Librarians and the Unauthorized Practice of Law

In law, the term "pro se" refers to individuals who are planning to represent themselves in a legal proceeding without an attorney. The last few decades have witnessed a dramatic increase in the number of pro se litigants. And since people naturally turn to libraries as sources of information, there has also been a dramatic increase in the number of library patrons seeking assistance with legal information and materials. These pro se patrons can present many challenges to librarians, but the one that probably causes the most concern is the possibility of engaging in the unauthorized practice of law.

What is the Unauthorized Practice of Law?

Unauthorized practice of law (UPL) is the practice of law by an individual who has not been licensed or admitted to practice law in a given jurisdiction. It is a crime in all 50 states to practice law without a license. It should be noted that this prohibition does not apply to pro se litigants who are representing themselves.

In general, the practice of law has been defined as "the professional work of a duly licensed lawyer", including services such as conducting cases in court, preparing papers necessary to conduct legal transactions, preparing legal opinions on points of law, and advising clients on legal questions (adapted from Black's Law Dictionary). Unfortunately for those wishing to help others with legal problems, further definitions have either been less than detailed or have differed significantly across states.

One thing that is generally agreed upon, however, is that the practice of law does include more than just appearing in court on behalf of a client. Although no precise definition exists, there are certain characteristics that will make conduct more likely to be viewed as the practice of law.

UPL in South Carolina

Practicing law without a license in South Carolina is a felony and carries a penalty of up to either five years in prison or a $5,000 fine, or both (S.C. Code Ann. 40-5-310). Individuals who are not admitted and sworn in as lawyers are *not* prohibited from representing themselves in their own causes, but representation of another individual is strictly prohibited (S.C. Code Ann. 40-5-80).

As in other states, the problem in South Carolina is often the determination of whether certain conduct is actually the "practice of law". However, it is very clear that practicing law in South Carolina includes not only litigation but also involves situations outside of the courtroom that require specialized legal knowledge or training. As noted in State v. McLauren, 536 S.E.2d 346, 349 S.C. 488 (S.C. App. 2002), "The Supreme Court has defined the practice of law to include the preparation and filing of legal documents involving the giving of advice, consultation, explanation, or recommendations on matters of law".

In carrying out this definition, South Carolina courts have taken a very hard line in UPL cases. This has been especially true when it comes to the "preparation and filing of legal documents" element. A variety of situations have been ruled as meeting the definition of the unauthorized practice of law, including:

- Representation of a third-party before IRS agents.
- Examination of titles and preparation of title abstracts.
- Assistance in the preparation of a will provided by a neighbor.
- Preparation of pleadings and an appearance in court by a paralegal without the supervision of an attorney.
- Filing of an appeal by a nonlawyer, who was the personal representative of an estate.
- Assistance in the filing of an inmate's petition for post-conviction relief, by a fellow inmate.

Librarians and UPL – Two Lines of Thought

We're All at Risk

One group of commentators has taken a very narrow view when it comes to librarians and the unauthorized practice of law. They begin all their analysis by focusing on the fact that unauthorized practice of law is a crime that can send an individual to jail. This places all nonlawyers attempting to help others with legal problems, including librarians, in an extremely vulnerable position.

To adherents of this line of thought, any assistance with legal information could be perceived as legal advice and would thus be a violation of the law. They believe that the pro se litigants who come to the library are in reality seeking legal advice, and are unaware of the fundamental differences between the services provided by a librarian and those provided by a lawyer. Thus, almost any reference interaction involving legal materials would be, in essence, practicing law.

To avoid trouble, libraries should adopt a very rigid and conservative policy as to what types of librarian conduct is appropriate when dealing with pro se patrons. The safest course is to limit pro se services to providing instruction on the proper use of research tools, such as indexes, and answering directional and holdings questions. Librarians should avoid making suggestions, whether it is for a book, an online service, an article in a legal encyclopedia, or even index terms, as any of these activities might be seen as giving legal advice.

In other words, not only the burden of using legal information but also of *finding* legal information should be completely on the pro se patron. These patrons should be shown only materials that they have specifically requested. In addition, they must use all finding tools personally, make all decisions as to the usefulness of materials, and interpret all the legal information they see.

There's Nothing to Worry About

A second group of commentators believe that the entire idea of librarians being accused, much less convicted, of the unauthorized practice of law is completely overblown and is much more myth than reality. They do not believe that pro se patrons confuse librarians with attorneys, even if they might see the librarians as having subject expertise in the law. In short, pro se patrons know the difference between seeking reference help and legal advice.

Followers of this line of thought believe that librarians who supply legal reference services are not performing any type of lawyerly functions. The act of searching for and finding appropriate legal materials simply brings together the elements of a legal problem. It is the interpretation and analysis of these elements that constitute legal advice and is what librarians need to avoid. Thus, as long as librarians continue to act as experts on *finding* the information, rather than experts on the information found, their risk of being prosecuted for activities springing out of normal reference work is virtually nonexistent.

This theory is bolstered by a report issued in 1995 by the American Bar Association's Commission on Nonlawyer Practice. Although this report carries absolutely no force of law, it does serve as a representation of the ABA's opinions. In a section regarding informal advice and assistance to pro se individuals, the report notes that informal help with legal problems "coming from neighbors, friends, co-workers, religious advisors, teachers, social workers, *law librarians* and others … who are considered to be reliable sources of information, has not generally been considered unauthorized practice." (p. 35, italics added).

