another lawyer or more astute clients, the advice given by way of a letter is aimed at the lay client. It is therefore important that the letter be written in such a way (in both style and content) that the lay client is given a clear understanding of his or her options and position. The format of a letter, as well as a memorandum, should allow for the subject-matter to be broken down into paragraphs, each dealing with a distinct aspect.

Table 2.1 Format for a letter (or memorandum) of advice

<table>
<thead>
<tr>
<th>Subject-matter</th>
<th>Content</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive summary</td>
<td>This is the initial part of the letter where the client's instructions, the answer to the question or problem and your recommendations are summarised.</td>
</tr>
<tr>
<td>Body</td>
<td>The main part of the letter discusses the question or problem in more detail, outlines the conclusion reached and makes a recommendation with regard to further action.</td>
</tr>
<tr>
<td>Reasoning or argument</td>
<td>The argument sets out the reasons for the conclusion with reference to the facts and the law applicable to these facts.</td>
</tr>
<tr>
<td>Conclusion and practical advice</td>
<td>In the concluding part of the letter the recommendations and advice are repeated and the client is advised with regard to the practical implementation of the recommendation. This includes what further evidence or information may be needed before proceeding any further.</td>
</tr>
</tbody>
</table>

Many lay clients are only interested in the first and last stages. They want to know what they can do and what their lawyer suggests they should do. Some clients may also want to know how their lawyer has arrived at the conclusion and on what grounds the recommendation is based. The result is that even the technical part of the letter (where the facts and legal principles are analysed and applied) should be in plain language. That means that jargon, stale Latin phrases and long quotations from textbooks and cases should be avoided.

It is difficult to counsel a lay client effectively in a letter or even in a memorandum. The counselling process is too personal, too important and too dynamic for that type of approach, but advising and counselling by letter cannot be ruled out altogether in every case. One of the advantages of advising by letter is that the client has the opportunity to read and re-read the letter and to reflect upon it, even to take further advice, before finally making a decision. The main disadvantage is that there is no opportunity for the client to ask questions or for the lawyer to determine whether the client understands the advice so as not to make a mistake.
Nowadays advice is often given in an e-mail. When you use that form of communication, you should adopt the same approach as for advice by way of a letter, subject to some additional precautions to ensure that confidential communication between your office and the client does not fall into the wrong hands. If attachments are to be attached, they should be in a format— such as Adobe Acrobat— that does not allow amendments or additions to be made to the attachments.

2.5 Advice per memorandum

Advising by memorandum is more formal than a letter but less formal than a written opinion by counsel. (The same applies to the counselling process.) A memorandum will usually involve some counselling that is more formal and subtle than counselling by way of a letter of advice.

Attorneys usually adopt memoranda as the means to advise corporate or institutional clients like government departments or bodies, municipalities, insurers and public companies. Clients like these often have internal legal departments, staffed by trained lawyers, to advise them on legal matters, including interpreting and explaining advice received from the client’s attorneys and counsel. This enables clients to understand legal advice better than a member of public. They often have problems of the same nature and file the written memoranda and opinions they receive for use in similar cases they encounter.

Advocates also adopt memoranda as a means of giving advice. They usually resort to this method when they deal with matters of procedure, when they record advice given orally in consultation, or when they engage in the counselling process itself. (It is a natural consequence of the divided profession that advocates are somewhat removed from the counselling process and that attorneys usually fulfil that function, even when counsel has been briefed.)

Since advising by way of a memorandum is in some aspects the same as advising by letter and the formal advice of a written opinion, the structure is similar. Advice by memorandum could be given in the following way:

☐ You can start, as in a letter of advice, by summarising what the issue is, what your answer is and what you recommend with regard to future steps.

☐ You can proceed by setting out the facts in more detail, explaining how the problem arose having regard to those facts, and then deal with the legal principles which can be brought to bear on the problem.

☐ You can then analyse the facts and the law in some detail, as in a formal opinion. Ultimately this analysis should lead to a conclusion or an opinion that answers the two basic questions at the heart of most cases, namely “What can the client do?” and “What should the client do?”

