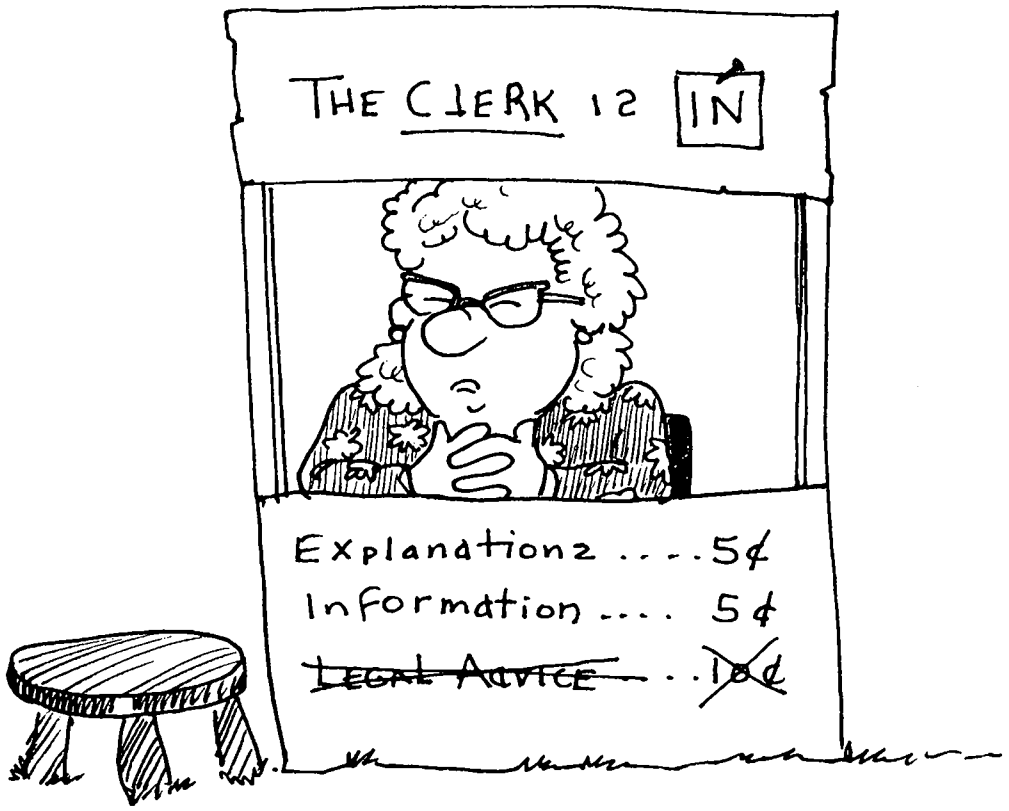
"Clerk's Office Staff Cannot Give Legal Advice"
What Does That Mean?

John M. Greacen

When you enter the clerk's office in any state or federal courthouse, in any part of the United States, you are likely to encounter a sign saying "Clerk's office staff are prohibited from giving legal advice." Most deputy clerks are taught from their first day on the job that they cannot give legal advice. They dutifully follow this rule, as they understand it, throughout their careers. Most deputy clerks who answer telephone calls from the public or provide service at the public counter invoke the rule several times a day in response to citizens' questions.

The National Association for Court Management has included the principle in its Model Code of Conduct, as subsection B of Article II, "Confidentiality:" "Members shall not give legal advice unless specifically required to do so as part of their official positions."

But ask a deputy clerk what constitutes legal advice, and you



EDITOR'S NOTE: *John M. Greacen is clerk of the U.S. Bankruptcy Court, Albuquerque, New Mexico. He gratefully acknowledges the assistance of Laura Goldsmith, assistant tenth circuit librarian, in the preparation of this article.*

will get no answer or a tautological answer like "Giving legal advice is giving advice about the law" or a variation of Justice Stewart's pornography definition, "I can't define it, but I know it when I see it." Does the term have any inherent meaning? Is it a legitimate and useful limitation on the information that a deputy clerk can give the public? If not, can we provide court staff with a better standard, or set of guidelines, to follow in deciding what information is and is not appropriate to provide in answer to a citizen's inquiry?

I will argue that the phrase has no inherent meaning, or even core meaning, and that its current use by courts has serious negative consequences for the ability of courts to provide full and consistent public service. I will attempt to articulate the various separate principles implicit in the phrase, distinguish those that are useful from those that are not, and suggest guidelines that might prove more helpful to court staff in performing their functions and more helpful to the public they are serving.

