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LEGAL SOFTWARE AND THE UNAUTHORIZED PRACTICE OF LAW: PROTECTION OR PROTECTIONISM

INTRODUCTION

There is a long tradition of self-help legal information in Anglo-American law.¹ During the colonial period, Eldon Revare James published *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, concluding that the legal treatises published between 1687 and 1788 were intended for use, not by lawyers, but by laypeople.² The ninth edition of *Every Man His Own Lawyer* was published in 1784 with topics “so plainly treated” that laypersons could “defend themselves and their estates and fortunes, in all cases whatsoever.”³ In 1879, John Wells published a newly revised edition of *Every Man His Own Lawyer*, described as “a complete guide in all matters of law and business negotiations for every State of the Union. With legal forms for drawing the necessary papers, and full instructions for proceeding, without legal assistance, in suits and business transactions of every description.”⁴

Today, self-help legal materials are increasingly becoming the subject of debate due to the inability of courts to define the practice of law, legal needs among lower and middle-income groups going unmet, popular support for self-help materials, and the advent of legal software.⁵ Many large book stores now contain law for non-lawyers sections, and similar information is available in the form of computer software. But despite its long history and previous acceptance by courts,⁶ recent events portend a bleak future for this type of information in Texas.⁷

1. See Mort Rieber, *300 Years of Self-Help Law Books* (visited Jan. 31, 1999) <<http://www.nolo.com/texas/History.html>>.

2. See *id.*

3. *Id.*

4. *Id.*

5. See Deborah L. Rhode, *Meet Needs with Nonlawyers: It is Time to Accept Lay Practitioners—and Regulate Them*, A.B.A. J., Jan. 1996 at 104.

6. See *New York County Lawyers' Ass'n v. Dacey*, 28 A.D. 2d 161, 283 N.Y.S. 2d 984, 997 (N.Y. App. Div. 1967), *rev'd on dissenting opinion*, 21 N.Y. 2d 694, 234 N.E. 2d 459, 287 N.Y.S. 2d 422 (1967).

7. “While Texas has become the first state in the nation to move toward outlawing such ‘cyberlawyer’ software, eight others have considered action against publishers of self-help legal manuals that provide help on wills, prenuptial agreements and other documents.” Jay Jorden, *Judge Rules Legal Software Crosses Line into Law*, AUSTIN AMERICAN-STATESMAN, Feb. 3, 1999, at A1.

Because a Texas court decided [previously] that self-help materials distributed in Texas automatically amount to the practice of law (and therefore must be authored or approved by a Texas lawyer), [Nolo, Parsons, and their distributors] engage in the practice of law in Texas every time a . . . product finds its way into the hands of a Texas citizen. If [a company] distributes a book explaining how to adopt a stepchild in an uncontested proceeding, change one's name or get a simple bankruptcy, [they are] practicing law in Texas just as fully as if it had a law office handling cases in the Texas courts.⁸

Parsons Technology, Inc. ("Parsons") sells Quicken Family Lawyer ("Quicken"), a legal self-help software package that can be used to prepare more than 100 legal documents.⁹ A Texas court recently decided that selling Quicken amounts to the unauthorized practice of law.¹⁰ In addition, the Unauthorized Practice of Law Committee¹¹ ("UPLC") of the Texas Supreme Court is currently investigating whether to pursue Nolo Press, Inc., which sells similar materials, for the unauthorized practice of law.

Depending on who you ask, legal self-help materials either carry the danger of "implicit legal advice cloaked in the robes of simplicity,"¹² or serve the legitimate purpose of filling a void created by our current legal system. Similarly, opinions differ as to whether attorneys in Texas are using unauthorized practice of law statutes to protect legitimate public interests or to implement a self-interested policy of protectionism.

