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American Library Association Speech Transcript

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Monroe Freedman speech at 'Committee on Professional Ethics' program, Tuesday,
June 26, 1979

It's a great pleasure to be here with you ^{since} so much of my professional and personal life revolves around books. To be able to speak to a group of people whose professional lives relate to the care and nurture of books and book users - I feel very much at home here. Also as one who academically and in private practice is involved with constitutional law, contract torts and lawyers ethics, I was rather fascinated by the questions, cluster of questions, presented to me. And with your indulgence I'm going to go a little bit beyond simply potential liability for giving advice. Let me say first, though, the reason (I was going to pass up this story). The reason I asked Barbara not to introduce me as a doctor is that I long since learned that it can be hazardous. When I was teaching at George Washington Law School I sent a young woman to the legal director of the American Civil Liberties Union in Washington - she had a civil liberties problem that she had asked me about - and she went to see Ralph Temple who is the legal director, very close friend of mine, and she walked in and as he reported to me, she said "Mr. Temple, I hate to bother you, but Dr. Freedman said that you might be able to help." And Ralph, who is sometimes something of a clown said, "Did he tell you he was a doctor? That man is no more a doctor than you or I!" He then said to me "She looked so embarrassed that I was sorry I did it." I said of course she looked embarrassed you idiot. Before I sent her to you I gave her a complete physical!

Let me start with the good news which is that the likelihood of your being sued, ^{the} successfully sued, for any of things I'm going to talk about is remote. And specifically the thing that I was first asked about when Barbara Rollock invited ^{me} to speak, the possibility of liability for the unauthorized practice of law or medicine through giving advice, is probably

the least exposure in terms of legal liability that you have. If one of the bar associations and medical societies in your diligent enforcement of ethics for which we, the monopoly that we exercise over the rest of the public, should be concerned that you are engaged in the unauthorized practice of law or medicine, the likelihood is that they would simply ask you to stop or at worse get a court order telling you to stop. But, I don't think anybody is going to go to jail or lose a lot of money on that ground. However, the bad news is, as the doctors have found, as we lawyers are beginning to find in lawyer malpractice actions, is that there are never guarantees against being sued. If someone had gone to a lawyer, for example, and said, "In order to support my mailbox on a post, I support it by tying it to a fence post and a utility pole on my own property. What is the likelihood that I will be sued by somebody who never comes within a mile of my house?" The answer is remote, using the word that I have used so far. And yet, the fire department held a parade, a young woman rode a horse during the parade. Riding her horse back home from the parade after dark, she went around a parked car, which took her on the edge of some residential property. The horse walked into the wire that had been strung from the mailbox to the utility pole to the fence pole. The horse threw the rider, ran a mile down the road, collided headlong with a van. People inside the van were injured. Among those who were sued were the horsebackrider, the van's driver, the fire department, the utility company, and of course the owner of the residence who had put up the wire to support his mailbox.

And so you can see, there are no hard and fast rules and it is impossible for anyone in the field of litigation to give you any guarantees. Also, the responsibilities of lawyers in this area and that includes my responsibility in trying to advise you can be a rather precarious venture. For example, a husband and wife got divorced. The lawyer representing

the wife did not insist upon her getting a share of her husband's rather substantial National Guard pension. Under the law of the State of California, at that ^{time} in 1968, that was not included; such pensions were not included in community property. Four years later, the court decided that it was. And the woman successfully sued her lawyer for not anticipating the change that subsequently came about in the law. The lawyer advised her correctly in terms of what the law was when he was advising her, but did not give her the benefit of an imaginative interpretation of where the law was going. And so if I give you advice today that is less than assurance one way or the other, I hope you will understand why it is.

Your potential liability is in both tort and contract; basically for what we could call professional malpractice in your capacity as a professional or generally for negligence in terms that any number of the public might be held liable for negligent conduct. The professional liability would stem from a failure to perform your duties with the ordinary skill and care of a librarian in your area, geographically and in terms of the area of work that you do. But even beyond that there is potential liability for the violation of any other duty (?) of care that one might have, for example to users of the library or even interestingly to people who never even come inside the library. The test is frequently stated as one of causation, that is, between your act, your alleged breach of duty, and the ultimate harm to somebody else. How firm or how weak the links are in that causal chain or under another view, but closely related, whether when you acted or failed to act, the injury to that other person who is now suing you was foreseeable. The foreseeability test is an interesting one. It's premised on the idea, as I understand it, that you shouldn't be sued, you shouldn't be held responsible unless you were at fault. And if you could not have foreseen that you were going to do

something wrong, hurt somebody else, then of course you cannot be said to have been at fault. But one leading authority stating the foreseeability test is this illustration from real life. A utility company had a power wire strung at the top of a pole and a guide wire further down supporting the pole. Between these two sufficient space was left to meet the requirements of the public utilities commission which stipulated the appropriate distance. With the distance between the powerline and the guide line a chickenhawk, for example, which was common in that area could not touch by flying between - the wingspan was not sufficient to touch one wire to the other. However, two chickenhawks engaged, I think perhaps euphemistically expressed, in aerial combat with each other flew between the two wires and the wing tip of one bird which was attached to the wing tip of the other touched the two wires, made the connection, the power ran down the guide wire, into a barbed wire fence which it was touching, and quite a few yards down until it reached a barn, the barn was burned down. Foreseeable? The court said, and the leading authority in the area said, "Viewed in retrospect, that could not be said to have been unforeseeable." This is one of my favorite nonsenses in the law: viewed in retrospect, it could not be said to have been unforeseeable.

