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Legally Speaking-Reference Questions and the Unauthorized Practice of Law

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LEGAL ISSUES

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Legally Speaking — Reference Questions and the Unauthorized Practice of Law

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It was a dark and stormy night, and a crime was about to be committed.

The scene: a library reference desk.

The characters: a well-meaning librarian and an upset patron.

PATRON: *I need your help, please! I wrecked my car, and the police officer gave me a ticket. I got these forms in the mail from the court. What do I do? Is there some sort of form I can use to respond?*

LIBRARIAN: *How long do you have to respond? What kind of ticket did you get?*

PATRON: *I have 20 days, so that makes the response due on the 5th. The officer said that I must have been going too fast, or else I wouldn't have slid into his lane. I was only going 25, but the ice was very thick and I just lost control! He said that I must be in control of my car at all times and under all conditions. Is that right?*

LIBRARIAN [taking **PATRON** to law books]: *Well, let us see. Why don't we take a look at West's Digest for this state. O.K., here we are—a case on the liability of a driver on a patch of ice. The case is *Smith v. Jones*. It was a case where someone was killed, and the court said that drivers can't be prosecuted for problems that occur as a result of weather.*

PATRON: *Oh, I'm so glad to hear that. I guess it means that I can fight the ticket. I know that if I challenge the ticket in court and lose I will have to pay court costs and an even higher fine. How do I respond to the court?*

LIBRARIAN [taking **PATRON** to State Form Book]: *Well, here is a form for replying to a traffic violation. I hope that this helps you.*

PATRON: *You have really helped me a lot. You relieved me, and now I know what the law is. Thank you very much.*

LIBRARIAN: *Good luck.*

The librarian committed a crime. What is wrong with this scenario? First of all, the librarian committed the Unauthorized Practice of Law (UPL). We can easily imagine this happening to us, but what the librarian

did wrong was to find the law for the patron, explain the law to the patron, and recommend a form. This behavior would have been acceptable if the question had involved business or history. However, by answering the patron's question about the law, the librarian stepped over the edge.

In fact, the librarian's answer was wrong. Most states specify that the driver must be in control at all times. For example, the Ohio Revised Code states that "No person shall operate a motor vehicle . . . on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle. . . ." A case involving someone who died might indeed say that the person can't be held responsible for vehicular homicide, but it has nothing to do with a traffic ticket. So our librarian not only committed a crime, but also gave improper advice which might cause the patron to pay a higher fine.

Pro se library users, patrons who are planning to represent themselves in court without an attorney, can sometimes be the cause of problems. According to Paul Healey, a law librarian at William Mitchell School of Law in St. Paul, Minnesota, and an expert on librarians and UPL:

Pro se library users can . . . approach the law library with a number of misapprehensions. In addition to being unfamiliar with legal materials, pro se users often misunderstand essential aspects of law and the legal process. The fluid nature of the law often comes as a surprise, including the lack of a clear answer to most legal questions. They often underestimate the skill required for effective representation in almost any legal matter, as well as the value of a dispassionate, but fully informed, point of view on a legal case. This often results in frustration for the pro se user, a condition that they hope the law librarian will help alleviate.²

Library workers must be very careful to avoid giving legal advice and committing UPL. A good discussion of this problem is found in Yvette Brown's article "From the Reference Desk to the Jail House: Unauthorized Practice of Law and Librarians."³ The prohibition against the unauthorized practice of law can be found in case law, statutory law, and Rules of Professional Conduct. Since the unauthorized practice of law is a crime, you can go to jail for UPL. For example, in Kentucky the unauthorized practice of law statute is Kentucky Revised Statutes section 524.130. This statute makes UPL a misdemeanor punishable by a fine or imprisonment. In the event that a librarian gives incorrect legal advice, he or she may also be sued for malpractice. In addition, many state

Bars will deny admission to those who have committed the unauthorized practice of law, so a librarian who commits UPL and then goes to law school may not be able to practice. If you stray over this line, it might destroy your entire career.

In a reference interview, the librarian may ask the patron what kind of information he or she needs and how the patron plans to use the information. The problem is the personal interview between the librarian and the patron. During a reference interview, the librarian gathers information, and the patron's particular set of circumstances are applied to the research. During a legal interview, lawyers gather information and the client's particular set of circumstances are applied to the legal procedures. If you apply the patron's circumstances to specific legal procedures, you are engaging in the unauthorized practice of law.

