Dispensing Law at the Front Lines: Ethical Dilemmas in Law Librarianship

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ABSTRACT

THE LAW LIBRARIAN has special ethical dilemmas because transferring information is so important in the American legal system. A duty exists, the article states, to keep legal queries confidential, but there is no clearly defined duty for the librarian not to comment on the law. Other concerns discussed are providing services to those neglected by lawyers and librarians maintaining more than an arm's length relationship with vendors. The possible establishment of an American Association of Law Libraries (AALL) commission to review the ethics of law librarian activities is also covered.

The day-to-day activities of law librarians present many challenges. Like other librarians, law librarians also collect, house, and retrieve information. However, the nature of information that law librarians manage and the services they provide makes their duty different and subject to special concerns.

In the American adversarial judicial system based on *stare decisis* (meaning to abide by decided cases), adequate knowledge of the law is necessary to show convincingly that one has abided by the law or has been wronged (*Neff v. George,* 1936). Legal knowledge depends on distilling legal principles from thousands of cases, and the presentation of that information to judicial decision makers is important for the determination of legal rights of the petitioners. The special nature of these library services stems from the fact that the judicial system in this country depends upon the transfer of legal

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information. Collectively, Americans rely on lawyers to ferret out facts and principles to present before the bench. Judges are not expected to gather information about the case at hand. This reliance on lawyers makes obtaining access to legal knowledge a crucial part of the adequate presentation of one's case.

More specifically, the importance of legal information stems from the common law adversarial system—the foundation of American law. The whole system is based on the concept that the lawyer or petitioner produces evidence and cites precedents that support the stance. A key to winning a case is gaining access to evidentiary facts and legal opinions decided earlier. In the aggregate, the people who have knowledge about legal matters have the power to uphold or change the law. They have the power to encourage the distribution of resources awarded by judges and the power to help make activity illegal. To an individual, knowledge of the law can mean a greater chance of not going to a prison, gaining monetary damages, or stopping the government or a corporation from taking some action. The holder of legal information is able to make a better legal decision than the uninformed. Such decisions as when to sue, who to sue, who to pay, and the likelihood of winning a suit are made by considering what one knows. Knowledge is therefore valuable. Individuals and corporations go to great lengths to uncover information. The dispersal of information about the law helps a democratic America because it helps to ensure that all have an equal position in court. This importance of law argues that law librarians should work to inform with seriousness. They should strive to disclose the law and enable persons to understand it.

In other words, law librarians should work to dispense understandable, timely, relevant, complete, and appropriate information (the goals were first proposed by Jack N. Behrman [1981] who probed the ethical content of business activities). "Understandable" information is intelligible information. To dispense convoluted information is to obfuscate the legal workings of this democracy and to confuse the patron. "Timely" means current law, not superseded law (unless the patron is undertaking historical research). Delivering outdated law is extremely dangerous because the patron may form opinions and act according to rules and regulations no longer in effect. The goal of "relevance" means not just providing accurate information but striving to provide information useful in helping individuals to make legal decisions. "Complete" means making available all general relevant information which helps the patron to understand a legal matter (this does not mean that all information on the topic should be given). "Appropriateness" calls for highlighting some information in certain

instances. For example, detailed reams of statistical data on house buying trends should be called to the attention of the legislative aide drafting a bill on rent control, but it is not necessary to indicate to a high school student who wants to know the definition of the phrase "rent control."

Librarians should attempt to meet ethical objectives based on these five standards. To a law librarian employed by the state in an academic, court, county, legislative, or prison library, the obligees are many and clear. Nonetheless, the librarian employed in the private sector should not exclude these standards. The public librarian owes understandable, timely, relevant, complete, and appropriate information to a community of people. The private librarian is directly accountable to the employer. The difference is the obligee and not the ethical standards. None of the five should be lacking. All of the ethical considerations discussed in this article are really just variations of these five standards.

