

## Pro Se Users, Reference Liability, and the Unauthorized Practice of Law: Twenty-Five Selected Readings\*

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*Professor Healey offers a short, annotated list of readings that he feels are particularly helpful to anyone interested in the subjects of pro se library patrons, reference liability, and the unauthorized practice of law.*

¶1 Reference liability and the unauthorized practice of law are perennial topics of interest to law librarians. There is, as a result, a large body of library literature on the topic.<sup>1</sup> This relatively short and highly opinionated annotated bibliography brings together a number of those articles that I feel ought to be reviewed by anyone who wishes to learn more about these topics.

¶2 The bibliography is divided into three sections. The first section deals with articles on the general topic of reference liability. Most of these are written for a general library, as opposed to law library, audience. The second section lists articles relating to unauthorized practice of law and pro se users. These articles are mostly aimed at the law library audience. The final section provides references to legal literature discussing the history and public policy underlying unauthorized practice of law doctrine. None of the articles in this section directly address librarianship.

¶3 I should make my own biases on this topic clear at the outset. I have done research and written in this area, and two of the articles included here are mine.<sup>2</sup> My work has led me to the conclusion that the risk of liability arising out of reference interactions is almost nonexistent.<sup>3</sup> I also feel that engaging in unauthorized practice of law during a reference interaction is perhaps a technical possibility, but

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1. I have so far collected over fifty articles from the library and legal literature on reference liability and unauthorized practice. There are also book excerpts and other materials that address the same issues. Readers wishing to find other articles on the topic can do so by searching such indexes as LegalTrac, *Library Literature*, and *Library and Information Science Abstracts*. Subject classification of such articles varies both within and between indexes, but searching such terms as “malpractice,” “negligence,” and “unauthorized practice” in combination with variations on “library” and “librarian” will usually get results.
2. Paul D. Healey, *Chicken Little at the Reference Desk: The Myth of Librarian Liability*, 87 *LAW LIBR. J.* 515 (1995) [hereinafter Healey, *Chicken Little*]; Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 *LAW LIBR. J.* 129 (1998) [hereinafter Healey, *Delicate Balance*].
3. Healey, *Chicken Little*, *supra* note 2, at 530–32.

not a practical one.<sup>4</sup> By that I mean that no librarian will ever be prosecuted for unauthorized practice of law while engaging in normal reference activities. A number of the authors included here disagree with my stance on both these issues. In spite of my position, I do believe that for ethical reasons law librarians should take a relatively hands-off approach to pro se users. Because of that, many of the articles listed below contain advice that I would agree with.

¶4 While most of the articles are included because of their importance to the field, or because I feel they offer good guidance, some are included as demonstrations of poor or inadequate analysis. My annotations to the articles should make it clear how I feel about them.

¶5 One of the ironic, and unfortunate, realities of the library literature on reference liability and unauthorized practice of law is that an astonishing number of articles are written by nonlawyers who, in the course of telling people not to give legal advice or practice law, end up giving legal advice and, at least in theory, practicing law. I am not sure why someone not trained in law would feel that they have the knowledge and skill to hold forth on legal topics, but they do. Such articles are generally “safe” in the sense that, being alarmist in nature, they uniformly advise people to be very conservative in what they do at the reference desk. That said, they are replete with faulty legal reasoning, misunderstood concepts, and outright misinformation. In addition, to the extent they advise librarians to limit services or avoid helping pro se users, they risk putting librarians in the position of violating their ethical obligation to provide the full measure of assistance possible without engaging in unauthorized practice. Only one or two such articles are included here.

¶6 This is a controversial area, and clear guidance is hard to come by. The articles in this bibliography will give you a look at the breadth of opinion on the topic, and allow you to review the logic, evidence, and advice on each side of the issue. This, in turn, should help you make your own judgments about how you should conduct yourself as a librarian when assisting users.

### Reference Liability in General

1. Angoff, Allan, “Library Malpractice Suit: It Could Happen to You,” *American Libraries* 7 (1976): 489.

This little gem is one of the oldest articles on the topic in the general library literature and may have started the persistent but apocryphal belief that some library somewhere has been sued for reference activities. Aimed more at provoking than informing, it is presented as a news account about a suit against a library over false information in a reference work. At the very end it is revealed that the account is fictional. Riddled with legal errors, it is notable only for its effect on subsequent literature.