In addition, there are many who argue that strict prohibitions against the unauthorized practice of law ultimately harm the public, especially the poor, as they directly interfere with the right to seek reasonable resolution of legal problems. Librarians have an ethical duty to provide full and adequate service to their patrons, and thus the need to provide assistance to those who might not otherwise receive it overrides any concerns regarding the unauthorized practice of law.

Recommendations for Avoiding Trouble

In truth, there may not be much controversy left in this area. There has been over 30 years of scholarly debate on the issue, but the fact remains that *not one* librarian has ever been prosecuted for unauthorized practice of law. The proliferation of legal self-help books and websites also lends increasing weight to

the idea that networks of "informal advice and assistance" with legal information are here to stay.

Of course, just because a librarian has yet to be prosecuted for unauthorized practice of law does not preclude a case from happening in the future. Thus, in order to avoid risking this possibility, it is wise to establish a policy that details the procedures that librarians should follow when conducting reference interviews with pro se patrons. Although clear guidelines can be hard to come by, a number of suggestions can be gleaned from the scholarly literature on the subject as well as the UPL statutes and cases in South Carolina.

The following are recommendations of policies and procedures a librarian should follow when conducting a reference interview with pro se patrons. This list is suggestive only, is non-inclusive, and should be adapted to the requirements of the library in question.

When Dealing with Pro Se Patrons:

- Do not physically fill out legal forms
- Do not give advice on how to fill out legal forms
- Do not interpret primary sources of law, *i.e.*, give no opinions as to what is meant by the law they are looking at
- Never do legal research
- Never give advice as to what you think the patron should do
- Never solicit a detailed description of the patron's situation
- Try to use black and white answers to abstract questions (Q. "Do I have any chance of beating this traffic ticket?"; A. "Let's see if we have any books on traffic laws in South Carolina or on how to proceed with a traffic case.")
- Never read any cases or laws over the phone; this will avoid the possibility of errors in reading or inflection. Explain how the patron can access the material themselves via the library, an online source, or document delivery.
- Make your role clear when asked for assistance on legal questions, *e.g.*, "I'm a librarian, not a lawyer, so I'm not allowed to give you any advice (... choose a form for you ... help you fill out this form ... interpret what this means for you ...)"
- Always use verbal disclaimers such as "this might be helpful", "this might be a good place to start", "try this and see where it goes"

- Prepare a written policy outlining the appropriate level of assistance for legal questions.

- Carry current materials; indicate when materials are not up to date and let patrons know that more current information may be available elsewhere.

- If the library adopts a policy that allows librarians to point out particular resources, such as major decisions or potentially helpful forms, always use strong verbal disclaimers:

  > "This is a case which involves traffic tickets and radar guns in South Carolina. I'm not a lawyer and I don't know if this will be helpful to your particular situation but it may be a good place to start your research."
  >
  > "Here's a book that contains legal forms. This section has been helpful to others, but I'm not a lawyer so I have no idea which forms you should or shouldn't use. It is always best to call a legal aid service or the court itself if you're not sure which one to use".

- Put up written disclaimers that define your role as a librarian, on the website and visible within the library. For example:

  > "This site offers legal information, not legal advice. We make every effort to ensure the accuracy of the information and to clearly explain your options. However, we do not provide legal advice – the application of the law to your individual circumstance. For legal advice, you should consult an attorney."
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  > "Because of the ethical and legal implications surrounding the unauthorized practice of the law, patrons must be advised that the Library staff may not engage in the following activities: perform legal research; answer a legal question; advise any patron on the status of the law on a particular issue; recommend that any patron contact a particular attorney; explain legal procedure, court rules or jurisdiction; or interpret the text of a statute, legal opinion, or administrative regulation."

- Refer more difficult questions to subject specialists, e.g., law librarians

- Have legal aid numbers nearby

When it comes to helping pro se patrons with legal information, the bottom line is that librarians are there to assist the patrons in the location of and proper use of legal tools. They should never do anything that could possibly be perceived as

interpreting information or giving advice, and should never analyze the relationship of the information to the patron's own situation. It is also best to get in the habit of using constant verbal disclaimers, such as, "this might be helpful" or "this may be a good place to start". A good basic rule of thumb would be "if in doubt, then choose the conservative route and stick to it."

Helpful Resources

American Bar Association, Commission on Nonlawyer Practice. *Nonlawyer Activity in Law-Related Situations: A Report with Recommendations*. Chicago: American Bar Association, 1995.

Healey, Paul D. *Pro Se Users, Reference Liability, and the Unauthorized Practice of Law: Twenty-Five Selected Readings*, 94 Law Lib. J. 133 (2002) http://www.aallnet.org/products/pub_llj_v94n01/2002-08.pdf.

S.C. Code Ann. 40-5-80, Pro se representation.

S.C. Code Ann. 40-5-310, Practicing without being admitted and sworn prohibited.

South Carolina Bar Association, *Unauthorized Practice of Law*, http://www.scbar.org/public/upl/default.asp.

State v. McLauren, 563 S.E.2d 346, 349 S.C. 488 (S.C. App. 2002).