☐ The memorandum should conclude with a firm recommendation with regard to what the client is advised he or she should do, including the ramifications of any decision that may be made, whether it is to act on the advice or to go against it. The memorandum should contain practical advice about the way forward.

2.6 Written opinions

While there is no impediment, legal or practical, to attorneys giving advice by way of formal, written opinions, a written opinion is the traditional way in which an advocate gives advice. Some of the most important sources of the Roman-Dutch law as applied in
South Africa are collections of opinions by famous advocates like De Groot. Often a written opinion is in itself a document of such complexity that it needs to be explained to the lay client by another lawyer, usually the attorney who briefed counsel in the first place.

An opinion differs from advocacy. When conducting a trial or any other form of litigation, the advocate makes submissions subjectively, meaning that the submissions which may advance the client’s case are put before the court whether the advocate believes in them or not. The judge then makes the decision. When giving an opinion, the advocate follows an objective approach, telling the client what he or she (counsel) really thinks of the facts and the law. What the client receives in litigation is advocacy. What the client receives in an opinion is objective advice.

Opinions:
- are advisory in character, answering some legal or factual question;
- are not academic even though they may contain an apparently academic discussion of a point of law;
- deal with real cases, which means that the opinion is case specific and is shaped by the facts of the case;
- require a consideration of the legal principles which are applicable to the facts of the case;
- are objective to the point of being dispassionate; and
- are not designed for the process of counselling the client, although the conclusions reached may well be essential considerations in that process.

If the facts change, the answer may change. Counsel must state the true position as they see it. Clients must know exactly where they stand. The counselling should be left to the attorney. If required, an advocate may assist, but this should be done with the client and the attorney present.

Advocates usually write opinions under circumstances where the investigation of the facts has been done by the attorney. The advocate might ask for clarification of the facts or for additional information to be obtained. Ultimately the opinion has to be given on the facts and instructions given by the attorney. Advocates often expressly record the facts upon which the opinion is based, either by referring to their written instructions or a set of documents or statements, or by listing the facts in the opinion.

In some instances counsel is required to make an assessment of the available evidence and base the opinion on his or her own view of the facts. In some cases, counsel may be requested to advise what the court is likely to find with regard to the facts. In such cases, he or she needs a sound method for fact analysis, a process described in detail later.

The Inns of Court School of Law suggests the following practical steps as a recipe for a good opinion:
- read and digest the instructions;
- determine what the question is which needs to be answered;
- absorb and organise the facts;
- construct a legal framework;
- look at the case as a whole;
- answer all the questions; and
- consider the advice you have given.
The writing process follows upon the preparatory stage and may overlap to some extent. A written opinion by an advocate will usually have a framework, for example:

- introduction;
- discussion of the facts;
- analysis of the legal principles involved; and
- conclusion or opinion.

2.6.1 Introduction

An opinion is always required on some aspect of the facts or the law. Take care to make the opinion understandable to the reader, who may not be familiar with the facts and the question to be discussed. For example, the opinion can be started as follows:

- I have been asked to advise on the quantum of the consultant’s damages in an MVA action.

- I have been asked to advise on the consultant’s prospects of success on appeal against the judgment of Mr Justice Wilson, delivered on the 1st April, 2007.

- I have been asked for an opinion on the proper method of valuation to be adopted with regard to the compensation to be paid to the consultant for the expropriation of his farms.

The introduction will also serve as a reminder of the question to be answered in the final conclusion or opinion section of the opinion. The introduction does not recite the facts but introduces the question to be answered. In some cases the question is put against such a simple set of facts that the question will inevitably refer to some of the facts.

2.6.2 Discussion

Since the question to be answered is not raised in a vacuum but in relation to a particular set of facts and circumstances, it is necessary to describe those facts and circumstances. Advocates usually set out the facts in the second part of the opinion. In some cases the pertinent facts and circumstances have to be found by evaluating the statements, documents and exhibits provided before arriving at an opinion of the likely findings of fact the court would make. This part of the opinion does not consist of a mere recital of the facts and circumstances but includes an analysis of the evidence to prove them. A detailed fact analysis in the style described in Chapter 14 may be necessary.

