

LEGAL INFORMATION VS. LEGAL ADVICE - DEVELOPMENTS DURING THE LAST FIVE YEARS

The increase in self-represented litigants nationwide heightens the need for assistance from courts and their staff.

by John M. Greacen, Director of the Administrative Office of the Courts for the state of New Mexico.

In 1995 my article "No Legal Advice From Court Personnel What Does That Mean?"¹ was the first published attempt to examine critically the standard court instruction to staff not to give legal advice. It explored legal and practical definitions of the term "legal advice" and suggested guidelines a court could give staff members on what answers they can and cannot provide. This article reviews that article's discussion and recommendations, as well as developments during the past five years.

"No Legal Advice" argued that the phrase "legal advice" had no inherent meaning to the courts or to court staff who were required to interpret it. The use of a vague term has negative consequences for the courts and the public; it causes staff to limit unnecessarily the flow of information to the public about court operations and it creates opportunities for discrimination among different categories of court users. The article addressed the concerns that cause courts to prohibit their staffs from providing information about court processes to the public—concerns about their "practicing law," about their giving incorrect information, and about their binding the judge by such incorrect information. It articulated five general principles that court staff should keep in mind in answering questions:

1. Court staff have an obligation to explain court processes and procedures to litigants, the media, and other interested citizens.
2. Court staff have an obligation to inform litigants, and potential litigants, how to bring their problems before the court for resolution.
3. Court staff cannot advise litigants whether to bring their problems before the court, or what remedies to seek.
4. Court staff must always remember the absolute duty of impartiality. They must never give advice or information for the purpose of giving one party an advantage over another. They must never give advice or information to one party that they would not give to an opponent.
5. Court staff should be mindful of the basic principle that neither parties nor their attorneys may communicate with the judge *ex parte*. Court staff should not let themselves be used to circumvent that principle by conveying information to a judge on behalf of a litigant, or fail to respect it in acting on matters delegated to them for decision.

Finally, the article suggested 11 guidelines for staff to use in responding to questions. The first six are positive statements. All staff are expected to perform the following tasks:

1. Provide information contained in docket reports, case files, indexes and other reports.
2. Answer questions concerning court rules, procedures, and ordinary practices. Such questions often contain the words "Can I?" or "How do I?"
3. Provide examples of forms or pleadings for the guidance of litigants.
4. Answer questions about the completion of forms.
5. Explain the meaning of terms and documents used in the court process.
6. Answer questions concerning deadlines or due dates.

The last five are negative statements. In providing information, staff will not:

1. Give information when you are unsure of the correct answer. Transfer such questions to supervisors.
2. Advise litigants whether to take a particular course of action. Do not answer questions that contain the words "Should I?" Suggest that questioners refer such issues to a lawyer.
3. Take sides in a case or proceeding pending before the court.
4. Provide information to one party that you would be unwilling or unable to provide to all other parties.
5. Disclose the outcome of a matter submitted to a judge for decision until the outcome is part of the public record, or until the judge directs disclosure of the matter.

Responses to the article

Many judges and court managers used the article and its recommendations in creating policies and training for court staff. And a court manager from Canada reported that it is the standard reference point for the courts of Canada as well. I have conducted training sessions for court administrators and court staff based on the principles set forth in the article in both federal and state courts throughout the country. The guidelines have been included in the curriculum of the "Litigant Without Lawyers" seminars presented by the Maricopa County Superior Court and in educational sessions at conferences of the National Association for Court Management and its Mid Atlantic Association for Court Management.

The Michigan Court Support Training Consortium, under a grant from the Michigan Judicial Institute, developed an interactive training program using compact disk interactive technology, called the Legal Advice CD-i program, based on the principles set forth in the article. That training program has been widely used by courts in other states and received the Justice Achievement Award from the National Association for Court Management in 1998.

Several states have adopted their own guidelines derived from those suggested in the article.

