Legal Advice vs. Legal Information Ann M. Anderson Training for New Clerks of Superior Court January 15, 2015 WWW.sog.unc.edu

What's a clerk to do?

You're talking to long-time friend on a Sunday afternoon. His father's mental health is declining, and he doesn't know what to do to help him. He wonders if you can give him some advice about his options.

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What's a clerk to do?

- You run into your neighbor at the post office. She tells you she has petitioned for her mother to be found incompetent. (One of your assistants hears guardianships.)
- She starts to tell you about her mother and asks your advice on how to testify at the hearing.
- What should you do?



The Law

• G.S. 84-4:

"[I]t shall be unlawful for any person...except active members of the Bar...admitted and licensed to practice as attorneys-at-law, to [practice law]."

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The Law

• G.S. 84-2:

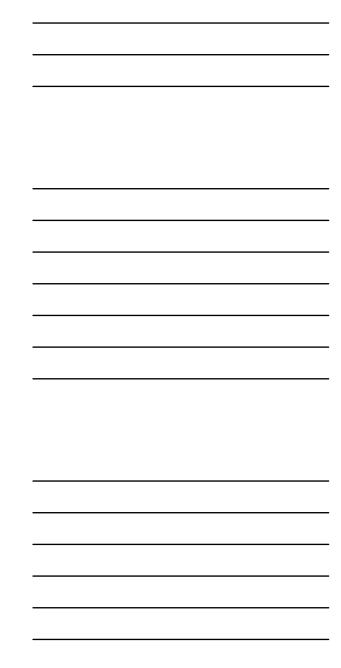
"No...clerk, deputy or assistant clerk...shall engage in the private practice of law."

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The Law

- "Practice law"
 - G.S. 84-2.1
 - "Any legal service", with or without compensation:
 - Preparing (or helping prepare) deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, or administrators or executors
 - Preparing (or helping prepare) petitions or orders in any probate or court proceeding;
 - Abstracting or passing upon titles;
 - Preparing and filing of petitions for use in any court; or
 - Assisting by advice, counsel, or otherwise in any legal work;
 - Advising or giving opinions on the legal rights of any person, firm, or corporation





The Bottom Line	
Clerks shall not give legal advice.	
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What's a clerk to do?	
Clerks <i>want</i> to help!	
Clerks are <i>supposed</i> to help.	
Isn't it a clerk's job to help?	
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The key distinction	
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Legal advice?	
Legal information?	- <u></u>
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The key distinction

- Legal information:
 - -Educating/informing
 - -Facts: "What", "Where," "How"
- Legal advice:
 - -Counseling
 - -Opinions: "Should", "Whether"

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Sources of guidance

- NC Supreme Ct: 2004 Order
- Clerks' Manual: Chapter 11
- Graecen article
- AOC education materials:
 - -What Can I Say? JUNO LearningCenter

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WELCOME TO THE NORTH CAROLINA STATE COURTS



WE WILL BE HAPPY TO HELP YOU IF WE CAN, HOWEVER, WE ARE ALLOWED TO HELP YOU ONLY IN CERTAIN WAYS, SINCE WE WANT TO BE FAIR TO EVERYONE IN A CASE.

THIS IS A LIST OF SOME THINGS THE COURT STAFF $\it CAN$ and $\it CANNOT$ do for you. Please read it carefully before asking the court staff for help.

WE CAN explain and answer questions about how the court works.

WE CAN tell you what the requirements are to have your case considered by the court.

 $\ensuremath{\mathbf{WE}}$ $\ensuremath{\mathbf{CAN}}$ give you some information from your case file.

WE CAN provide you with samples of court forms that are available

WE CAN usually answer questions about court deadlines.

WE CANNOT provide you with guidance on how to fill out forms

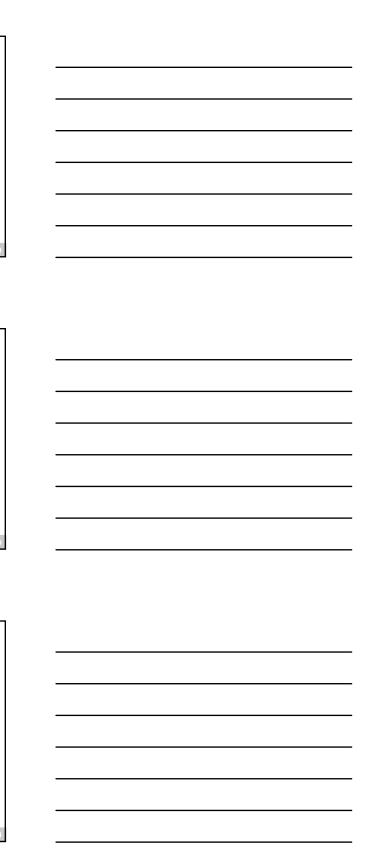
WE CANNOT GIVE YOU LEGAL ADVICE. Only your lawyer can give you legal advice.