A number of questions will have to be answered in the process of weighing up the facts and considering their significance. What are the basic facts? What is the significance of each individual fact? Are the inferences to be drawn from the evidence or the facts sound? Are there facts about which you have some doubts or reservations? Is there more information available? Are all the facts accounted for or are there facts running counter to the general picture painted by the other facts? Can the crucial facts be proved? What would the position be if the facts were different? Does the other side have facts you do not have? What can be done to obtain any missing information?

In litigious matters you may have to consider the burden of proof in relation to the facts. To what standard do the important facts have to be proved? Who bears the onus of proof? (Remember that the onus of proof determines who loses when there is no balance of probability either way on the disputed facts.) Above all, is the available evidence admissible, reliable and sufficient?

The discussion and analytical parts of the opinion often flow into each other so that there is no distinct separation between them.
2.6.3 Analysis

The particular facts and circumstances of the case have to be considered in the context of the legal principles applying to those facts. This may also include the contractual provisions between the parties.

It is important to point out at this stage of the opinion what the pertinent legal principles are and how they apply to the particular facts and circumstances of the case. This analysis is an essential component of the argument or process of reasoning which is followed from the introduction of the question to the final conclusion. The client doesn't merely want to know what conclusion the lawyer has reached but also how that conclusion has been arrived at. The opinion has to be persuasive in the sense that it has to be convincing in the way it answers the main questions put to counsel and must also accord with the known or assumed facts, the law and the principles of logic.

The starting point will thus be the question: What is the law on the point? This is not always an easy question to answer. The law is not always clear and in fact, the law may even be difficult to find. If the law is found in a statutory provision, you will have to interpret the section. If the section has been considered in prior cases, the law reports may give some assistance. The common law is found in textbooks, new and old, and in case law. In some instances you may have to go to original texts in Latin or High Dutch to find the answer.

Although you start with the law, you end with the facts. The purpose of finding the law is to ensure you apply the correct legal principles to the facts of the case. This is probably the most important part of the opinion. It is here where you have to demonstrate how you came to your conclusion or opinion. The facts and the law are merged in this exercise. The only tools available to you are your legal knowledge, research skills, words and logic. The reader has to be persuaded by what you have written. In demonstrating how you arrived at your opinion, you will rely on analogy, examples, precedents in case law, hypotheses, the probabilities as you see them, assumptions, and even your experience of human behaviour and judicial attitudes. This will assist you in arriving at an answer and will be used to justify the opinion you give the client.

I do not proclaim that this process is easy. In fact, it can be very difficult. You may lie awake many a night wrestling with the facts and the law before you find the answer. You may struggle to find a way to express your opinion so that the client can follow your reasoning. The good news, however, is that it gets easier with practice. You will soon develop a style that works for you. There is often more than one way to arrive at a conclusion. Even if it takes time, all problems can eventually be solved. Sometimes the best thing to do is to write the opinion and then to let it lie on your desk for a while. Let it stew in the subconscious of your mind. It is surprising how often fresh insights into the problem break through while you are engaged on something totally different. When that happens, you can rewrite the opinion to the extent necessary. You don't have to send the opinion out while you are still uncertain about its correctness.

2.6.4 Conclusion

The process by which one arrives at the answer cannot be defined nor can it be restricted to a particular model. There are so many different ways to arrive at an opinion after stating the question, setting out the facts and the law, and applying logic and experience in order to justify the answer. However, the client asked for an opinion and you have to express an opinion one way or the other. It does not mean that a lawyer is always obliged to have a firm opinion on every question. It may well be that you conclude,
for example, that the outcome of an appeal cannot be predicted. If that is your conclusion, you are entitled to say so but you still have to justify your view like any other (by reference to the facts and the law).

An opinion starts and proceeds almost like an argument. (An argument is a connected series of statements or postulates supporting a particular conclusion or submission.) Therefore, once you have completed the opinion, re-read the document to determine whether you have covered all the facts and circumstances and have discussed all the legal principles leading to your conclusion or opinion.

2.6.5 General comments

William M Rose Pleadings without Tears 5 ed Blackstone Press Ltd (1999) gives some sound tips for opinion writing. It is worth repeating some of them here.