- In 1997, the Michigan Judicial Institute prepared and distributed a booklet entitled, *Legal Advice v. Access to the Courts: Do YOU Know the*

Difference? The booklet provides general guidelines, together with specific applications of those guidelines through the use of questions and answers. The booklet was endorsed by the Michigan Supreme Court as a model for providing information to the public and access to the Michigan court system.

- In June 1998, the New Mexico Supreme Court adopted a standard notice entitled "Information Available from the Clerk's Office." It requires all courts to post that notice "in lieu of any other notices pertaining to the topic of information or advice that court staff may or may not provide." The notice sets forth the information that court staff can and cannot provide and includes information on how to find a lawyer; New Jersey has created a similar notice.
- In November, 1998, the Ventura County Superior Court adopted guidelines for its employees staffing its Self Help Legal Access Center.
- The Supreme Court of Florida, with one dissent, has adopted a rule of court, Florida Family Law Rule 12.750, entitled "Family Self Help Programs," that sets forth the services that court "self help" staff can and cannot provide.
- A Customer Service Advisory Committee for the Judicial Branch, created by order of the Iowa Supreme Court, has developed *Guidelines for Clerks Who Assist Pro Se Litigants in Iowa's Courts*. The Iowa Supreme Court recently approved the guidelines. The Advisory Committee also developed a guidebook for clerks containing 25 pages of model responses to frequently asked questions.
- A Task Force on Unrepresented Litigants of the Boston Bar Association conducted a comprehensive study of the needs of self-represented litigants in all levels of courts in Massachusetts. Its August 1998 *Report on Pro Se Litigation* is one of the most thorough treatments of the topic, including extensive recommendations to the courts and the bar for improving their programs. Exhibit F of that report is a set of "Sample Staff Guidelines" for Massachusetts courts.
- Finally, in 2000, the Utah Judicial Council adopted guidelines for all court staff in that state.

Critiques

Jona Goldschmidt and his colleagues have criticized the suggested guidelines on two grounds. First, they believe that the article does not go far enough in its analysis of the court's obligation to provide information to the public. The United States Constitution, through the privileges and immunities clause, the First Amendment, or the due process or equal protection clauses of the Fourteenth Amendment, may create a fundamental right of access to the courts for persons representing themselves.²

The closest that any U. S. Supreme Court opinion has come in articulating such a broad right of access is Justice Brennan's concurring opinion in *Boddie v. Connecticut* (1971),

finding that Connecticut's mandatory filing fee for divorce cases violated an indigent person's right to due process. Justice Brennan objected to language in the majority opinion limiting the reach of the decision to divorce proceedings—"the exclusive precondition to the adjustment of a fundamental human relationship." Justice Brennan wrote:

I cannot join the Court's opinion insofar as today's holding is made to depend upon the factor that only the State can grant a divorce and that an indigent would be locked into a marriage if unable to pay the fees required to obtain a divorce. A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually . . . the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.' . . . I see no constitutional distinction between appellants' attempts to enforce this statutory right and an attempt to vindicate any other right arising under federal or state law. . . . The right to be heard in some way at some time extends to all proceedings entertained by courts.

If there is such a right of access to the courts, then, argues Goldschmidt and colleagues, the courts must provide information sufficient to enable self-represented persons to exercise that right.

The significant and as-yet-unanswered question is whether self-represented litigants' rights obligate the state to take affirmative steps to provide them with some form of "adequate" legal assistance. Until a definitive ruling on this question is made, courts should—if only for efficiency reasons—begin (or continue) to develop creative means of guiding the increasing number of self-represented litigants through the legal process.³ Second, Goldschmidt and colleagues argue that the guidelines are too general in nature. They believe that court staff need explicit direction on the answers to be given to specific questions, not just general direction differentiating legal information from legal advice. All courts owe their staff the support of an operating manual, describing basic court operations and instructing them how to handle routine matters. These materials, in turn, serve as a reference for staff in answering questions from the public. The most extensive manual of this sort that I have seen is the *Clerk's Practice and Procedure Guide* developed by the United States Bankruptcy Court for the District of New Mexico. The judges of the court instructed the clerk to develop the manual in order to give lawyers who did not specialize in bankruptcy law the basic information they would need to practice before the court. With the help of a committee of the local bankruptcy bar, the court prepared a manual detailing the court's procedures with respect to all parts of the bankruptcy process. The manual is available to the public. It also serves as a resource for court staff in answering questions posed by the public.

