

Legal Advice vs. Legal Information



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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?



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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].”



The Law

- G.S. 84-2:

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



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.



What's a clerk to do?



Clerks *want* to help!
Clerks are *supposed* to help.
Isn't it a clerk's *job* to help?



The key distinction


Legal *advice*?



Legal *information*?



The key distinction



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




Sources of guidance

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



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 CAN AND 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.

WE 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 opinion about what will happen if you bring your case to court.

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 to seek.
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*.



Supreme Court Order

Court staff MAY

- Provide public information 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
- 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.





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)



What's a clerk to do?

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



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?”



What's a clerk to do?

COMPLAINT
IN SUMMARY EJECTMENT

County _____ in the Superior Court at Justice
District Court Division-Small Claims

1. The defendant is a resident of the county named above.

2. The defendant entered into possession of premises described below as a lessee of plaintiff.

Description of Premises (include location) _____

3. The defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the 10-day grace period before filing the complaint.

The lease period ended on the above date and the defendant is holding over after the end of the lease period.

The defendant breached the condition of the lease described below for which remedy is specified.

Criminal activity or other activity has occurred in violation of G.S. 42-93 as specified below.

4. The plaintiff has demanded possession of the premises from the defendant, who has refused to surrender it, and the plaintiff is entitled to immediate possession.

5. The defendant owes the plaintiff the following:

Amount of Damage if Any: \$ _____

Amount of Rent Past Due: \$ _____


Amount Due: \$ _____

6. I demand to be put in possession of the premises and to recover the total amount listed above and daily rental until entry of judgment plus interest and reimbursement for court costs.

Name and Address of Plaintiff (Plaintiff or Agent) _____

Name of Plaintiff (Plaintiff) / For or Hire _____

Signature of Plaintiff (Plaintiff) _____




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?”

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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?”

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What's a clerk to do?

1. the undersigned affiant, being first duly sworn, say that:

1. I am an heir, an executor named in the will, a devisee named in the will, the public administrator a creditor of the decedent. I am not disqualified under G.S. 28A-4-2.
2. At least thirty (30) days have passed since the date of the decedent's death.
3. The decedent died intestate, testate.
4. (a) The decedent died on or after 10/1/09 and the value of all personal property owned by the decedent less liens and encumbrances thereon, and less the spousal allowance under G.S. 30-15, does not exceed \$20,000.
 (b) I am the surviving spouse and the devisee of the decedent, the decedent died on or after 10/1/09, and the value of all personal property, less liens and encumbrances thereon, and less the spousal allowance under G.S. 30-15, does not exceed \$30,000.
5. (Check if decedent died testate.) Decedent's will dated as shown above has been probated in each county in which is located any real property owned by the decedent as of the date of death, and a certified copy of the decedent's will is attached to this Affidavit.
6. No application or petition for appointment of a personal representative is pending or has been granted in any jurisdiction.
7. After diligent inquiry, I have determined that the persons listed below are all the persons entitled to share in the decedent's estate. (If there is a court-appointed guardian for any such person(s), list the guardian's name and address on an attachment.)

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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 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?"

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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.
- *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.
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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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.

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?*

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..."*

What's a clerk to do?

An attorney asks:

“Are there any local rules here about seeking default judgments?”

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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?”

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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?

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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?

- "I 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”

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

What's a clerk to do?

- “I 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?”