This Comment examines these issues in light of the recent decision in *Parsons* and the current Nolo Press controversy. Parts I and II outline the advantages and disadvantages of self-help information. Part III examines the unique nature of, and novel issues presented by, legal software. Part IV examines unauthorized practice of law statutes and the interests they serve. Part V discusses alternatives to banning completely the sale of legal software. Part VI concludes that, while self-help software may present potential problems, the benefits to users far outweigh the potential dangers of harm and thus, *Parsons* was wrongly decided. In addition, it would be in the best interest of the Texas Supreme Court's Committee on the Unauthorized Practice of Law not to proceed with an action against Nolo Press. This Comment

8. *Self-Help Law Books and Software: Why The First Amendment Protects Your Right to Use Them* (visited Jan. 31, 1999) <<http://www.nolo.com/texas/rights/html>> [hereinafter *Self-Help Law Books and Software*].

9. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. CIV.A.3:97CV-2859H, available in 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999).

10. See *id.*

11. "The unauthorized practice of law committee is composed of nine persons appointed by the Supreme Court. At least three of the committee members must be nonattorneys." TEX. GOV'T CODE ANN. § 81.103(a), (b) (West 1998); "The unauthorized practice of law committee shall seek the elimination of the unauthorized practice of law by appropriate actions and methods, including the filing of suits in the name of the committee." TEX. GOV'T CODE ANN. § 81.104(2) (West 1998).

12. Steve Kaufman, *Self-Help Legal Software Tests Boundaries of Practice of Law*, KNIGHT-RIDDER TRIB. BUS. NEWS, Feb. 4, 1999, available in 1999 WL 10396258 (quoting Mark Ticer, chair of the subcommittee on the Unauthorized Practice of Law).

does not address whether banning self-help materials violates the First Amendment rights of the sellers.¹³

I. THE ADVANTAGES OF SELF-HELP INFORMATION

A. Low Cost

Legal advice is expensive, and thus a luxury which some cannot afford. In fact, James Turner, executive director of HALT (Help Abolish Legal Tyranny), asserts that the current legal system is simply too expensive for the average citizen.¹⁴ Nationally, as little as one-quarter of low-income and one-third of middle-income households are having their legal needs met.¹⁵ A recent study by Temple University found that the legal system addressed less than one-third of legal problems in Florida, among low and moderate-income families, with "cost concerns" cited as the most common barrier to obtaining legal services.¹⁶ Nationally, cost concern is the second most common reason for not seeking legal help in low-income households.¹⁷

One benefit of self-help materials is that they are relatively inexpensive. Quicken, for example, costs about twenty-five dollars and allows a person to make changes to a legal document without paying attorney's fees.¹⁸ Therefore, self-help materials provide a viable alternative for those who have simple legal needs but lack the resources required to hire an attorney.¹⁹

But the cost of legal services is only one reason many Americans are not receiving the legal help they need. Some feel that seeking help is futile, while others exercise self-help or simply do not consider a situation to be a problem.²⁰ And while legal software may remove the barrier of cost, alternatives that include rather than exclude attorneys may remove more than one obstacle, and thus, be more beneficial.

13. See generally Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981); *Self-Help Law Books and Software: Why The First Amendment Protects Your Right to Use Them* (visited Jan. 31, 1999) <<http://www.nolo.com/texas/rights/html>>; Timothy Howard Skinner, *Legal Software and the First Amendment, and the Unauthorized Practice of Law: Regulating the Sale of Software That Provides Legal Services.*, SOFTWARE L.J., Summer 1998.

14. See *Self-Help Law Books and Software*, *supra* note 8.

15. See Rhode, *supra* note 5, at 104.

16. See INST. FOR SURVEY RESEARCH, TEMPLE UNIV., LEGAL NEEDS AMONG LOW AND MODERATE-INCOME HOUSEHOLDS IN FLORIDA: FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY, Jan. 9, 1995, at 5-8.

17. See *Legal Needs and Civil Justice: Major Findings from the Comprehensive Legal Needs Study*, A.B.A., 1994 [hereinafter *Legal Needs and Civil Justice*].