Let me give you some illustrations. Happily, I have not found a great deal of authority specifically implicating librarians. But others in analogous situations have been sued and successfully and the illustrations you might find instructive. For example, someone went to a county registrar's office and asked for information regarding a piece of property that he was going to buy. Specifically, whether it was encumbered by any lawyers. The clerk, not the registrar himself, but the clerk, incorrectly said that that the property was free and clear. The property was bought or credit was

extended and relied upon that information which turned out to be wrong. The registrar who had not even given that information was held liable for the clerk's erroneous information given to the person who made the inquiry.

Touching upon something that we're going to - two important subheadings here: one is that a supervisor can be liable for the improper conduct of someone subordinate to him or her and, I think we ought to note also, that since it was the registrar's duty to give this information it would not have been appropriate to seek to avoid such liability by saying, sorry we don't give that information. That duty was incumbent upon the registrar so what it comes down to is that one who was in the position of a public official and librarians have been held to be in that category, may not be able to avoid performing the duty of giving information and may, having been damned if you don't, be damned if you do, if you give the information incorrectly.

In another case a court clerk told the marshall that a judgment had been entered for a landlord against a tenant. The marshall then went down and evicted the tenant. The clerk had the information backward. The tenant had prevailed. The eviction, therefore, was wrongful and the tenant sued the clerk who had wrongly informed the marshall.

In another case, a court clerk told an attorney that a judgment had been entered in favor of the attorney's client. The judgment had not been entered by the clerk and was not subsequently entered by the clerk. The client thereby suffered and therefore successfully sued the clerk for having given the incorrect information.

In another case, a notary in preparing a will, gave incorrect information about the number of witnesses required and/or the kind of witnesses required for the will and the ultimate action against the notary for the incorrect information was brought not by the person with whom the notary was dealing,

but by the disappointed beneficiary who would have recovered eight times more if the will had been properly witnessed. And therefore properly executed.

Now of course what all that suggests is that there is a high likelihood of liability for negligent misstatement by a librarian and by that librarian's supervisor, liability on the part of the librarian's supervisor, for misstating information that is requested. And we might note at the same time that there would be similar liability, I would expect, for an error brought about by misfiling - so that information was wrongly or only partially available that should have been readily available and also for failure to maintain supplements for a service. So that someone goes to a book, finds the answer that was correct yesterday but is no longer correct today as the supplement would have shown, but the supplement didn't get into the book. I would think that there would be a good likelihood of liability if those events occurred and somebody were demonstrably injured as a result.

Another illustration not involving a librarian, as you will see, is a case in which somebody unknown wrote a woman's first name and telephone number and references to her sexual proclivities on the wall of a men's room in a tavern. The woman's husband found out about it and demanded that the scrawling on the wall be erased or painted over. The tavern keeper did not do so within a reasonable time and as a result the tavern keeper was held liable for publishing or republishing the slander against the woman. Now, that also is suggestive with regard to potential liability for a librarian because insofar as there is anything defamatory of in a book, an invasion of privacy some identifiable person in a book, conceivably pornography in a book that violates the state law. At least

once the librarian has been put on notice, there is, I'm sorry to say, potential liability.

A good deal of what I'm talking about and certainly that issue implicates very important questions relating to the First Amendment as something that would be a whole separate talk in itself and I hope you will pardon me if I don't get into the ramifications of that. I'm only trying to outline the scope of the potential problems.

Other illustrations of other kinds of violations of duties to others and particularly library users or other members of the public, I think there is at least one case involving a library. There are several cases involving apartment buildings and such, in which the person who was in charge of the premises was held liable for not adequately maintaining security when a user was raped or robbed on the premises. Liability for the librarian in our context who does not take adequate steps to make the premises secure to those who are using it.

Another set of cases involves people who move somebody from one point to another. Say, you find somebody drunk at a library desk, and you move that person outside someplace, even perhaps to a safer place. But safer isn't good enough. People moving drunks have been held liable when the drunk then picks himself up and stumbles someplace not too far away where they are injured. Liability on the part of the person who did the moving. Also note, of course, that the apparent drunk may not really be drunk. It may be somebody suffering from an insulin, a diabetic attack, a heart attack, or whatever.