"Legal advice" has no inherent meaning.

In the context of the questions that a deputy clerk is called upon to answer, the prohibition against giving "legal advice" provides no guidance. Which of these questions calls for "legal advice?"

1. "Has a complaint (or petition, motion, response, answer, certificate of service, objection, etc.) been filed?"

2. "I just got this here summons and complaint. It says I have to file an 'answer' or I will be subject to de-fault. I can't afford an attorney, and I wouldn't trust one anyway. What is an answer? What does one look like? What does it say? What does 'default' mean?"

3. "When is my answer due?"

4. "What does 'interrogatory' mean?"

5. "I got this summons for jury service. My wife and I have tickets for a Mediterranean cruise on the date I have been called to serve. What happens if I don't show up? Well, what should I do then?"

6. "When will the court decide my case?"

7. "Do I have to do anything else?"

8. "Here is the situation I am in. . . . How should I bring this issue before the court for resolution?"

9. "Hi. This is Joe Schmoe. I'm a new attorney with the Wizard firm. I need to file a motion for extension of time to file my brief. Does the court have a local rule that I should be aware of? This is my first request for an extension. How is the judge likely to react to it?"

Operating from some inherent meaning in the words "legal advice" it is impossible for a clerk to decide whether to answer any of these questions. Is it legal advice to refer a caller to a rule or statute? It is legal advice to explain the meaning of a legal term? Is it legal advice to characterize a document according to a term that has legal significance (for example, if the clerk says, "Yes, an objection has been filed," is the clerk making a representation that a document titled "objection" is in the court file, or is she or he stating that the document legally constitutes an objection?) Is it legal advice to tell someone what the court's standard practices are? ("The court usually issues an opinion within forty-five days of hearing oral argument.") Is it legal advice to tell a citizen when a filing is due? If so, how is it possible for a clerk to comply with the rules that require him or her to send out such notices. If not, what about the clerk's venturing an opinion on the application of an ambiguous rule to a specific situation? Is it legal advice to answer questions from a lay person, but not to answer questions from a lawyer?

Based upon my experience, I would venture the following guesses:

- most deputy clerks would answer questions 1, 3, 5, and 9 (after answering Question 9 they will slam down the phone and mutter under their breath, "You are the one who went to law school. You are the one who makes the big bucks and drives the Beemer. Read the damn rules yourself.");
- most deputy clerks would not answer questions 2, 4, 6, 7, and 8; and
- if you asked these questions of clerks in the same court, and in courts in the same state, you would get different responses. You would probably get inconsistent answers from the same clerks on different days.

A deputy clerk's inability to define the term *legal advice* and to apply it consistently to ambiguous situations puts him or her in pretty good company. Most state and federal trial and appellate judges required to apply the term will begin by stating that it is unclear. Whether in the context of the definition of "giving legal advice" or in the definition of "the practice of law," which includes the giving of legal advice, courts and commentators concede the

ambiguity of the terms. Wolfram, in *Modern Legal Ethics*, sec. 15.1 at pp. 835, 838 (West, 1986) states: "On the whole, state law has been characterized by its broad sweep and imprecise definition . . . many definitions of unauthorized practice are obviously inadequate because they would proscribe almost all areas of commercial and governmental activity." Courts have sometimes characterized a nonlawyer's practice as unauthorized if it involved giving legal advice. The obvious, and now familiar, difficulty with such a definition is its breadth.

In 1992 the Iowa Supreme Court pointed out that Iowa's Code of Professional Responsibility (taken from the American Bar Association's 1969 Model Code of Professional Responsibility) ducked the issue, stating "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law" *(Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Baker*, 492 N.W.2d 695, 701).

The New Mexico Supreme Court has taken a similar position. "There is no comprehensive definition of what constitutes the practice of law in our basic law or the cases. The Court has specifically declined to take on the onerous task. . . . Defining the practice of law is an extremely difficult task, which we find unnecessary to undertake at this time. The line between what constitutes practicing law and what is permissible business and professional activity by nonlawyers is indistinct" (*State Bar of New Mexico v. Guardian Abstract & Title Co.*, 9 N.M. 434, 439, 575 P.2d 943 [1978]).