A knowledgeable staff

My experience in providing training on this topic all over the country has convinced me that lack of staff knowledge of procedures is not a significant impediment to the ability of court staff to provide information to the public. In training sessions I ask participants to write down the questions they have the most difficulty answering and use them as the basis for the discussion. I ask for volunteers to answer the questions, following my suggested guidelines. Experience has shown that court staff are extraordinarily knowledgeable about court procedures, requirements, and practices. With one exception, some participant in every seminar has been able to provide the procedural or substantive

information needed to answer a question. The exception was in Delaware, where all participants agreed there was no answer to a particular question—their case management information system did not provide the requested information.

My experience suggests, therefore, that court staff throughout this country *know the correct answers* to the questions they are asked by the public. Consequently, courts should not delay authorizing their staff to provide procedural information until they develop detailed guidebooks or reference materials.

As additional courts develop rules and guidelines, they are becoming more detailed. See, for instance, the elaboration provided by the Florida rule of court and the draft Iowa guidelines. In addition, the drafters of the Iowa guidelines have included a substantial number of standard answers to frequently asked questions. Some such standard answers, based on the most common questions that recur in training sessions on this subject, appear at the end of this article.

A just outcome

Russell Engler, Professor of Law and Director of Clinical Programs at the New England School of Law, has written a thought-provoking article arguing that judges, mediators, and court staff *should* provide legal advice to self-represented litigants.⁴ Engler argues that most persons representing themselves in court do so because they cannot afford to retain counsel. Without competent advice concerning available options and their advantages and disadvantages, litigants cannot obtain a just outcome. He argues that principles underlying the concept of the court's impartiality must be reconsidered. Instead of giving no advice to either side, Engler believes that the court must give whatever help is needed to *both* sides, giving more help to one side than to the other where needed. He argues that true impartiality exists when both parties are fully informed of their rights, their procedural options, and the benefits and detriments arising from exercising them. The most obvious instance in which the court has an obligation to provide different levels of help to one side than to the other is when one side is represented by counsel and the other is not. In order for the courts to do justice, Engler argues, the courts must be prepared to provide whatever assistance is needed to both sides in order for them to understand their rights and remedies and make a reasoned, informed judgment of their best interests. Current restrictions on court staff, mediators, and judges inhibit their ability to ensure justice. He poses the problem of the mediator who is prohibited from informing one party that his proposed settlement terms are foregoing a remedy to which he is clearly entitled by law. His article goes on to argue that the type of advice needed, and who should provide it, depends on the context—the nature of the legal proceeding and the type of dispute.

Professor Engler's analysis is thought-provoking. He forcefully points out the injustices that can result from imbalances in the power and knowledge of self-represented parties. However, his view that a dispute cannot be resolved justly without fully informing both parties of every substantive and procedure right and option available is not one to which I am willing to subscribe. It is neither necessary nor realistic to expect the courts to serve not only as dispute resolvers but also as counselors and advocates for both sides.

Unauthorized practice of law

Much of the concern about court staff providing information arises from apprehension they will be practicing law without a license. In my view, laws or court rules prohibiting the unauthorized practice of law do not apply to court staff performing tasks at the direction of the court. Preoccupation with the topic of unauthorized practice of law focuses attention on the wrong issues and provides either too much or too little guidance to the courts on what information their staff should and should not provide.

First, as a matter of law, when court clerks are providing information that the courts direct them to provide, they cannot be engaged in the *unauthorized* practice of law. The courts have authorized them to do what they are doing. When the authorization comes from the state court of last resort, which is the body responsible for deciding what constitutes the practice of law, there can be no doubt that court staff are insulated from any statute or rule prohibiting the unauthorized practice of law. The Supreme Court of Florida recognized this principle in its family court rule on self-help programs. Section (e) of Rule 12.750 reads:

(e) Unauthorized Practice of Law. The services listed in subdivision (c), when performed by nonlawyer personnel in a self-help program, shall not be the unauthorized practice of law.