Before you can hope to write a good opinion, you will have to master the skills of legal research (Chapter 13) and fact analysis (Chapter 14). It is not enough to state the facts; you must analyse them. The weight and significance of individual facts should be considered (and explained) very carefully. You should consider (and explain) how the law impacts upon the facts and how a different conclusion may be arrived at if the facts are not as you have them. This is a neglected subject in legal education. No one seems to teach lawyers how to analyse the facts of a case. If you have any difficulty or don’t know where to start, try the process described in Chapter 14; its uses are not restricted to preparation for trial.

Although your instructions may ask for an opinion on a narrow or specific question, you should give the client practical advice where it appears appropriate. You can’t always do this, for example, where you have been asked to advise on the meaning of a word in a statute. Practical advice supported by good reasons will help the client to decide what to do. Keep in mind that the client wants to know what he or she can do and should do.

If the facts you have been given are incomplete, insufficient or doubtful, express your view on a hypothetical basis, assuming that different factual findings could be made. Explain how the conclusion may change as different facts are assumed. This should, however, be done as a last resort. Ask for more information or clarification of the facts first. Qualify your opinion, if you have to, but try not to avoid the issue.

Consider the main argument that could be raised against your views and then deal with it. Explain why you think that argument will not prevail over yours. This exercise will not only sharpen your views, it will also expose glaring errors in your opinion or reasoning. It may also come in handy later when the case has gone to a hearing on the subject-matter of your opinion and you have to defend the views you have expressed. You will then have considered the opposite view and, presumably, found some answers to it. It is good to do this at a stage when your client still has the opportunity to follow a different course.

Use headings and sub-headings where you can to help separate (and clarify) your discussion of various points, for example:
A. Introduction - the question
B. The facts
   1. The background
   2. The disputed facts
   3. The probabilities
C. The law
   1. The first point – Prescription
   2. The second point – Estoppel
D. Conclusion
   1. The answer
   2. The argument against it
E. The way forward – some practical advice.

Be careful not to express your views in absolute or arrogant terms. You may have some difficulty explaining to an irate client, who has just lost the case, what you meant when you said the defence had no merit whatsoever! It is far better to express your views with some circumspection, for example: On these facts I am of the view that the court will probably reject that defence.

When relying on authority for a point you make in the opinion, give the full citation of the case, statute or book, but do not burden the opinion with long quotations from it. Paraphrase, if necessary. Ideally you should tell the client what you think in your own words and only refer to authority when necessary. However, sometimes a point is made so well or so succinctly in a book or judgment that it bears repeating in the exact words of the author. Do not quote reams of authority for obvious or trite points, though. Always acknowledge your sources.

You may test your own opinion by applying the theory of the case methodology advanced in Chapter 1 to it. Ask and answer the following questions:

☐ What is the issue or question?
☐ What is the conclusion I have reached on that issue or question?
☐ What are the strongest points leading to that conclusion?
☐ What is the counter-argument?
☐ What are the strongest points against the counter-argument?

2.7 Protocol and ethics

☐ Guard against the subconscious desire to provide the client with the advice he or she would like to hear. Be objective and if you have to be ruthless in your objectivity in order to advise the client properly, then so be it! Don’t sound unsympathetic, however, because the client may lose faith in you and consequently in your opinion.

☐ Be very careful to express your views confidently and precisely. Do not be vague or ambivalent. A letter, memorandum and written opinion will remain as a permanent record of your advice.

☐ Be sensitive to the client’s feelings. Be diplomatic when you have to break bad news.

☐ Do not be judgmental. The client wants your opinion, not your judgment.

☐ Discuss the advice you want to give informally with a colleague. It has long been the tradition of the Bar that members discuss problems they encounter on an informal and off-the-record basis (which means that you are not allowed to quote that colleague or refer to his or her views in your dealings with your client or anyone else). There is one proviso, however, and it is that you should have exhausted your own research into the matter first. The same practice applies between attorneys.
When counselling the client, be careful to allow the client to make the decision. It is
the client's right and duty to make the decision. It is patronising for a lawyer to as-
sume that the client is not able to make the decision. Nevertheless, there are some
decisions a lawyer can make on behalf of the client. Make sure you and the client
know precisely what the boundaries are between decisions you can make and deci-
sions only the client can make. When in doubt, leave the decision to the client.