Some attempted definitions look toward the activity performed, such as "the drafting of legal instruments and contracts by which legal rights are secured" (*In re Anderson*, 79 B.R. 482, 485 [Bankr. S.D. Calif. 1987]), or "representation of parties before judicial or administrative bodies" (*State of New Mexico ex rel Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 526, 514 P.2d 40 [1973]). Of course, such lists include the phrase "giving legal advice and counsel" without attempting to define it further. Others look toward the level of knowledge and expertise required. For instance, legal advice "requires the use of legal judgment requiring legal knowledge, training, skill, and ability beyond that possessed by the average layman" (*O'Connell v. David*, 35 B.R. 141, 144 [Bankr. E.D.Pa. 1983]), findings adopted in part (35 B.R. 146 [E.D.Pa. 1983], affid, 740 F.2d 958 [3d Cir. 1984]), or advice is legal advice if it "affects important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen" (*In re Bachmann*, 113 B.R. 769, 772-73 [Bankr. S.D.Fla. 1990]).

Under these definitions, woe to the poor deputy clerk who answered any of the questions above. If the answer touched on law or procedure, it might be legal advice. If the deputy clerk does not possess "knowledge of the law greater than that possessed by the average citizen," he or she should be fired for incompetence. If the true test is the importance of the rights of those "advised," it is evident that questions that court staff should answer are proscribed, such as the time period for filing an appeal, which most courts hold is jurisdictional.

Some courts have recognized that court personnel do, and must, give advice on legal matters. The West Virginia Supreme Court has said that "a magistrate or magistrate court personnel should not furnish legal advice to a party to a proceeding in magistrate court. On the other hand, a magistrate or other magistrate personnel may furnish legal information to parties to proceedings in magistrate court, many of whom will not be represented by legal counsel" (*State v. Walters*, 186 W. Va. 169, 411 S.E.2d 688, 691 [1991]). The court did not elaborate further on the distinction between legal "advice" and legal "information." In recently amended court rules, the Florida Supreme Court stated: "For anything you do not understand about the above information and for any additional questions you may have concerning the preparation of your case for trial, please contact the Clerk of the County Court. . . . The clerk is not authorized to practice law and therefore cannot give you legal advice on how to prove your case. However, the clerk can be of assistance to you in questions of procedure." (*In re Amendments to the Florida Small Claims Rules*, 601 S.E.2d 1202, 1212 [1992]).

Neither of these distinctions—advice versus information and law versus procedure—is satisfactory for the poor deputy clerk who needs to decide whether to answer a question. Cases are often won and lost on procedural

issues. It is hard to know what is information when an inquiring citizen is clearly going to rely and act on what you say.

Negative Consequences of the Term's Ambiguity

The consequence of a fuzzy definition of "giving legal advice" is to vest unguided discretion in the deputy clerk to answer what he or she wishes to answer and feels comfortable answering and to refuse to answer any question he or she decides not to answer. The result, as with all unconstrained discretion, is the potential for abuse, favoritism, and undesired consequences.

Deputy clerks may offer advice to persons they like and refuse it to persons they do not. They may help polite citizens and rebuff more obstreperous ones. They might help persons of their own race and decline to help persons of other races. They might help people who call during slack business hours and decline to help those who call at peak hours.

Courts have difficulty with persons who chose to represent themselves. Many such persons do not trust lawyers, or the legal system, and are therefore very hard to deal with. They will challenge information given. They are not friendly. They often demand services the staff does not usually provide. An easy way to "get rid of" such persons, particularly on the telephone, is to cut the questions short with the useful phrase, "I am not allowed to give legal advice. What you are asking me involves legal advice." The self-represented litigant can, and often will, argue. But he or she cannot prevail, because the deputy clerk is the ultimate arbiter of the meaning of the phrase.

It is clear to many observers that the rates of self-representation are growing, reaching as high as 65 percent of all domestic relations matters in a number of courts. In several federal courts of appeals, half of all appeals are now prosecuted by appellants without lawyers. It is also clear that such litigants cannot successfully get their cases heard and resolved without getting additional help from the courts. Such help can come in the form of simplified procedures, easy-to-understand-and-use forms, and guidebooks written in "plain English." See Robert B. Yegge, "Divorce Litigants without Lawyers: This Crisis for Bench and Bar Needs Answers Now," *Judges Journal 33*, no. 2 (spring 1994), 8-13, 44. Volunteer bar efforts are also helpful. But even these efforts will not succeed unless court staff are capable of providing extensive information to litigants without lawyers and willing to do so.