18. See Ross D. Vincenti, *Self-Help Legal Software and the Unauthorized Practice of Law: Regulating the Sale of Software that Provides Legal Services*, COMPUTER L.J., Spring 1988, at 189.

19. See Rhode, *supra* note 5, at 104.

20. See *Legal Needs and Civil Justice*, *supra* note 17.

The answer to meeting the needs of the poor for legal representation does not lie at the doorstep of unlicensed neighbors, relatives, and friends, but at the doorstep of the bar itself, which somehow needs to merge the current overabundance of lawyers, many of whom can't find work, with the unrepresented needs of the poor.²¹

B. Information and Access

Self-help materials serve to "demystify" the legal profession.²² Aside from being relatively cheap, self-help information also provides exposure to the law. These materials also increase access to justice,²³ allow the public to become informed about certain areas of the law,²⁴ and thus become empowered.²⁵ This type of information becomes especially important in areas where legal needs are not being met such as the preparation of wills. Nolo contends that seventy percent of Americans do not have a will.²⁶ In addition, one-quarter of Texans cannot afford any legal help, and half are not having all of their legal needs met.²⁷ Even if an attorney's services are later required, a more knowledgeable layperson is a better client and feels more in control because she is familiar with the law.²⁸

Legal software also addresses many problems involving common life cycle events such as death and divorce. The end of life presents a number of issues software can alleviate. Potential legal problems that can arise at this time include a relative dying intestate, decisions effecting organ donation, and making effective wishes not to have life prolonged by artificial means.²⁹ Having to pay an attorney for any of these means that, in most cases, no legal advice will be sought.

Marriage and the dissolution of marriage present another area of common legal problems. The availability of no-fault divorces in many states leads many laypeople to believe they can get a divorce without an attorney.³⁰ This alternative seems not only attractive, but also justified because for tasks

21. Robert L. Ostertag, *Nonlawyers Should Not Practice: Nothing Can Substitute for the Professional Skills and Values of a Lawyer*, A.B.A. J., May, 1996, at 116.

22. Polly Ross Hughes, *Bill Attempts to Halt Ban on Legal Software*, *Books*, HOUSTON CHRON., Feb. 20, 1999, at 29 (quoting Steve Wallens, State Representative).

23. See Rhode, *supra* note 5, at 104.

24. See Vincenti, *supra* note 18, at 189.

25. See *id.* at 190.

26. See Larry Blasko, *Where There's a Will There's a Way in Most States*, BUFFALO NEWS, Nov. 10, 1998, at B8.

27. See Jorden, *supra* note 7, at A1 (quoting Ralph Warner, Nolo Press, Inc. co-founder).

28. See *Self-Help Law Books and Software*, *supra* note 8.

29. *Self-Help/Legal Software Ban Overdoing It on Consumer Protection*, HOUSTON CHRON., Feb. 9, 1999, at 20.

30. See Timothy Howard Skinner, *Legal Software, the First Amendment, and the Unauthorized Practice of Law: Regulating the Sale of Software That Provides Legal Services*, SOFTWARE L.J., Summer 1998, at 324 n.19 (citing Engel, *The Standardization of Lawyer's Services*).

that are largely “ministerial” in nature, such as uncontested divorces, lawyers tend to charge disproportionately high prices when they have a “monopoly.”³¹

Attacking the materials used to create forms that accomplish these tasks promotes the continuation of this legal monopoly and deprives many of access to legal services and information. On the other hand, Nolo contends that the legal system is made more accessible and affordable by the seven million copies of its approximately one hundred and fifty titles currently available in bookstores and public libraries in all fifty states.³²

In addition to issues of cost, policy also militates in favor of allowing access to legal self-help information. Restricting access to any information, and especially legal information, is not good for a democratic form of government because it “tends to concentrate power in the hands of the few”³³ and effectively precludes many citizens from handling their legal problems.³⁴ As Jerome J. Shestack³⁵ points out, this may have serious unintended consequences:

