

The Unauthorized Practice of Law by Librarians

by Jennifer McLean and Lee Finks

Is it unethical for librarians to refuse to give assistance to patrons who have complicated legal questions? Or, conversely, is it unethical for librarians to give the patrons assistance, especially when it seems the question could best be answered by an attorney? For that matter, could it be illegal to act in such a way?

Practicing reference librarians in North Carolina public libraries are confused about and divided on the proper approach to answering legal questions. This article has grown out of a master's research paper on this topic by the first author,¹ done under the supervision of the second author. Although the research, described below, was modest in its design, it has revealed that this issue requires more study and that guidance for our public service librarians is needed.

The study, based on questionnaires returned by seventy-six public reference librarians (an 84% response rate) in the eight largest systems in North Carolina, indicated that the number of legal reference questions being asked in public libraries is increasing. It also indicated that these librarians are unsure whether providing answers to legal questions is an appropriate part of reference service. Of those with strong opinions, there was an almost equal division between those who argued for and those who argued against providing answers to legal questions at the reference desk. Many of the respondents said they lacked confidence about dispensing legal information and needed further education in this area of the law.²

The study also attempted to probe whether reference librarians are willing to answer questions that may or may not be considered unauthorized practice of law. The methodology involved presenting a series of questions that a small panel of attorneys had rated as to whether they were appropriate for a non-attorney to answer, and asking the respondents to indicate for each question whether they would try to answer it, provide the sources that might answer it, or refer the patron to a lawyer. Two examples from the ten questions: "My grandmother is elderly and would like to know more about living wills. I would like to see a copy of a living will form" was a question judged to be appropriate for a librarian to answer. "Someone has accused me falsely of breaking and entering. I was arrested and let out on bail. What are my rights?" was a question that the panel judged

should be referred to an attorney.³

Some respondents had sharply different opinions on the role of the librarian in assisting patrons with legal questions. One person responded, "The librarian should never recommend that the patron contact a lawyer; the patron comes to the library to find the information from the help of the librarian or from the books available." From a very different perspective, another respondent commented, "I lack the legal expertise necessary to give the correct information to my patrons. I am capable of finding the answers to many easy legal questions, but beyond that my patrons would receive a higher quality of service and information if they would seek legal counsel."⁴

Among the responses with regard to the hypothetical questions, about half were "correct", as determined by the attorneys' rankings. No significant patterns were observed between such demographic variables as education and the answers given on the test using hypothetical scenarios.⁵ One can conclude, however, that if there is a correct — as opposed to incorrect — approach to answering patrons' legal questions, it is not being followed by all or most librarians. At the least, there is no uniformity in the way librarians approach this issue. Given that the issue is of such importance, there probably

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— North Carolina General Statutes,
Section 84-4.

should be a general rule for librarians to follow.

The Larger Problem

As more and more users visit public libraries with the intent of researching the law on their own, reference librarians indeed find themselves in a precarious situation. When responding to requests for assistance, are reference librarians providing legal information or are they entering into the realm of the practice of law?⁶ Except for individual libraries' policies that address the issue of providing legal services, there are no accepted general guidelines in North Carolina public libraries that address whether answering legal questions is an appropriate part of legal reference service.

The *North Carolina General Statutes* define the practice of law, addressing both lawyers and persons not licensed to practice, as follows: "It shall be unlawful for any person or association of persons, except members of the Bar of the State of North Carolina, to engage in advising or giving legal counsel or to perform

for or furnish to another legal services."⁷

In 1989, the Standing Committee on Unauthorized Practice of Law of the Virginia State Bar Association stated that "librarians, assuming that they were not licensed attorneys, could not perform legal research because librarians were untrained in the law and unregulated by the profession."⁸ The Virginia State Bar Association prohibits librarians from researching the law but does not prohibit librarians from retrieving legal materials. Because it remains unclear at what point retrieving becomes research, librarians are hesitant to assist in offering any kind of legal information, no matter how simple. At present, the North Carolina State Bar has no similar regulation that specifically states or limits the librarian's role in providing legal information.

The practice-of-law issue was addressed in 1978 by the American Association of Law Librarians Code of Ethics which

stated, "law librarians, while engaged in their professional work, have a duty neither to engage in the unauthorized practice of law nor to solicit an attorney-client relationship."⁹ The Code does not specify, however, what activities would be considered the unauthorized practice of law.

The respondents in the McLean study confirmed what is generally

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acknowledged in the field, that library education and continuing library education do an inadequate job of preparing reference librarians to handle legal questions. Fifty-eight percent of the respondents stated that more education was needed and there were many comments to the effect that librarians lack the necessary preparation and knowledge.¹⁰

To add to the difficulties of resolving this issue, there is no agreement among experts and commentators regarding what qualifies as appropriate legal reference service. Some say that even identifying relevant books involves some "interpretative application of the facts to the law."¹¹ If one accepts this statement, then providing access to legal sources is, indeed, a form of practicing law. Other commentators suggest that the librarian can show patrons how to use the primary sources which address their questions, can recommend secondary sources on the subject, or can refer patrons to an agency which provides trained legal help, but should never give advice.¹² Showing patrons the books needed (statutes, codes, etc.) and demonstrating how to use them by using illustrations unrelated to the question of the user allows patrons to find their own answers.¹³

However, there exists a shady area in deciphering the difference between "reference and research" or "reference and interpretation."¹⁴ According to Mills, legal advice consists of "answering a question about law...when the answer requires skill and familiarity with the law, or when the listener relies on the answer as an accurate statement of his rights and obligations, or when the answer is directed to the specific legal problems of an individual rather than to the common problems of the public generally." He goes on to state that there is "no clear distinction" between the two; it depends "very much on the circumstances of the information exchange and the understanding of the parties involved."¹⁵ In most cases, librarians are not trained in the field of law and are therefore unlikely even to be aware of the difference.