There is a difference between answering a reference question and giving legal advice. Librarians may help a patron find legal decisions, but should not analyze or discuss the relationship of the decision to the patron's own situation. Librarians should **NOT** point out the relevant decision or recommend the

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use of a specific form for a particular situation. You should **ABSOLUTELY NEVER** give any interpretation or advice about the law or about legal opinions. In other words, the librarian must not do legal research or give advice about any kind of legal issue.⁴ As Brown indicates, the penalties for UPL can be severe.⁵

In order to avoid UPL, librarians should show the patron the text of a requested law or give him or her a book dealing with the subject in question. We can safely send the patron to the right place, give him or her the location of the information, check library holdings and materials, assist in locating material, and provide an explanation about how to use a digest or index. The patron, not the librarian, must personally go to the index or digest. He or she must personally select the proper form, case, or statute, as well as using Shepard's Citations. The patron, not the librarian, should interpret and draft all legal documents.

So how do we do our jobs as librarians without falling into the UPL trap? Should we just avoid all questions involving the law entirely? Of course not! There are three main types of questions that most librarians encounter in the library—directional questions, holdings questions, and reference questions. It is only if the reference question goes too far that UPL becomes a problem.

Directional questions involve a patron asking about the location of a library material or the location of something in the facility. Besides the most frequently asked question—"Where is the restroom?"—some examples of questions include:

- Where do I find the *Federal Reporter*?
- Where is the *Code of Federal Regulations* located?
- I need to look at section 231 of the *Minnesota Statutes*.

Holdings questions involve a patron trying to find out if the library owns a particular item. These questions involve using the library catalog to answer the question. Some examples include:

- Does the library get the *University of Toledo Law Review*?
- What is the call number of *West's Bankruptcy Reporter*?
- How far back does the library have the *ABA Journal*?

There is no problem in answering these questions.

A reference question involves the use, recommendation, or instruction in the use of information sources, including books, Internet, and databases. There is a very thin

line between answering a reference question and answering a legal question, but the distinction can be made. Some examples of reference questions include:

- I'm looking for cases on the right to die.
- I need to find the Minnesota statutes on driving while intoxicated.
- How do I use the *Federal Practice Digest*?
- I need help with **Lexis, Westlaw, Internet, or CD-ROMs**.

You can safely send patrons to the right place, give them the location of books, and provide an explanation about how to use the materials, but the patron must select the proper form or case or statute. For example, suppose that a patron came into the law library and said that he had an order from a Judge for a jury trial to begin on a certain date. His adversary's counsel withdrew from the case five days before the trial. The patron asked "Isn't the Judge's order for a trial date more important? He can't do that—he is violating the Judge's order." You can **NOT** tell the patron any information about continuances or withdrawal of counsel, even though

you may know the answer. The most that a librarian can do is to show the person the rules of civil procedure, digests, legal encyclopedias, and other sources. The patron must read through the books personally to find the law.

There is controversy about UPL, and some scholars believe the whole idea is overblown. For example, Paul Healey in his excellent article "Chicken Little at the Reference Desk: The Myth of Librarian Liability,"⁶ expresses the opinion that UPL is more myth than reality. However, it is still important for librarians to understand how far is too far. Some of the following scenarios may help explain what librarians may do and what we may not do.

- A Certified Public Accountant who researched case law before having a meeting with the Internal Revenue Service engaged in the practice of law. *Agran v. Shapiro*, 273 P.2d 619 (1954).
- A man was found to have practiced law when he showed someone a motion to quash and told the person to go to the library and look at form books.

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Questions & Answers Copyright Column

by **Laura N. Gasaway** (Director and Professor of Law Library, CB#3385, Univ. of North Carolina, Chapel Hill, NC 27599; ph: 919-962-1321; fax: 919-962-1193)

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QUESTION: *An instructor has an old 16mm film published by Southern Bell Telephone and Telegraph Company. He wants to put it on videotape to use for his class, and to preserve it. Is this infringement? Should he contact AT&T archives?*

ANSWER: According to the Copyright Act, only a library or archives may convert the format of a work for preservation purposes. Before that may be done, section 108(c) dictates that the library first try to purchase a copy in the desired format at a fair price. If it is not available, then for preservation, a library may reproduce the videotape. So, your library probably does have to contact Southern Bell to try to obtain another copy since it appears to be the publisher.