Stemming from the principle that all Americans should enjoy access to legal information, a probable duty exists for a law librarian to keep confidential the identity of a patron and the nature of a legal query. Anything less than a guarantee of privacy may deter the sensitive patron from seeking information and thereby keep a patron at a legal disadvantage. This deterrence, in a small way, may thwart the workings of the court where justice depends on the transfer of information. This is an age in which persons in the middle and poor classes do not always have the means to employ lawyers (McKay, 1986), but they can take advantage of access to law librarians at governmental libraries. A law librarian should pledge not to divulge information concerning communications between the librarian and the patron just as lawyers would pledge the same for their clients (of course an exception occurs when a librarian, in giving information, is an accessory to a crime to perform an illegal act). A general respect for individual privacy will also preclude decent librarians from prattling about the details of patrons' legal inquiries. Most state legislatures acknowledged the need for such preclusion when they passed into law provisions that disallow librarians to furnish circulation records (i.e., the names of library patrons and the books they read) to anyone (Kennedy, 1989).

A recurring and tough ethical dilemma a law librarian faces is the conflict between wanting to produce information and the danger of practicing law without a license. Many resolve this issue by noting that the librarian should not interpret the law. A common belief is that librarians should not give legal advice because of the harm it could cause laypersons.

> Laymen come into a law library expecting to find people with legal expertise and tend to accept what law library staff members say as accurate statements of the law. Thus the inexperienced and uneducated layperson can...be easily misled by what we tell him.... [A]n individual who is given inaccurate legal advice by an attorney can recover for injuries suffered as a result by suing his lawyer for malpractice but one who relies to his detriment on information he is given by law library personnel does not have nearly as effective a remedy. (Mills, 1979, p. 180)

The availability of a remedy for being misled protects the patron and should not determine whether a librarian can interpret information. Although no known law librarian has been sued for malpractice, lawyers are constantly sued for informational deceit or misrepresentation. Moreover, adequate causes of negligence and concomitant remedies for monetary damages and specific performance exist. Information integrity may even improve if the librarian is subject to possible malpractice suits and held accountable to patrons. In a widely publicized case, the head librarian at a naval air force station was held responsible by the military for failure to update a maintenance manual used by mechanics who inspected a plane. The inspected plane had crashed. The exposure of librarians to similar negligence suits does not seem improper especially in the face of extreme possible damages such as those arising from a plane crash ("Library Head Blamed ..., 1990, p. 940).

Historically, reference services have been closely scrutinized when they are of a legal nature. For at least seventy-five years, writers have cautioned law librarians in the United States to restrain their librarianship by neither giving legal advice nor interpreting the law (Schanck, 1979). Interpretation is clearly employed when one notes particular law associated with a factual situation or predicts the outcome of a case. But the word *interpretation* is relative, although many claim that a line exists between interpretation and noninterpretation.

Upon reflection, the line demarcating the interpretative area is blurred. The stark immediate quandary of a law librarian in helping a patron is whether the librarian may find applicable information—i.e., applying the facts of an immediate case to the analysis of a law. The organization of U.S. legal materials generally follows the organization of the branches of government: legislative codes of statutes and session laws, judicial case reporters, and executive and administrative codes and registers. The very act of selecting a source defines the concern at hand as one being controlled by the legislature, courts, or an executive leader respectively. To choose to refer to a work is to opine a fitting jurisdiction and controlling governmental branch. The identification of relevant books involves some interpretive application of the facts to the law. Within the books, the sections are divided by topic or by jurisdiction, and so the librarian

must choose among subjects or legal forums. The mere retrieval of a book after viewing a parallel citation is problematic. For example, in finding a U.S. Supreme Court case, one is forced to choose between locating the case in an official or an unofficial reporter. Any direction chosen by a librarian on how to find the law involves a selection of certain materials as relevant to the patron's legal needs as does the identification of pertinent law. Yet the fallacy that there is a distinct difference between reference and research or reference and interpretation persists. 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." The librarian can retrieve and copy specific materials as that action "does not require the possession or use of any legal knowledge or skill." This reasoning forces a pretended schism between the integral acts of retrieving and researching, and inhibits the ability of a law librarian to perform any kind of research however simple (Virginia State Bar, 1989).

