

# Distinguishing Legal Information from Legal Advice

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CLERKS  
CANNOT  
GIVE  
LEGAL  
ADVICE

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MEANINGLESS

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## Problems with a vague standard

- Clerks tend to give less information
- Practice varies from court to court and clerk to clerk and day to day
- Clerks don't treat everyone the same
  - Against laypersons and in favor of lawyers
  - Against difficult people and in favor of nice ones
  - Depending on the workload
  - Against minorities

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## Standards that don't work

- Involving activities commonly performed by lawyers
- Requiring knowledge "greater than that possessed by the average citizen"
- Substance versus procedure
- Potential effect on the outcome of the case
- Importance to the requester
- Information applicable to a specific fact situation
- Situations where giving a different answer would constitute legal malpractice

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## Principles upon Which to Build a Sound Policy

- The courts must provide information to court users about how the process works
- The limitations on what court staff can provide derive from ethical principles governing the courts
- Court staff need clear guidelines

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## Ethical Obligations of Court Staff

- To remain impartial
  - with respect to parties in a case
  - with respect to lawyers
- To maintain confidential information
- To avoid ex parte communications
- To perform competently

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## State and Federal Guidelines

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|--------------|--|
| ■ California | ■ New York                                   |
| ■ Florida    | ■ North Dakota                               |
| ■ Idaho      | ■ Utah                                       |
| ■ Iowa       | ■ Wisconsin                                  |
| ■ Michigan   | ■ Federal Judicial Center training materials |
| ■ Missouri   |  |
| ■ New Mexico |  |
| ■ New Jersey |  |

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## Definitions

- **Legal information**  
Facts about the law and the legal process
- **Legal advice**  
Advice about the course of action a client should take to further his or her own best interests

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## General Guidelines

### ■ Legal information

Staff should answer questions that call for factual information – questions that start with “who,” “what,” “when,” “where,” or “how.”

### ■ Legal advice

Staff should not answer questions that call for an opinion about what a litigant should do – questions that contain the words “should” or “whether.”

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## General Guidelines

### ■ Legal information

Staff should tell a litigant how to bring an issue to the attention of the court.

### ■ Legal advice

Staff should not suggest whether it is wise to bring that issue before the court, how best to present the issue, or how the judge is likely to decide the case.

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## General Guidelines

### ■ Legal information

Staff should inform a litigant of his or her options and the steps to carry out an option

### ■ Legal advice

Staff should not suggest which option the litigant should pursue

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## General Guidelines

- If you don't know, don't guess.
- Even if you would be allowed to provide the information if you knew it, you must say "I don't know" if you are not sure.
- Refer these questions to a supervisor.

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## North Dakota's guidelines

- Staff can explain common, routinely employed court rules and procedures
- Staff cannot suggest which of several available procedures a litigant should follow
- Staff should not attempt to apply a rule to the facts of a litigant's case

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## North Dakota's guidelines

- Staff can tell litigants how to file a complaint or other pleading
- Staff cannot advise litigants whether to file a complaint or other pleading, whom to name as a defendant in a complaint, what sort or amount of damages to seek, what arguments to include in a complaint or pleading, or what arguments to make in response to a filing by the other side

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## North Dakota's guidelines

- Staff can provide litigants with pamphlets or information on how to present evidence in court
- Staff cannot tell litigants specific questions to ask witnesses in court
- Staff cannot recommend techniques for presenting evidence in court
- Staff cannot recommend objections to raise to motions or evidence submitted by the other side

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## North Dakota's guidelines

- Staff may tell litigants how to request a continuance
- Staff may not recommend to litigants whether to request a continuance

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## North Dakota's guidelines

- Staff can tell litigants what to do when they have settled a lawsuit
- Staff cannot recommend when or whether a litigant should settle a dispute

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## North Dakota's guidelines

- Staff can explain the process for appealing a judge's decision
- Staff cannot recommend whether a litigant should appeal a judge's decision

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## North Dakota's guidelines

- Staff can provide information about past rulings in a case
- Staff cannot predict what the court will do

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## North Dakota's guidelines

- Staff can provide cites to (or show litigants how to find) statutes, court rules, and ordinances
- Staff cannot provide an analysis or interpretation of statutes or ordinances based on the specific facts of a litigant's case
- Staff cannot perform legal research for a litigant

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## North Dakota's guidelines

- Staff can explain what records are kept by the court and provide those records that can be made available to the public (including confidential files pertaining to the requestor)
- Staff cannot provide access to court records that are sealed

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## North Dakota's guidelines

- Staff should recommend the use of a lawyer and provide information concerning lawyer referral services and legal aid
- Staff cannot recommend a specific lawyer

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## North Dakota's guidelines

- Staff can provide forms and instructions, and record on the forms information provided by the litigants if the litigants are not capable of filling out the form themselves
- Staff cannot provide or suggest the information that should be entered on the forms

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## North Dakota's guidelines

- Staff can provide general information about the courts, procedures and legal terminology
- Staff cannot provide advice about the course of action a litigant should take to further his or her own personal interests

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## North Dakota's guidelines

- Staff shall not disclose the outcome of a case before the information is released to the public
- Except in emergencies, staff should tell litigants to put in writing information that they want to convey to the judge and provide a copy to the other side
- In emergencies, staff may convey to the judge information provided orally by a party

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## Guidelines are not enough

- Clerks need procedures manuals to which they can refer for correct answers to procedural questions
- Clerks need standard handouts on FAQs, such as service of process
- Clerks need training
- Clerks need customer service skills

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