The differences in attitude among librarians are clearer,

however. Librarians know that the law in our society is both complex and intimidating, as are the lawyers and courts that ordinary citizens often must face. We also know that lawyers are expensive to hire and thus we understand the appeal to ordinary citizens of trying to find the answers to difficult legal questions in the friendly confines of the local public library.

Often the temptation is great to provide help in working with legal information, especially with users for whom we feel sympathy. The typical librarian is, after all, service-oriented. There are also many proponents of the philosophy that the layperson has the right to engage in legal research with persons other than a lawyer. Proponents believe that prohibiting the practice of law by non-lawyers has "safeguarded" and "preserved" a profitable occupational monopoly for lawyers and at the same time restricts those who do not have the financial resources to refer to a lawyer.¹⁶

An earlier study of the public's access to the law by Martin Friedland is worth noting here. In studying a sizeable sample of educated and motivated people who were neither librarians nor lawyers, Friedland discovered that these individuals failed in locating information in both statutes and regulations even though they had been instructed earlier in how to use the sources. Friedland concluded that the legal literature is almost impossible for laypeople to use and thus it is unlikely that they will find the desired information. Because law libraries and academic libraries often are not available to the public, Friedland further concluded that the most likely place to research the law is in the public library.¹⁷

On the other hand, there are persuasive arguments against the answering of legal questions. One is that legal questions are complex in nature. What a librarian may believe to be a simple, straightforward question may be very complicated and require the assistance of a lawyer.¹⁸ Librarians are not trained in the legal profession and so, as Mills asked "how can one who is not fully aware of citizens' legal rights determine when substantial ones are being affected?"¹⁹ Another reason librarians should provide only legal information and not legal advice is that, unlike most subjects, the law is always changing and rarely is there a definite and clear answer on any issue.²⁰

Yet another reason relates to the nature of professionalism. Johan Bekker, one of librarianship's most respected ethicists, stated explicitly that librarians "should not transgress on the field of operation" of other professions. This is not just to avoid legal claims for giving incorrect information or to prevent misuse of information, but because library users can be harmed by being given information outside of the context of accurate professional advice.²¹

At present, nothing has been found in the literature indicating that a reference librarian or a law librarian has been sued for providing legal advice to a patron. The way the law is written in each state, however, makes civil suits as well as criminal prosecution for the unauthorized practice of law a possibility; and suits

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Very little research addressing the problems of legal information services in the public library is available. The ongoing research of the Canadian library educator, Patricia Dewdney, dominates this area of study and we look forward to the release of her new studies.²³ Others who have written in this area include the authors cited in the above discussion: Sinder, Mills, Protti, and Rice.

It is obvious that librarianship needs more research, more education, and, most important, more guidance in the area of legal reference work. Until a general policy is promulgated by an authority such as the Public Library Association or the American Library Association, reference librarians will probably remain unsure as to what their role or function in providing legal reference service involves.

Our first concern as professionals is always service to the public, but in trying to help we must beware of unintentionally doing harm. Someday, perhaps not too far in the future, a lawsuit may be waiting, aimed at some well-intentioned reference librarian, who, one dark and stormy night, gave a patron some bad legal advice.

References

¹Jennifer McLean, "An Examination of Reference Librarians' Perceptions in Providing Legal Reference Service in North Carolina Public Libraries" (Master's thesis, School of Library and Information Sciences, North Carolina Central University, 1992).

²Ibid., 24-9.

³This methodology, developed as it was for a master's thesis, has limitations and cannot claim statistical validity or reliability. Nonetheless, this is an interesting and potentially fruitful research approach and students in the future may be able to refine this "test" and use it to draw helpful conclusions.

⁴McLean, 29.

⁵Ibid., 40-1.

⁶Probably the best single discussion of this problem appeared in an issue of this journal. We refer to Janet Sinder's "Answering Legal Questions: Reference or Unauthorized Practice of Law?" *North Carolina Libraries* 49 (Spring 1991): 18-20.

⁷North Carolina General Statutes, Section 84-4 (1985).

⁸Maria E. Protti, "Dispensing Law at the Front Lines: Ethical Dilemmas in Law Librarianship," *Library Trends* 40 (Fall 1991): 238.

⁹Michael E. Rice, "Reference Service versus Unauthorized Legal Practice: Implications for the Canadian Reference Librarian," *Legal Reference Services Quarterly* 10 (Winter 1990): 54.

¹⁰McLean, 27-8.

¹¹Protti, 237.

¹²Sinder, 19-20.

¹³Robin Mills, "Reference Service vs. Legal Advice: Is it Possible to Draw the Line?" *Law Library Journal* 72 (1979): 192.

¹⁴Protti, 238.

¹⁵Mills, 186-87.

¹⁶Rice, 43.

¹⁷Martin L. Friedland, *Access to the Law*, Toronto: Carswell Methuen, 1975.

¹⁸Mills, 192.

¹⁹Ibid., 185.

²⁰Sinder, 19.

²¹Johan Bekker, *Professional Ethics and its Application to Librarianship*, (Ph. D. dissertation, Case Western Reserve University, 1976), 353-54.

²²Mills, 180.

²³Patricia Dewdney, "Legal Information Services in Ontario Public Libraries," *Canadian Library Journal* (December 1988): 365-371; and Dewdney and Joanne Marshall, "A Comparison of Legal and Health Information Services in Public Libraries," *RQ* (Winter 1991): 185-196; and also current research in progress.

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