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4. Healey, *Delicate Balance*, *supra* note 2, at 138–42.

2. Del Vecchio, Rosemary, "Privacy and Accountability at the Reference Desk," *Reference Librarian* 38 (1992): 133–40.

This is an interesting and worthy article. Del Vecchio points out that in the case of libraries, apart from circulation records, there are no laws protecting confidentiality. Therefore any obligation to protect exchanges at the reference desk derives from ethics, not law.
3. Diamond, Randy, and Martha J. Dragich, "Professionalism in Librarianship: Shifting the Focus from Malpractice to Good Practice," *Library Trends* 49 (2001): 395–414.

This new article is well worth reading for anyone concerned about malpractice for librarians. In lucid, readable text Diamond and Dragich explain why malpractice litigation involving librarians has failed to materialize, and then go on to explore the issue of professionalism and the role of professional standards. In addition to demonstrating that the risk of malpractice liability is very small, they make a case for changing the emphasis of the discourse from avoiding liability to enhancing professionalism.
4. Dragich, Martha J., "Information Malpractice: Some Thoughts on the Potential Liability of Information Professionals," *Information Technology & Libraries* 8 (1989): 265–72.

This is a thoughtful and well-written piece on the issue of liability. Dragich takes both Angoff (see entry no.1) and Nasri (see entry no. 7) to task on the issue of liability. She points out that malpractice involves the breach of a professional duty that causes actual harm to a client. This is not the same, as Nasri would have it, as guaranteeing a satisfactory result in every transaction. Dragich raises interesting points about the problems of online information and the complicating effects of the economic value of information.
5. Gray, John A., "Personal Malpractice Liability of Reference Librarians and Information Professionals," *Journal of Library Administration* 9, no. 2 (1988): 71–83.

This is an excellent and thoughtful article that examines liability issues relating to librarians. Gray makes a crucial distinction between reference librarians, special librarians, and information brokers, and analyzes the risk of liability for each group separately. As to reference librarians, he finds little or no reason to believe that liability is imminent.
6. Healey, Paul D., "Chicken Little at the Reference Desk: The Myth of Librarian Liability," *Law Library Journal* 87 (1995): 515–33.

This article looks at the general risk of incurring liability for activities at the reference desk. It surveys the literature and then tests the theories presented in other articles against standard legal theory. The conclusion is that there is virtually no risk of liability for reference activities so long as librarians act as experts on finding information rather than experts on the information found.
7. Nasri, William Z., "Malpractice Liability: Myth or Reality?" *Journal of Library Administration* 1, no. 4 (1980): 3–6.

Nasri, a lawyer and library school professor, feels that liability arising from reference interactions is inevitable, although apparently only because liability is

occurring in other professions. He assumes the bizarre position that a librarian can be sued when information is wrong because the information provided at the reference desk is guaranteed to be correct. He also claims that “the person who provides the information is liable for the harm caused by it” (p.5). This is a patently false statement. Not only is there no legal precedent for such a claim, there is at least one decision that holds the opposite.<sup>5</sup> Despite his credentials, Nasri’s reasoning on this topic is not to be trusted.

8. Stover, Mark, “Confidentiality and Privacy in Reference Service,” *RQ* 27 (1987): 242–44.

This is another article that addresses the issue of confidentiality at the reference desk. Stover concludes that there is no legal privilege to communications between librarian and user, and no legal sanction for violation of confidentiality.

### Unauthorized Practice of Law and Pro Se Users

9. Begg, Robert T., “The Reference Librarian and the Pro Se Patron,” *Law Library Journal* 69 (1976): 26–32.

This is one of the earliest articles on the topic. Begg lists various possible motivations for becoming a pro se litigant and also discusses the problems pro se users are perceived to cause for the library. He recommends excluding pro se users from the library entirely if possible. Otherwise he suggests enforcing registration and fees for library users, establishing service limitations, identifying problem users, making referrals, using pamphlets and research guides, and giving them “the old run-around.” While his suggestion to use deceit in dealing with users is a bit unsound, his descriptions of why people become pro se litigants, and the issues they raise, are quite useful.