The Task Force on the Future of California's Courts published *Justice in the Balance, 2020* (December 1993), which recognized the importance of a broader clerk's office information-giving role and the critical need to refine the traditional limitation on the giving of legal advice to accomplish it.

Several issues are confused in the traditional rule that a clerk of court cannot give legal advice. Three topics can be eliminated from the analysis of the core issues—prohibitions on a clerk's practice of law, the traditional rule that the courts are not estopped from enforcing the rules because of a clerk's incorrect advice, and principles of confidentiality.

Most court clerks and administrators are prohibited by statute, rule, or code of conduct from practicing law while serving in the position of clerk. For instance, Fed. R. App. P. 45(a) provides that "neither the clerk nor any deputy clerk shall practice as an attorney or counselor in any court while continuing in office." This principle applies as well to judges (at least to full-time judges). It arises from concern that a clerk might use the power of her or his position in the court to gain an unfair advantage in legal practice. It would certainly be unfair to an opponent for a clerk to be able to represent parties in actions in the court where she or he works. It would also be unfair for a clerk to be able to use the possibility of granting favors to, or imposing punishments on, persons practicing before the court the clerk serves in order to obtain an advantage for the clerk's clients in another court. Being engaged in law practice is inconsistent with the clerk's paramount duty to see that all litigants are treated fairly in the court. But this principle is unrelated to restrictions upon the sorts of advice or information that a clerk should provide to litigants and potential litigants asking about court procedures.

A second extraneous issue is that of estoppel. Courts often intone the "no legal advice" theme when counsel attempts to claim that its failure to follow a procedural rule is based upon misinformation provided by court staff. For instance, in *Brown v. Quinn,* 406 Mass. 641, 550 N.E.2d 134, 136, 137 (1990), the Massachusetts Supreme Judicial Court stated that "the defendant's coun-

sel was not absolved of his procedural responsibilities by the clerk's error . . . it is the responsibility of the bar, not the court staff, to attend to the progress of pending matters."

The intermediate appellate court in Massachusetts reached the same conclusion in *Krupp v. Gulf Oil Corp.,* 29 Mass. App. 116, 557 N.E.2d 769, 771 (1990): "We know of no authority for treating as excusable neglect reliance on a clerk's incorrect advice concerning a general principle of law." The Wyoming Supreme Court, in *Wyoming ex rel. Wyoming Workers' Compensation Division v. Halstead,* 795 P.2d 760, 775 (1990) said "She was acting in performance of the ministerial duties of the Clerk of Court. She could not give legal advice, and, if she did, respondent acting through his guardian could not rely thereon for the purpose of estoppel."

While courts may want to prohibit all advice and information giving by court staff to forestall all such claims (by giving them a presumptive lack of credibility), the needs of the courts to provide better public service to a growing part of its constituency (pro se litigants) makes this simplistic defensive device unavailable. The courts can continue to maintain the non-estoppel doctrine while authorizing staff to give a wider range of information. For instance, signs in court clerks' offices might read: "Litigants may not rely on information or advice provided by court staff that proves to be inconsistent with the law or rules of procedure."

A final subject improperly confused with "giving legal advice" issues is that of confidentiality. Note the National Association for Court Management's classification of the rule as a matter of confidentiality. Court staff should be made aware of the need for absolute secrecy concerning the possible outcome of all pending matters. A court staff member should be fired for leaking the contents or outcome of a court opinion to a party or to the press before it is made public. This is also true for information concerning the actual date that a decision will be rendered (as contrasted to the court's general practices concerning issuing opinions). But disclosing confidential information of this sort would not usually be considered the giving of legal advice. Nor is the throttling of court staff a necessary or appropriate means of preventing the improper disclosure of confidential information.

What are the principles that court staff should keep in mind when providing advice and information to court users? I would suggest these four general notions:

Court staff have an obligation to explain court processes and procedures to litigants, the media, and other interested citizens. Court staff have a unique understanding of the way in which the court functions. It is often superior to the understanding of the attorneys who practice in the court. It is to the advantage of the court, the lawyers, and the litigants for court staff to share that knowledge. Court proceedings are more effective when everyone operates with the same expectations concerning the ground rules.

