

## Chapter 9

### Avoiding the Unauthorized Practice of Law

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#### Introduction

Illinois, like all American jurisdictions, generally enjoins the practice of law by anyone not admitted to the state bar. It is important that law librarians, both those with and without J.D.s, recognize when and whether a particular reference answer might be straying too close to the line separating providing reference service from the unauthorized practice of law (UPL).

#### The Law

In Illinois, the admission of attorneys to the bar and the regulation of their practice is governed by the Attorney Act, 705 Ill. Comp. Stat. § 205/0.01 *et seq.* (2011)<sup>13</sup>, and the Illinois Supreme Court Rules, Article VII, Rules on Admission and Discipline of Attorneys.<sup>14</sup> Section one of the Attorney Act provides:

No person shall be permitted to practice as an attorney or counselor at law within [Illinois] without having previously obtained a license for that purpose from the Supreme Court of this State... 735 Ill. Comp. Stat. § 205/1 (2011).

Neither the Attorney Act nor the Illinois Supreme Court Rules define the phrase “unauthorized practice of law.”<sup>15</sup> However, the Illinois Supreme Court has broadly defined the provision of legal services as “when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.”<sup>16</sup> Broadly, the practice of law is not limited to appearing in court on behalf of a client. “When lawyers give transactional advice and engage in similar non-court representation of clients, the cases hold that they are practicing law.”<sup>17</sup>

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<sup>13</sup> Available at <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=1853&ChapterID=50&Print=True> (all Websites last visited September 4, 2012).

<sup>14</sup> Available at [http://www.state.il.us/court/supremecourt/rules/art\\_vii/artvii.htm](http://www.state.il.us/court/supremecourt/rules/art_vii/artvii.htm).

<sup>15</sup> However, Illinois Supreme Court Rule 779 governs the proceedings against those accused of unauthorized practice of law, *see* Ill. Sup. Ct. R. 779 (“Unauthorized Practice of Law Proceedings”). The fact that Illinois does not define the practice of law by statute or rule is not unique: “A 1994 ABA survey indicated that 13 jurisdictions have adopted no definition of the “practice of law,” and three others did not respond to the survey. Of the 35 jurisdictions that reported that they had a definition, one could find that definition only in the case law in 28 of the 35 jurisdictions.” Legal Ethics, Law. Deskbk. Prof. Resp. § 5.5–3 (2012-2013 ed.).

<sup>16</sup> *People ex rel. Ill. State Bar Ass’n v. Schafer*, 404 Ill. 45, 50 (1949). For more on the unauthorized practice of law, geared toward a member of the public, see Illinois State Bar Association, “ISBA and the Unauthorized Practice of Law – What the Public Needs to Know.” available online at <http://www.isba.org/sites/default/files/committees/uplfaq.pdf> and providing information for *pro se* patrons seeking no- or low-cost legal aid.

<sup>17</sup> Legal Ethics, Law. Deskbk. Prof. Resp. § 5.5–3 (2012-2013 ed.).

### Applying the Law to Reference Services

Reference librarians can often be confronted with the possibility of providing legal advice, even unintentionally, while providing reference services. It is important to remember that while we strive as reference librarians to provide our patrons with the “right” answer, there are times when we must limit what we say so as not to run afoul of the law.

Thus, while we can provide an answer to the question, “In which year was *Bivens v. Six Unknown Federal Narcotics Agents* decided?”, and while we can show a patron how to find *Bivens* in the *U.S. Reports*, we cannot tell a patron what the holding in *Bivens* means, or whether *Bivens* is still good law, or whether a cause of action exists for the patron under the facts of *Bivens*.

But, at the same time, we can direct a patron to a treatise on constitutional torts, where she can read about the nature of *Bivens* claims and how *Bivens* has been construed and applied. We can direct a patron to *Causes of Action*, where she might find a sample complaint setting up a *Bivens* claim and how to plead a *Bivens* cause of action (though we could not direct her to the *correct* form to use). And we could show her *how* to Shepardize *Bivens* (or another case or statute), providing we did not analyze the results of her efforts.

It is also the case that lay persons are allowed to represent themselves in criminal cases.<sup>18</sup> The right is extended to lay persons in Illinois in civil cases as well.<sup>19</sup> Thus, a layperson seeking resources to assist in her case or transaction can be helped by a librarian in locating such resources, again, so long as legal advice is not provided:

Assume that a lay person wishes to write her or his own will. If the lay person asks the law librarian where the self-help books on writing wills are located, the law librarian, without violating the rules against unauthorized practice, can direct a layperson to the books on wills. “Go to aisle 14, and there are the books on wills.” The law-librarian is not aiding the “unauthorized” practice of law because the lay person is authorized to represent herself or himself. Legal Ethics, Law. Deskbk. Prof. Resp. § 5.5–3 n. 38 (2012-2013 ed.).

Thus, while we should be careful not to cross the line into extending legal advice, nor should we as librarians be overly fearful of fulfilling our duties to the extent possible, which includes directing patrons to the resources most likely to help them, and instructing on their use (without instructing, necessarily, on their meaning).

### Conclusion

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<sup>18</sup> The Sixth Amendment right to represent oneself in criminal cases was established in *Faretta v. California*, 422 U.S. 806 (1975).

<sup>19</sup> “Plaintiffs shall have the liberty of prosecuting, and defendants of defending in their proper persons.” 705 Ill. Comp. Stat. § 205/11 (2011).

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While the research undertaken for this chapter did not reveal any cases (judicial or administrative) in which UPL proceedings were brought against a reference librarian, nonetheless the possibility exists, most likely at the behest of a patron to whom the librarian, with the best of intentions, inadvertently crossed the line from providing direction (“this might be a helpful book”) to advice (“this is the form you want”). While we often see it as our duty to provide our patron exactly the answer she is looking for, when it comes to legal advice, regardless of our training and background, there is a line that should not be breached.