10. Brown, Yvette, “From the Reference Desk to the Jail House: Unauthorized Practice of Law and Librarians,” *Legal Reference Services Quarterly* 13, no. 4 (1994): 31–45.

This is one of the most widely cited articles on the topic. Brown feels that almost any reference interaction involving legal materials is, in some sense, practicing law. She says that pro se users are “seeking legal advice” and are “unaware of the fundamental differences between the services of an attorney and the services of a librarian.” She worries that reference interviews can lead to unintentionally dispensing legal advice. The article proposes a number of measures to be taken, from verbal disclaimers to distributing handouts and other materials. It is worth reading for these suggestions.

11. Condon, Charles J., “How to Avoid the Unauthorized Practice of Law at the Reference Desk,” *Legal Reference Services Quarterly* 19, no. 1–2 (2001): 165–79.

This relatively recent article sums up a fairly reasonable approach to dealing with pro se litigants at the reference desk. Of particular note is Condon’s mention of the potential uses for online resources in assisting pro se users.

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5. *Osmond v. EWAP, Inc.*, 200 Cal. Rptr. 674 (Ct. App. 1984).

12. Graecen, John M., “‘No Legal Advice from Court Personnel’ What Does That Mean?” *The Judges Journal* 34 (Winter 1995): 10–15.

This oft-cited article relates directly to court personnel, but has many implications for law librarians. Graecen points out that the practice of law is undefined, and consequently it is impossible to determine what is and is not legal advice. He feels that this ambiguity has negative implications for the court and the public, and that court personnel must sometimes assist people in ways that could be seen as giving legal advice. He concludes with guidelines.

13. Healey, Paul D., “In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron,” *Law Library Journal* 90 (1998): 129–47.

This article looks at the attitudes of librarians toward pro se library users and then explores the underlying theories on which those fears are based. The article concludes that the risk of being accused of unauthorized practice of law in the library is slight, but that questions of ethics indicate that librarians should take a hands-off approach to assisting pro se users.

14. Kirkwood, C. C., and Tim Watts, “Legal Reference Service: Duties v. Liabilities,” *Legal Reference Services Quarterly* 3 (Summer 1983): 67–82.

This article takes a very severe approach to pro se users. Particularly troubling is the strict hierarchy of service that Kirkwood and Watts propose and the distrust with which they approach pro se library users. They feel that pro se users should not be helped at all unless some specific institutional mandate requires it, and that a reference librarian must be prepared to control the flow of information to a user, “turning it on and off like a spigot.” They note that law librarians can’t “hide the law” but shouldn’t be “spreading the word.” This is a very troubling article, and its approach to the issue raises a number of serious ethical issues.

15. Leone, Jerome, “Malpractice Liability of a Law Librarian?” *Law Library Journal* 73 (1980): 44–65.

Leone feels that law librarians are not overstepping the bounds of unauthorized practice in their normal duties and that authorities concede much greater latitude than librarians realize. He also raises the issue of whether pro se users in fact have an affirmative right to legal assistance from law librarians. Leone says that law librarians are not limited to handing out books, but can also suggest topics. He says that if the assistance provided to a user does not amount to the unauthorized practice of law, then that prohibition should not be employed as an excuse for not serving a user.

16. Mills, Robin K., “Reference Service vs. Legal Advice: Is It Possible to Draw the Line?” *Law Library Journal* 72 (1979): 179–93.

By any standard, this is one of the classic articles on the topic of legal advice and reference service. Mills takes the position that almost any reference interaction involving legal materials is, in some sense, practicing law. She fears that there might be an implied attorney-client relationship at the reference desk through the concept of agency, or that an attorney/librarian might be held to an attorney-client relationship with pro se users and liability could result. In spite of this, law libraries are unlikely targets for enforcement even if they are giving advice. In fact, Mills worries that users have little recourse for harm from law librarians.

17. Mosley, Madison, Jr., "The Authorized Practice of Legal Reference Service," *Law Library Journal* 87 (1995): 203–09.

This article is one of several that take a more open and proactive approach to pro se users. In contrast to Brown (see entry no. 10), Mosley questions whether pro se users, even when they see law librarians as subject experts in law, actually confuse this with being a lawyer. He contends that pro se users in a law library are seeking reference help, not legal advice, and know the difference between the two. He feels that legal reference can be differentiated from the practice of law by avoiding the performance of legal services for a third party, and that law librarians supplying legal reference services are not performing lawyerly functions. Mosley also feels that law librarians should stop focusing on what constitutes the practice of law and begin concentrating on not performing lawyerly functions. He points out that the search for legal materials only brings together the elements that must be analyzed in a legal problem. It is the analysis that constitutes legal advice and that is what law librarians should avoid.