A committee of the Washington State Bar Association has reached the same conclusion. The Committee to Define the Practice of Law worked for almost a year and a half to develop a comprehensive definition of the practice of law for the State Bar Association to recommend to the state supreme court for adoption. Section (b)(2) of its Definition of the Practice of Law excludes "serving as a court house facilitator pursuant to court rule". . . . "whether or not [it] constitute[s] the practice of law."

The attorney general of Vermont has applied this reasoning to court staff activities authorized by the trial court, not the court of last resort. In Vermont, the unauthorized practice of law is prohibited by rule of the state supreme court. An attorney wrote to the Vermont attorney general asking that it commence a criminal contempt proceeding to enforce that rule, complaining about an advertised job description that included the following duties of a court case manager: "assist litigants to complete court documents and to understand the judicial process" and ensure "that all persons involved in child support actions understand the court process, their rights under the law and all documents that they are asked to file or agree to." The complaint also questioned the court's production and distribution of various booklets that define legal terms and discuss the divorce process. While expressing his opinion that the activities set forth in the job description did not constitute the practice of law, Chief Assistant Attorney General William Griffin noted that "[e]ven if they did, since the activities are authorized by the Court and performed on its behalf, the Attorney General would be hard pressed to argue that they are unauthorized."⁵

Analyzing this issue in terms of the unauthorized practice of law focuses attention on what lawyers do, not on what courts must, and must not, do. First, courts must provide self-represented litigants with the information they need to bring their cases before the court. Whether or not there is a constitutional right to access to the courts, there are overwhelming policy reasons for the courts to provide effective access. That is what courts are for—to serve as the forum for resolving disputes. For the courts to enjoy the public trust and confidence of the people, they must make their services practically, as well as theoretically, available to the public. So, the focus of the courts must be on providing the information that citizens need in order to avail themselves of the courts' dispute-resolving services.

The limitations on the court staff in answering questions from the public arise not from what lawyers do, but from the principle of impartiality central to public trust and confidence in the courts. Court staff should not advise a person accused of crime whether to plead guilty—not because lawyers give such advice, but because that advice causes the court staff, and hence the court itself, to be taking sides in the outcome of the case. An example where courts are misled by looking to unauthorized practice of law principles, rather than to the needs of the courts, is with respect to court forms. Some courts consider the choice of the appropriate form for a litigant to use to be a function that lawyers perform for their clients and therefore restrict the role that staff can play in pointing out the correct form to a litigant requesting assistance. See, for instance, the discussion of this issue by Goldschmidt and colleagues.⁶

As a practical matter, court staff are fully competent to direct litigants to the correct form. This service constitutes an essential part of the information a litigant needs in order to be able to present his or her case to the court. And, because the court provides equal services to all litigants—e.g., to petitioners as well as respondents—the court does not depart from its impartial role in providing forms and directing litigants to their proper use.⁷

By focusing on the issue of the unauthorized practice of law, courts may not go far enough in limiting the role that staff can play. For instance, does the fact that a particular court staff member is a lawyer free the court from concerns arising from the court's need to remain impartial? Or, in Arizona, where there is no unauthorized practice of law statute, can the courts decide that there are no limitations on the role that their staff should play in assisting litigants?

Finally, the ethical opinions analyzing the functions that clerks can and cannot perform from the standpoint of the unauthorized practice of law draw the same line in the same place as does my analysis based on the principle of maintaining the court's impartiality. The Massachusetts Advisory Committee on Ethical Opinions for Clerks of the Court reviewed five scenarios that regularly occur, approving clerk conduct in three and disapproving it in the remaining two. In summarizing its opinion, it stated:

[P]roviding assistance with filling out forms and offering procedural advice clearly do not run afoul of the prohibition on the practice of law. Drafting documents, taking over a case and becoming an advocate on behalf of a litigant would clearly violate the prohibition.