Once the client has made a decision, respect that decision and implement it. If the
decision is one which cannot reasonably be made on the facts and the advice you
have given, explain the ramifications of the client's decision to him or her and ex-
plain why the option you prefer, is better. Then allow the client to decide.

Do not contradict or devalue the decision made by the client by your words or con-
duct, even if you disagree with it.

2.8 Exercises

1. Use Mrs Smith's statement in Appendix 1 as your instructions and write a letter to
our client in which you explain what her options are with regard to the policy ceded
to her.

2. Write a formal opinion answering the following questions: Do the proceeds of a
policy on the deceased's life fall in the deceased estate when that policy has been
ceded to our client? If not, what steps could our client take in order to receive early
payment of those proceeds?

2.9 Associated skills and techniques

Preparation for trial: Legal research – Chapter 13.
Preparation for trial: Fact analysis and strategy – Chapter 14.

2.10 Further reading

D Green, J Holtam, P Sarton, S Scorey, C Shield, and A Thomas Skills for Lawyers Jordan

5.8.2 The legal opinion

The first question is whether Abel is likely to win if he takes Ben to court for refusing to pay for the damage to Abel’s car.

Cathy may give Abel her oral or written opinion about the prospects of success if legal action is taken against Ben. Her opinion will follow this logical sequence:

Step 1 The facts
Cathy will carefully interview Abel to ensure that she has all the necessary information that is, “facts”, on which to base her legal opinion.

Step 2 The issue
Cathy will then decide what the central issue is. In other words, she must ask what it is that the client (Abel) wants.

Step 3 The rule of law
The next step is to research and state rules of law (chapters 12 and 13: Research skills) applicable to the issue – in other words, the legal tests that have to be applied to decide the issue.

Step 4 Apply the rules of law to the facts
At this stage, the rules of law are applied to the facts of the case.

Step 5 Conclusion
Cathy now reaches a conclusion based on the preceding four stages. Is the legal action against Ben likely to be successful?

Now, apply these five steps to the information given in 5.8.1, above:

Step 1 Facts
All the necessary information has been obtained from Ben.

Step 2 Issue
On the given facts, is Ben liable to compensate Abel for the loss Abel suffered? (Abel’s loss would be the amount of R2 600, being the lowest of the three repair quotations obtained.)

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18 What follows is the basic approach to drafting a legal opinion to provide a basis for understanding the contents of the letters of demand Abel will send to Ben. The actual drafting of legal opinions is beyond the scope of this work.

19 Following the "FERAC" approach: 1. Facts; 2. Issue; 3. Rule of Law; 4. Apply to facts; 5. Conclusion. This is also the current approach in answering problem-type questions in law tests and examinations.
Step 3  **Rules of law**

The wrong done to Abel by Ben is a civil wrong called a "delict" (or "tort"). The legal remedy for this kind of delict is the Aquillian action. To succeed in this action, Abel will have to prove four separate things (or "elements"):

1. **Wrongfulness**
2. **Fault** (in the form of intention or negligence);
3. **Causation**; and
4. **Monetary loss.**

Step 4  **Apply the rules of law to the facts**

1. **Wrongfulness**
   - That Ben's action (cutting the branch and letting it fall onto Abel's car) was wrongful (that is, wrong in the eyes of the community as a whole, or contrary to the "legal convictions of the community") will be easily proved on the facts (two eye-witnesses).

2. **Fault**
   - That Ben was at fault (that is, he acted intentionally or negligently; either he cut the branch to let it fall on Abel's car on purpose (intentionally) or a reasonable person in Ben's position would not have cut the branch in similar circumstances [negligence]) can be inferred from the facts. At the very least, one can infer negligence on Ben's part, in the absence of a reasonable explanation from him.

3. **Causation**
   - The falling branch caused the damage to Abel's car. The fact that the severed branch fell onto Abel's car will also be easy to prove (two eye-witnesses: Abel and the water-meter inspector).