18. Protti, Maria E., "Dispensing Law at the Front Lines: Ethical Dilemmas in Law Librarianship," *Library Trends* 40 (1991): 234–43.

Protti is another activist on the issue of assisting pro se users. She feels that any difference between legal reference service and legal advice is a fallacy. Law librarians should be proactive, dispensing understandable, timely, relevant, complete, and appropriate information to pro se users. She feels that lawyer/librarians may well know more than other lawyers about a given area, and in such a case should advise a pro se user. In contrast to Mills (see entry no. 16), Protti feels that the availability of legal remedies protects the user, and therefore librarians should not be prevented from interpreting the law. She also feels that accountability may improve the provision of information.

19. Schanck, Peter C., "Unauthorized Practice of Law and the Legal Reference Librarian," *Law Library Journal* 72 (1979): 57–64.

This article focuses on practical advice in dealing with pro se users. Schanck says that suggesting a book, index terms, or a source might all be activities that constitute interpreting the law. He proposes some "don'ts" for avoiding the unauthorized practice of law, including not soliciting a detailed description of the user's situation, answering an abstract question with a black and white answer, and not telling a pro se user what something means.

### **Legal Sources on Unauthorized Practice of Law**

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

This report arose out of recent criticism of the bar's stance on unauthorized practice. It provides a fairly good history of the unauthorized practice issue and generally recommends a loosening of unauthorized practice standards. Although it does not have the force of law, the report's casual mention of law librarians should be noted: "Informal help with legal problems, coming from neighbors, friends, coworkers, religious advisors, teachers, social workers, *law librarians*

and others who have had experience handling a similar legal problem or who are considered to be reliable sources of information, has not generally been considered unauthorized practice” (p.35, emphasis added).

21. Apsan, Moses, “Note: Assisting the Pro Se Litigant: Unauthorized Practice of Law or the Fulfillment of a Public Need?” *New York Law School Law Review* 28 (1983): 691–724.

Apsan describes the right to proceed pro se and gives background on defining the practice of law and unauthorized practice of law. He outlines the exceptions to unauthorized practice of law prohibitions and gives some examples of lay assistance in areas such as divorce. The article does not address librarianship, but the concepts he discusses clearly apply to library activities. He says that concerns about liability should take a backseat to the need to provide full and adequate service, and to provide some assistance to those who might not otherwise receive it.

22. Christensen, Barlow F., “The Unauthorized Practice of Law: Do Good Fences Make Good Neighbors—or Even Good Sense?” *American Bar Foundation Research Journal* 1980, no. 2: 159–216.

An excellent, if lengthy, explanation of the history of unauthorized practice of law prohibitions in America and the public policy behind those prohibitions. Christensen highlights the struggle between self-interest and protecting the public that has marked prosecutions for unauthorized practice, concluding that the regulation of unauthorized practice should take into account nonlawyer activities that promote the public good.

23. Denckla, Derek A., “Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters,” *Fordham Law Review* 67 (1999): 2581–99.

This article provides excellent background on the history and policy behind prohibitions against unauthorized practice of law. Denckla argues that the prohibitions are too strict and ultimately harm the public—especially the poor.

24. Kim, Helen B., “Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard,” *Yale Law Journal* 96 (1987): 1641–60.

Kim takes the stance that the strict prohibitions against unauthorized practice of law interfere with the right to be heard in civil court. She proposes a system of legal education for pro se litigants.

25. Rhode, Deborah L., “Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions,” *Stanford Law Review* 34 (1981): 1–98.

Rhode is one of the preeminent legal scholars on unauthorized practice issues and is also a critic of strict prohibitions. This study of current unauthorized practice of law enforcement efforts concludes that most are aimed at form preparation services that appear to be a threat to the bar. Almost none of the surveyed complaints arose out of a complaint of injury by a consumer.