WE CANNOT tell you whether or not you should bring your case to court.

WE CANNOT give you an oninion about what will hannen if you bring your case to court.

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Graecen's 5 Principles

Court staff:

- 1. Have obligation to explain court processes and procedures to litigants, media, and other citizens.
- 2. Have obligation to inform litigants and potential litigants how to bring their problems before the court.

Graecen's 5 Principles

Court staff:

- 3. Cannot advise litigants whether to bring their problems before the court, or what remedies
- 4. Must remember the absolute duty of impartiality, and must never give advice to one person to create an advantage over another.
- 5. Must remember that neither parties nor their attorneys may communicate with judge ex parte.

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NUMBER OF GOVERNMENT						

Supreme Court Order

Court staff MAY

- in Dockets, calendars, case files, indexes
- Provide/recite rules, procedures, fees & costs
- Help a person find statutes and rules
- Identify and provide applicable forms and written instructions
- Provide public information Answer questions about how to complete forms
 - · Define common court process terms
 - Provide #s for referral services, local attorney rosters, AOC Web site, other Web sites
 - Aid individuals with disabilities according to the ADA.

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Supreme Court Order

Court staff MAY NOT

- · Advise whether statute/rule is applicable
- Recommend particular course of action or response [that's legal advice!]
- Advise a person how to phrase responses to forms/pleadings, etc.
- Apply law to facts of a case
- Fill in forms
- Recommend:
 - Whom to sue
 - Types of claims, arguments
 - Types of
 - defenses/objections - Types of damages to seek
 - Evidence, witnesses, objections, arguments to make at hearing or trial (or when to make them)

Supreme Court Order

Court staff MAY NOT (cont'd)

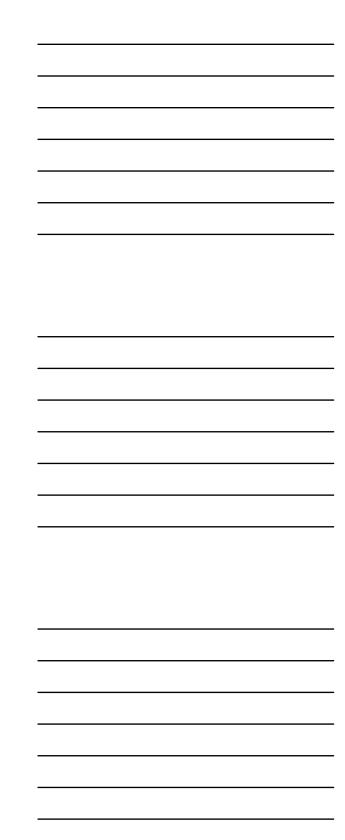
- · Recommend when or whether to:
 - Seek or oppose continuance
 - Settle a dispute
 - Appeal
- · Interpret the meaning or implications of statutes or appellate court decisions (as applied to a case)
- Perform legal research for an individual
- Predict the outcome of a case, strategy, or action

Supreme Court Order

Provide information.

Avoid recommendations.





Clerks' Manual

Chapter 11: Ethics for Clerks

- Section IV, pp. 7-8
- Appendix I (Suggested responses to common questions)

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What's a clerk to do?

"Would you help me fill out this complaint (petition, etc.)?"

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What's a clerk to do?

"I just got this traffic ticket."

"What do I do now?"

"Should I go to court on this?"

"Do I have to get a lawyer?"

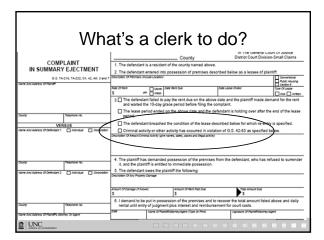


What's a clerk to do?

"My renter hasn't paid rent in two months.