The increase in numbers of self-represented litigants throughout the nation heightens the need to provide them with information. Court staff are the first people litigants come into contact with, and there are many ways they can assist. Recognizing this, courts are developing guidelines and providing the staff training necessary to ensure access to justice for all.

1. 34 *The Judges Journal* 10 (Winter 1995). A slightly different version appeared contemporaneously in *Clerks, Office Staff Cannot Give Legal Advice: What Does That Mean?* 10 *COURT MANAGER* 35-40 (Winter 1995).

2. See the discussion on pages 19 to 24 in Goldschmidt, Mahoney, Solomon and Green, *MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* (American Judicature Society, 1998). *Editor's note*: To order, see page 205.

3. *Id.* at 24.

4. Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 *FORDHAM L. REV.* 1987 (1999).

5. Letter from William Griffin, Assistant Attorney General, to Jan Rickless Paul, Esq., dated August 8, 1994.

6. *MEETING THE CHALLENGE*, *supra* n. 2, at 43.

7. It is clear that the New Mexico Supreme Court, the state in which an ethics opinion questioned the propriety of a judge's providing litigants with forms he drafted, finds it acceptable for court staff to provide approved court forms to litigants. *See* the New Mexico legal information form.

Suggested answers to recurring questions

Here are some of the most common questions presented by participants in seminars on this topic, and suggested answers:

Do I need a lawyer?

You are not required to have a lawyer to file papers or to participate in a case in court. You have the right to represent yourself. Whether to hire a lawyer must be your personal decision. You may want to consider how important the outcome of this case is to you in making that decision. A lawyer may not cost as much as you think. I have information on the Lawyer Referral Service if you want help in finding a lawyer who specializes in your kind of case. [Lawyers participating in the Albuquerque Bar Association lawyer referral service offer one half hour of consultation for \$25 plus tax.]

Should I hire a lawyer?

Same as above.

Can you give me the name of a good lawyer?

The court cannot recommend a particular lawyer. I have information on the Lawyer Referral Service if you want help in finding a lawyer who specializes in your kind of case.

Should I plead guilty?

You need to decide that for yourself.

What sentence will I get if I plead guilty [or do not plead guilty]?

The judge will decide what sentence to impose based on the facts and the law that apply to your case. I cannot predict what the judge will do.

What will happen in court?

Suggested answer to a plaintiff in a small claims case: The judge will call on you to present your evidence first. Then [he][she] will call on the other side to present its evidence. The judge will ask questions if [he][she] needs clarification. When the judge has heard all the evidence, [he][she] will announce [his][her] decision.

What should I say in court?

You must tell the truth.

How do I get the money that the judge said I am entitled to?

You are responsible for taking the steps necessary to enforce a judgment (or an award of child support). Here is a pamphlet that describes the procedural options available to you. When you decide what option to pursue, I can provide you with the appropriate forms. [It may be appropriate to refer a litigant to an agency for help, e.g, with child support enforcement.]

What should I put in this section of the form?

You should write down what happened in your own words.

What should I put down here where it says "remedy sought"?

You should write in your own words what you want the court to do.

Would you look over this form and tell me if I did it right?

You have provided all of the required information. I cannot tell you whether the information you have provided is correct or complete; only you know whether it is correct and complete.

I am not able to read or write. Would you fill out the form for me?

In that case, I am able to fill out the form for you, but you have to tell me what information to put down. I will write down whatever you say and read it back to you to make sure what I have written is correct.

What do I do next?

Describe the next step in the court process.

I want to see the judge. Where is his office?

The judge talks with both parties to a case at the same time. You would not want the judge to be talking to the [police officer][landlord] about this case if you were not present. Your case is scheduled for hearing on ____ at _____. That is when you should speak with the judge.

The judge heard my case today but did not make a decision. When will he decide?

There is no way for me to know when the judge will issue a decision in your case. In general, judges try to reach a decision within [60] days of taking a case under advisement. But there is no guarantee that the judge will decide your case within that time.