It is possible that under fair use a faculty member might copy the entire film to a new format, but the law is less clear about whether that might constitute infringement as opposed to when a library does the preservation.

QUESTION: *May a federal government library photocopy an entire issue of a journal in order to bind a complete volume? The library has a subscription to the journal and*

has all of the issues for the year except one. That issue was received but was lost.

ANSWER: The answer is yes. Again, under section 108(c), if the library first tries to buy that missing issue and it is no longer available, or is available but not at a fair price, then the library may reproduce it for its collection.

QUESTION: *An academic library was contacted by a person not affiliated with the university requesting loan of a copy of a PBS video which is no longer in production and which he was unable to obtain from them. A faculty member here does not want to risk losing the video by loaning it. May the library copy the video to loan to him?*

ANSWER: Unfortunately, this is not what is meant by preservation in the copyright law. It is infringement to duplicate videos for someone just to loan them. In fact, only under the preservation sections can libraries copy videos at all! Section 108(b) applies only if the video is unpublished, and section 108(c) applies only when the library's copy has been lost, damaged, stolen, deteriorated or is obsolete.

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State ex rel Oregon State Bar v. Wright, 280 Ore. 713, 573 P.2d 294. Showing specific forms, explaining how a law or rule applies to a specific person, or interpreting cases is a clear violation of the laws against the unauthorized practice of law.

- A non-attorney who, as incidental to another transaction or calling, resolves legal questions for another at his request by giving him advice is "practicing law" if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind. *Gardner v. Conway*, 234 Minn. 468, 48 N.W.2d 788.

There is a way to satisfy our patrons without crossing the line into UPL. So please don't shy away from helping with reference questions if the patron has a legal issue. Instead, remember the principles of effective reference service, and apply them to the situation. So how should the librarian in our opening scene have handled the patron? Let's turn back time and see how the transaction should have been handled.

PATRON: *I need your help, please! I wrecked my car, and the police officer gave me a ticket. I got these forms in the mail from the court. What do I do? Is there some sort of form I can use to respond?*

LIBRARIAN: *What kind of ticket did you get?*

PATRON: *I have 20 days, so that makes the form due on the 5th. The officer said that I must have been going too fast, or else I wouldn't have slid into his lane. I was only going 25, but the ice was very thick and I just lost control! He said that I must be in control of my car at all times and under all conditions. Is that right?*

LIBRARIAN [taking **PATRON** to law books]: *Well, let us see. Why don't we take a look at West's Digest for this state. In a nutshell, the Digest puts cases together by topic with a numbering system. It is kind of like the Library of Congress Classification System or the Dewey Decimal Classification System. So you can look up your topic in the index, and find out what number it is under. When you look under that number, you will find cases on your topic.*

PATRON: *Thank you very much! I'll take a look at this and decide whether to fight the ticket or pay it. If I challenge the ticket in court and lose I will have to pay court costs and an even higher fine. How do I respond to the court?*

LIBRARIAN [taking **PATRON** to State Form Book]: *Well, here are the form book and court rules for our state. Take a look at this and see if anything looks*

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applicable to your situation. I hope that this helps you.

PATRON: *You have really helped me a*

lot. You relieved me, and now I know where to find the law. Thank you very much.

LIBRARIAN: *Good luck.*

Endnotes

1. Ohio Revised Code 4511.202 OPERATION WITHOUT REASONABLE CONTROL.
2. Paul D. Healy, "In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron," 90 *Law Library Journal* 129, 131 (1998).
3. Yvette Brown, "From the Reference Desk to the Jail House: Unauthorized Practice of Law and Librarians," 13(4) *Legal Reference Services Quarterly* 31 (1994).
4. For example, I worked on a policy on UPL when I was the Reference and Computer Services Librarian at Hamline University Law Library. See, Hamline University School of Law Library, "Reference Policy on the Unauthorized Practice of Law," Created by Bryan M. Carson and John Tessner (February 8, 1998).
5. Brown, *supra* n. 3.
6. Paul D. Healey, "Chicken Little at the Reference Desk: The Myth of Librarian Liability," 87 *Law Library Journal* 515, 525 (1995).