There is another parameter on the degree of legal reference service that is not placed on other types of librarians. Couched in ethical terms, the American Association of Law Libraries Code of Ethics and Law Library teaching handbooks explicitly state that "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" (AALL Code of Ethics, 1989). That sentiment, that only lawyers should comment on the law, is so strong that lay people who seek legal assistance in a law library may be referred automatically elsewhere (Leone, 1980). Referral clearly works to the advantage of lawyers collectively who hold a monopoly on interpreting legal information.

Even a law librarian who belongs to a bar is counseled not to interpret the law. However, the law librarian specialist may know more about the field than the average lawyer with a passing acquaintance in the particular subfield. Examples of specialists are those law librarians who work at libraries that exclusively center on banking, securities, or tax matters. To reject the notion that all librarians may not comment on the law, is to reject the legal expertise of a double degreed (M.L.S. and J.D.) lawyer. The ethical standard here needs to be rethought especially as bar licensed librarians multiply. No longer can it be assumed that a "lawyer usually has more complete knowledge of the law" or that a "lawyer understands the practical functioning of the legal system" (Schanck, 1979; Public Services Liaison Committee, 1990) although the law librarian does not. Other librarians are allowed to discuss the contents of the material

they manage. If law librarians are competent and able to provide the patron with insight into the workings of the law, they should not be restrained from speaking (Chicco et al., 1991). First Amendment freedom of speech considerations in this area warrant additional investigation.

Further reasons to support the ethical principle that librarians should not "advise" are the notions that a "lawyer has better access to the facts in the case" and "is able to research the law at length" (Schanck, 1979; Public Services Liaison Committee, 1990). These are really temporal constraints concerning the opportunity to interview the client/patron and to collect information. Librarians who have passed a bar and work in the private sector are at times indistinguishable from lawyers. They may not argue in court, but they surely retrieve applicable law and discard inapplicable law just as lawyers do. Like most lawyers, they have a certain readily identifiable clientele (which is largely made up of lawyers), interview their patrons or clients, and even bill for their time. It seems as if the chasm between reference work performed by librarian-lawyers and legal advice given by lawyers is an imaginary one that benefits the legal profession by protecting the profession's claimed turf of legal elucidation.

The AALL supports the principle that law librarians should not opine on the law's application (AALL Code of Ethics, 1989). A mention of the principle appears to be absent from literature concerning ethics promulgated by the American Bar Association (ABA). Ironically and recently, the ABA has made some attempts to encourage nonlawyers to analyze the law especially when no lawyers are available or willing to participate fully in the given case (Krucoff, 1981).

Optimally, the law librarian's business is sharing legal information, and the law librarian concertedly should teach and demonstrate how to use finding aids—especially to population groups that normally do not retain lawyers. The main themes of library school (cooperative lending efforts, public knowledge of governmental information, and outreach to persons who cannot come to the library) conflict directly with the adversarial themes of law school ("hiding the ball" through the Socratic teaching method, competition in oral arguments, and exclusive law review memberships). The cooperative philosophy promulgated by librarians is useful in serving population groups underserved by lawyers. According to the AALL Code of Ethics, the law librarian "has a duty actively to promote free and effective access to legal information" (AALL Code of Ethics, 1989).

This obligation arises from a law librarianship tradition as well as from the knowledge that certain population groups have little

recourse in the courts, the main focus of justice in our society, because they have little access to legal information. After all, 90 percent of U.S. lawyers serve 10 percent of the population (Carter, 1978). The middle-class claims to governmental information may be fulfilled through tax supported libraries. For this reason, law librarians have examined what they can do to help untrained patrons to learn the law. One of the examining forums is the AALL's "Committee on Services to the Public and Legal Resources in Public Libraries."