4. **Monetary loss**
   - Abel will have to prove the amount of the monetary loss he suffered as a result of the damage caused. In addition to the repair quotations obtained, Abel may have to get an independent expert (mechanical engineer or professional vehicle assessor) to inspect his damaged car. This inspection will confirm which one of the three quotations is reasonable and should be accepted.

Step 5  **Conclusion**

Abel's prospects of succeeding in getting compensation from Ben are very good.

After receiving Cathy's legal opinion, Abel knows that, should he be forced to take Ben to court, he would probably win the case. However, the asking of legal action should always be a last resort as it is expensive, time-consuming and damaging to personal relationships. Abel, therefore, decides that his next step will be to write a friendly note to Ben requesting that Ben pay the R2,000 required to fix his car.

### 5.8.3 A friendly, handwritten letter to Ben

**Planning the letter**

**Step 1  Objectives**

1. To inform Ben that Abel insists on compensation for the damage to his car.
2. To attempt to persuade Ben to pay the amount of R2,000.
3. To maintain a cordial personal relationship with Ben.
Writing Skills

Step 2  Strategy and tactics

Overall strategy: To maintain a friendly, chatty tone in the letter, but with a clear message that the payment of the R2,600 must be made.

Tactics: Ensure that the salutation (that is, "Dear Ben"), the body of the letter, and the ending (that is, "Cheers") are consistent in tone. Suggest a follow-up meeting to agree on details, and give a deadline for a positive response from Ben.

Step 3. REPOV ("Recipient's Point of View")

Read the draft letter from Ben's point of view before sending the final copy. Make the necessary alterations.

(b) The final copy of the friendly letter

1 Devon Road
Berea
Durban
4001

Hi Ben,

Long time no see! I hope you are keeping well.

I thought I would drop you a short note about the branch incident as I haven’t heard from you since our discussion a few weeks ago. Could we get together soon to sort it out? I have now got three repair quotations which I have attached to this letter.

I would appreciate it if you could get back to me by Monday, as I really need to have my car fixed now.

Look forward to hearing from you.

Cheers,

(Signed)

ABEL

If Ben now ignores this letter, Abel's next option will be to send a more formal letter of demand.

As the amount of Abe's loss is less than R3,000.00, his claim falls within the jurisdiction of the Small Claims Court. Also, in terms of section 29 of the Small Claims Court Act, 1984, Abel is not permitted to serve a Small Claims Court summons on Ben until he has first sent Ben a letter of demand. This letter of demand has to be delivered to Ben by hand or sent to him by registered post. In addition, the letter must indicate that the recipient (Ben) has a period of 14 days, calculated from the day he receives the letter, in which to settle the claim.

20 Section 18(a) of the Small Claims Court Act (61 of 1984). The purpose of the Small Claims Court is to adjudicate small civil claims—currently the maximum amount this court can make is R7,000. Letters before this court are not permitted to be represented by lawyers.

21 Section 29(1) of the Small Claims Court Act, 1984.
Notes on format of legal opinions

LEGAL OPINION:

S v Tau 2010 (34) SACR (O) 354

1.

1.1 I have been asked to advise on the consultant’s prospects of success on appeal against the judgment of Mr Justice Wilson, delivered on 1 April 2007.

BACKGROUND

2.

2.1 Start relating facts as received by client/attorney.

2.2 What is being claimed?

2.3 What is not in dispute?
   2.3.1 Point not in dispute number 1.
   2.3.2 Point not in dispute number 2.

2.4 What is in dispute?
3.

3.1 From the facts discussed the following issues are clear:

3.1.1 Whether the court a quo sufficiently considered the client’s personal circumstances upon sentencing;
3.1.2 Whether the appeal may succeed.

DID THE COURT A QUO SUFFICIENTLY CONSIDER THE CLIENT’S PERSONAL CIRCUMSTANCES UPON SENTENCING?

4.

4.1 The court’s duty to consider the personal circumstances of an accused upon sentencing has been solidified in case law.

See: S v Zinn 1969 (2) SA 537 (A)

I advise accordingly.

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N Louw
BIBLIOGRAPHY:

CHARROW, VR; ERHARDT, MK and CHARROW, RP

MARNEWICK CG

PALMER R and CROCKER, A