Another group of cases involves people giving others the wherewithall to injure somebody else. There are cases where a tavern keeper or even a friend in a social context gives someone too much to drink. And that person

drives off and injures someone else or someone leaves his or her keys in the car. The car is then stolen, the thief drives negligently, injuring someone. The owner who left the keys has, in a number of cases, been held liable.

In another case, getting closer to our situation, the manufacturer of a slingshot sold to children was held liable when a child used the slingshot and injured another child with it.

And then there is a case suggesting liability getting even closer to our area on the part of a publisher of an encyclopedia for a misstatement with regard to the toxicity of drugs referred to in the encyclopedia.

You put all those things together and it suggests that you might find yourself liable for information in a book on how to make slingshots or a book containing other dangerous information, such as home repair information that turns out to be dangerous - the stress that a wall will take, or whether you have to wear safety glasses when you perform a certain repair, or whatever it may be. A book about dieting in which the diet may be injurious to health. I would expect that in any of those cases there would have to be some showing that the librarian was on notice of the contents of the book. But sorry to say there is at least potential for liability in such cases.

There is an important defense that librarian would have and any public official has and that is an immunity when the function you are carrying out is a discretionary one rather than a more clerical or what is called ministerial one. I guess we could illustrate it with the selection of books as being highly discretionary. The maintenance of files, the card catalog or supplements I suppose, is ministerial or clerical. The greater

chance of liability and this may in some ways be surprising is not for the discretionary job, which may well be immune, but for the more clerical or ministerial kind of job. Giving advice to people who call up or come into the library I suppose is someplace in between. Which means that it is going to be very difficult to predict. 's

That does suggest something and that is that insofar as library regulations give the librarian a significant amount of discretion in deciding whether to give information and what information to give, the chances of your being immune from liability are increased thereby.

I was asked to give some advice if I could as to how you might best protect yourselves. What I've just suggested is certainly one way. That those responsible issue regulations or directives with regard to giving, particularly legal and medical advice, that place discretion in the librarian as to whether to give the advice on a particular occasion and how much advice to give. Such directives should include, and whether it's there or not you should certainly be cautioned to include a caveat - a warning - to the person to whom you are speaking that insofar as this is medical advice or legal advice you're not holding yourself out to be a lawyer and that it might be a good idea for your caller, even if that caller is a doctor or a lawyer, to consult a doctor or a lawyer rather than to rely on the information you are giving.

Second, I think it would be desirable in itself because I think inter-relationship among professions is a good thing in itself. But it would be desirable for librarians to talk to the local bar association or medical society. For example, with lawyers with regard to a legal reference service. And whether when someone comes in or calls up with legal problems, it might not be desirable for you to be able to provide a telephone number or a book

which bar associations now increasingly are preparing giving people advice as to where they can find lawyers who specialize in certain areas. I think that is a desirable service in itself because access to legal services is, I think, an important thing in our society and too many people do not have access to legal service not because they can't afford it, but because they are ignorant of the fact that they have rights, the fact that lawyers are available to serve them and how to go about finding a lawyer.

Next, it might not be a bad idea to arrange for professional liability insurance. Either through your own library or institution or perhaps through the American Library Association. At this point it should be very inexpensive unlike the situation for doctors and, as I suggested earlier, increasingly lawyers are finding themselves in. A group program of insurance should not be an expensive thing and might be a highly desirable service that your association might be interested in providing for you.

And finally, I would suggest that you set up a kind of hotline or arrangements for a hotline to an attorney. So that when someone comes in with a troublesome question or when, as was suggested at lunch, someone comes in demanding information, like, what's the name of the person who took out that book, and the person who's making the demand may be the local sheriff threatening to lock you up,)

It might be useful to have on your own rolodex the name and number of a lawyer who you know is available to serve you on that kind of short-notice basis. If you are affiliated with a state institution the state attorney general's office might do that for you, the corporation counsel of a municipality might do that for you. If you're connected with a university the lawyers for the university or if there is one, professors in the law school might be prepared to provide information for you on that kind of

basis.

I was chatting, very preliminarily and tentatively, with Judith Krug about my willingness to do that at least experimentally on a no-fee basis for the ALA, for members of the ALA, just to see whether there's a need for that service and what it would amount to. Certainly I have found in the course of preparing for today that there are some fascinating questions both from an academic and from a practical point of view and I think it might be fun for me and perhaps less painful than it might otherwise be for you if we were to set up something of that kind.

In conclusion, it seems to me that the chances that anybody in this room is going to get sued are quite remote. But, as indicated by some of the cases that I have suggested to you, there certainly are no guarantees in the area with respect to litigation and people's felt (?) sense of grievance justifiably or not. I guess the best advice is simply to do the best professional job you possibly can in as free and giving a way as possible. But, if you're in doubt, check with somebody who might be able to give you some informed advice. Thank you.