The law librarian's attitude is one of accommodation and the general AALL attitude has been one of service especially to *pro se's* (individual patrons who are practicing self-help law) (Begg, 1976). *Pro se* patrons deserve the attention of librarians. The U.S. Supreme Court has decided that there is a constitutional right to self-representation in a criminal trial where the accused chooses to represent himself (*Faretta v. California,* 1975). Within this right is an implicit subright that grants the *pro se* defendant an opportunity to read the same tools that the opposing party uses and a probable duty of the librarian to assist in finding the tools (Leone, 1980). Other lay groups that are helped are prisoners and the institutionalized. Law librarians working in the public sector should purchase and make available consumer-oriented self-help law guides to serve these special groups based on the premise that Americans need more information about the law. Self-help law books are in great demand. The major publisher of these books, Nolo Press, keeps more than sixty titles in stock (Nolo Press, 1990).

The relationship between librarians and book dealers or publishers provides another ethical consideration. It should be one that is in accord with standards of accountability. The law librarian should choose vendors based on quality of service and the product and of the reasonableness of the price. Also, the librarian should provide payment promptly. The librarian should discourage personal gratuities and refuse or return any gifts of significant value. One common practice that merits review is the publisher/dealer sponsorship of events at American Association of Law Libraries' meetings. Lavish breakfasts, receptions, and banquets paid for by vendors help the publisher to sell but increase the cost of the product involved. At the 1989 summer AALL annual meeting, for example, one publisher funded a rodeo solely for the law librarian audience complete with a sit down dinner and country band (AALL, 1989). The year before at the annual meeting, a publisher hosted an evening of "the stars" with prizes, games, clips from the television show "LA Law," and even flew in an actor from the show to shake people's hands at the reception. Altogether, more than 4,200 law librarians were invited to each. A law librarian who is responsible for

acquisitions who attends such functions has at best a conflict of interest and possibly an ethically unsound relationship with the vendor. The problem is that attendance can be difficult to avoid. Lavish receptions are regularly combined with AALL business and professional meetings. Some believe that without such publisher subsidy, attendance at the meetings would fall. Nonetheless, the AALL might rethink its propensity to rely on vendor sponsorship for social events better paid for by the individuals in attendance and on vendor sponsorship of educational and professional programs.

Law librarians should also generally not act as paid consultants for a publisher who sells books to the librarian's employer. An example of such action is evidenced by the increasing number of publisher advisory boards composed of law librarians. Members of the board allow the use of their names for advertising, sometimes fly to funded special meetings, and may attend seminars hosted by the vendor by invitation only. Yet these same board members work for employers who make thousands of dollars in annual payment to the hosting publishers. Some laudable board members, who recognize the ethical dilemma, donate their advisement fees to their law schools or a scholarship fund (Mid-America Law Libraries Association, 1989).

Law librarians believe that their work necessitates a special code of ethics that is not entirely reflected in the American Library Association's Code of Ethics nor in the American Bar Association Code of Ethics. The AALL Code, effective September 1978, addresses matters of conduct peculiar to this hybrid profession. The drafters of that code hoped that the AALL administration would sanction those who did not abide by the code. They wanted an "ethics commission" to be established with commissioners holding staggered terms. The commission would issue advisory opinions on the ethics pertinent to any stipulated set of facts presented by any aggrieved individual or institutional member of AALL. The purpose of the commission would be to decide whether the conduct described in the stipulated facts abides by the AALL Code of Ethics. Enforcement would rest with the complainant. The commission would create and publish a body of advisory opinions that would serve to guide the determination of violative conduct and allow for minority opinions (Dupont, 1979). For whatever reason, the commission never came into being and the AALL now administers no formal sanctions for code indiscretions. The absence of opinions on ethical matters limits standards. A profession that neither airs ethical grievances nor polices itself is missing an opportunity to achieve high levels of service. Therefore, members within AALL should work to establish the envisioned commission.

During the last twenty-five years, the amount of litigation in

this country has increased at an astounding rate. As persons in our technological society become more interdependent, due to communication and transportation innovations, the need for legal boundaries burgeons. Concomitantly, the role of the law librarian in disseminating the law strengthens, especially as lawyers become overwhelmed with learning a vast amount of law (Posner, 1987). No one profession deals with the law autonomously. Law librarians are increasingly called upon to explain, distinguish, and find judicial opinions, statutes, and rules. They are exposed to more and more diverse and constant ethical dilemmas. Their particular predicaments should not go unnoticed.

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