As noted above, the court will not be able to resolve pro se litigation fairly or expeditiously unless it provides a great deal of additional information to litigants representing themselves. This information may take the form of sample pleadings and information packets (for instance, on discovery practices, options, and obligations). But it also includes the provision of information by court staff in response to individual inquiries.

Court staff have an obligation to inform litigants, and potential litigants, how to bring their problems before the court for resolution. It is entirely appropriate for court staff to apply their specialized expertise to go beyond providing generalized information (how do I file a lawsuit?) to giving detailed procedural guidance (how do I request a hearing? what does the court like to see in an application for fees, a motion for default, a child support enforcement order, a motion to suppress evidence, or an application for letters testamentary?)

Any advice that a court staff member gives, which is limited to this purpose and function, is appropriate—including the provision of references to applicable rules, statutes, or court precedents, the supplying of forms or examples of pleadings commonly used by other counsel, or the articulation of the reasons for the court's preferring a particular process. Such advice is helpful to the party receiving it. The party might have committed a fatal procedural mistake without such advice. But the fact that it is helpful does not make it improper. The court system has an interest in seeing that disputes are decided on their merits. Court staff should help litigants to use procedures to reach that end, not erect them as hurdles over which court users will stumble.

Court staff cannot advise litigants whether to bring their

problems before the court, or what remedies to seek. Court staff cannot advise court users whether to avail themselves of a particular procedural alternative. We can never know enough about a litigant's personal position to know what is in that litigant's best interests. That is uniquely the lawyer's role.

Court staff must remain ever mindful of their 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. Giving the sorts of procedural information required in answering the nine questions at the beginning of this article does not cross the "impartiality" line. It is equally available to all litigants. It helps both (or all) sides to present their case to the judge for decision on the merits.

Advising a party *what* to do (rather than *how* a party might do what it desires to do) crosses the line from impartiality to partiality. It invites a deputy clerk to act on behalf of one litigant to the detriment of another. The clerk owes an equal duty to both.

Court staff should be mindful of the basic principle that counsel may not communicate with the judge ex parte. Court staff should not let themselves be used to circumvent that principle, or fail to respect it in acting on matters delegated to them for decision. This principle requires a little explanation. Today many courts delegate significant decision-making authority to clerks' offices, especially on procedural matters, and costs and fee awards. Clerks' office staff must be aware of the need to follow traditional principles of avoiding *ex parte* contacts in the way in which they exercise such decision-making discretion.

It is clear that the traditional prohibition against "giving legal advice" does not help a staff member understand or correctly apply these five principles. We should rescind the old phrase and substitute these principles in its stead. For staff to understand them thoroughly, clerks should provide full explanations of them and use hypothetical questions to demonstrate their proper application to every day work situations.

One national court administration organization has already recognized the applicability of these more helpful general principles applicable to the provision of information by clerks' offices. The National Conference of Appellate Court Clerks includes the following in subsection B of Canon III (titled "An Appellate Court Clerk Should Perform the Duties of Office Impartially and Diligently").

> An appellate court clerk should exercise great care and discretion in initiating or considering exparte or other communications concerning a pending or impending proceeding. However, an appellate court clerk may be called upon in the course of his or her duties to explain to litigants and their counsel the rules, operating procedures, and other practices of the court. Such explanations should always be rendered in an impartial manner, so as not to advantage or disadvantage any litigant. A clerk should never offer explanations to one party that the clerk would not share with the opposing party.

Sample Guidelines for Providing Information

The following are one clerk's attempt to provide useful guidance to staff in dealing with requests for information.

All staff are expected to perform these tasks:

- Provide information contained in docket reports, case files, indexes and other reports.
- Answer questions concerning court rules, procedures and ordinary practices; such questions often contain the words "can I" or "how do I."
- Provide examples of forms or pleadings for the guidance of litigants.
- Answer questions about the completion of forms.
- Explain the meaning of terms and documents used in the bankruptcy process.
- Answer questions concerning deadlines or due dates.

In providing information, staff will not:

- Give information when they are unsure of the correct answer; transfer such questions to supervisors.
- Advise a litigant 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.
- Take sides in a case or proceeding pending before the court.
- Provide information to one party that you would be unwilling or unable to provide to all other parties.
- Disclose the outcome of a matter submitted to a judge for decision, until the outcome is made public, or the judge directs disclosure of the matter.

CM