Can you show me the right form to get his sorry butt removed from my property?"

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What's a clerk to do?

"This form says that I can remove my tenant for 'criminal activity'."

"I think he's been smoking pot on the back deck.

Does that count?"



What's a clerk to do? "My father died and left everything to my mother in his will. I'm trying to help her." Should "Can we do a summary administration?" What's a clerk to do? "I've been told to try collection by affidavit in my mother's estate." "Am I qualified to do that?" "Can you show me the right form?" UNC___ What's a clerk to do?



No application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction.
 After diligent inquiry. I have determined that the persons issed below are at lith persons entitled to share in the decedent's estate. (If there is a court-appointed partial for large such person(s), list the guardian's name and address on an attachment.)

What's a clerk to do?	
"What does 'spousal allowance'	
mean?"	
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If you don't know, don't wing it!	
Providing information means	
providing correct information.	
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What's a glark to do?	
What's a clerk to do?	
"I've been called as a witness in an incompetency hearing for next	
week."	
"I don't want this lady to be found	
incompetent. What should I say at the hearing?"	
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What's a clerk to do?

"My cousin is guardian of my aunt's estate. I know she's mishandling the money."

"Can I get her removed?" "How do I get the money back for my aunt?"

What's a clerk to do?

- You run into your neighbor at the post office. She tells you she has petitioned for her mother to be found incompetent. (You hear most of the guardianship proceedings in your county.)
- She starts to tell you about her mother and asks your advice on how to testify at the hearing.
- Issues?

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Graecen's 5 Principles

Court staff:

- 3. Cannot advise litigants whether to bring their problems before the court, or what remedies to seek.
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- 5. Must remember that neither parties nor their attorneys may communicate with judge ex parte.

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SCHOOL OF GOVERNMENT

Ex Parte Communication

- A communication:
 - -Involving less than all parties
 - -Written or oral
 - -About a pending (or impending) case
 - Made to the judge/hearing officer in the case
 - Without all parties given notice or opportunity to be heard.

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What's a clerk to do?

- You run into your neighbor at the post office. She tells you she has petitioned for her mother to be found incompetent. (You hear most of the guardianship proceedings in your county.)
- She starts to tell you about her mother and asks your advice on how to testify at the hearing.
- What should you do?

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What's a clerk to do?

- After listening to your neighbor talk about her mother...
- The next day you approach your assistant clerk who will hear the case, and you say...
- "Listen, there's something you really need to look out for in that hearing..."



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What's a clerk to do?	
An <u>attorney</u> asks:	
"Are there any local rules here about seeking default	
judgments?"	-
What's a clerk to do?	
An attorney asks:	
"I need to calendar a motion to compel discovery. I'd like it to be	
heard by Judge Is there a way I can make sure I get on his calendar?"	
Q UNC	
What's a clerk to do?	
A pro se plaintiff asks:	
"The defendant in my case is not answering my request for	
documents."	
Can I make him respond?	
How do I ask a judge for help?	



What's a clerk to do?

"I have a judgment from the magistrate. How do I get the money?"

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What's a clerk to do?

"I'm supposed to go to my foreclosure hearing tomorrow. I need more time to work out payments to the bank, but they won't talk to me.

Can I get more time?
What should I say to the clerk?

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What's a clerk to do?

- "1 had a contractor work on my house in 2011, and he screwed up a bunch of stuff."
- "I told him I was going to sue him, but he said I can't 'cause I waited too long."
- "He said if I sue him now he'd get the case dismissed and I'd have to pay all his attorney's fees."

"Did I really wait too long to sue?"
"Will I really have to pay his attorney's fees?



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The Law

- "Practice law"
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 - "Any legal service", with or without compensation:
 - Preparing (or helping prepare) deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, or administrators or executors
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 - Abstracting or passing upon titles;
 - Preparing and filing of petitions for use in any court; or
 - · Assisting by advice, counsel, or otherwise in any legal work;
 - Advising or giving opinions on the legal rights of any personfirm, or corporation

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What's a clerk to do?

- "1 had a contractor work on my house in 2009, and he screwed up a bunch of stuff."
- "I told him I was going to sue him, but he said I can't 'cause I waited too long."
- "He said if I sue him now he'd get the case dismissed and I'd have to pay all his attorney fees."
- "Who's a good lawyer to help me?"