Denial of access to justice is not merely a theoretical defect in the administration of justice; it has deep practical ramifications. Lacking effective representation, poor persons often see the law not as a protector, but as an enemy which evicts them from their flat, victimizes them as consumers, cancels their welfare payments, binds them to usury, and seizes their children. We know now the unhappy results of the law’s failure to meet the just expectations of those it governs. Law loses its stabilizing influence; at best there is alienation and unrest; at worst, violence.³⁶

Self-help materials provide information cheaply and effectively to laypersons who might otherwise go without. The American Association of Law Libraries opposes any effort to ban self-help materials because they consider such action “a threat to the rights of both the publisher and consumer.”³⁷

31. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 98 (1981).

32. See *Texas Supreme Court Steps into Book-Banning Fray* (visited Jan. 31, 1999) <http://www.nolo.com/texas/press_release3.html>.

33. *Self-Help Law Books and Software*, *supra* note 8.

34. See John Greenwald, *A Legal Press in Texas*, TIME, Aug. 3, 1998, vol. 152, No.5.

35. President-elect of the American Bar Association, partner Wolf, Block, Schorr & Solis-Cohen in Philadelphia, Pennsylvania, and past chair of the ABA Standing Committee on Legal Aid. See Jerome J. Shestack, *Will Justice Be Rationed?*, 80 MARQ. L. REV. 727, 727 n.A (1997).

36. *Id.* at 727.

37. Letter from Robert L. Oakley, Washington Affairs Representative, American Association of Law Libraries, and Elizabeth M. McKenzie, Chair, Legal Information Services to the Public, American Association of Law Libraries, to Norman R. Rogers, Investigator, Unauthorized Practice of Law Committee (May 21, 1998) (available at <<http://www.ll.georgetown.edu/aallwash/lt052198.html>>).

II. THE DISADVANTAGES OF SELF-HELP INFORMATION

Self-help materials are by no means a panacea. While using this type of information may solve some problems (i.e. access to the legal system and cost of legal services), it may simultaneously give rise to new ones. Some materials may give advice that is incorrect or misleading.³⁸ Thus, some attorneys see banning these types of materials as merely fulfilling the court's responsibility to protect nonlawyers from potentially incompetent advice.³⁹

Also, a layperson is not subject to a malpractice suit or discipline by the state bar.⁴⁰ Therefore, the bar cannot monitor and control the nature or quality of legal advice being administered the same way it can with attorneys.⁴¹ Restricting access to self-help information thus preserves the integrity of the legal profession by ensuring minimum standards.⁴²

Additionally, legal software may create more problems than it solves. In trying to remedy a legal problem, a user may rely on incorrect self-help materials or may fail to realize that what seems simple is not, thereby actually compounding the initial problem.⁴³ In this case, more widespread use would increase the need for legal services and for more expensive remedial action, not less.⁴⁴ Thus, banning these materials would protect the already crowded courts from the problems that would arise as more laypeople attempt to use these materials.⁴⁵

III. THE UNIQUE NATURE OF SOFTWARE

A. Users

Although legal software was originally intended to be used by attorneys,⁴⁶ it was made available to the public largely in response to consumer's desire for "do-it-yourself" type materials⁴⁷ and is now a multi-million dollar industry.⁴⁸ Even though legal software is cheap, users may be able to afford to hire an attorney. Thus, software may simply be a cheaper option for those who can afford legal services instead of a viable alternative for those who

38. See Vincenti, *supra* note 18, at 194; Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. CIV.A.3:97CV-2859H, available in 1999 WL 47235, at *4 (N.D. Tex. Jan. 22, 1999) (citing Plaintiff's Brief in Support of Motion for Summary Judgment at 5).

39. See Vincenti, *supra* note 18, at 203.

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.*

44. See *id.*

45. See *id.*

46. See Skinner, *supra* note 30, at 319.

47. See *id.*

48. "Consumers spent about \$10 million last year on self-help legal software, a part of a growing market for software and online services." Kaufman, *supra* note 12.

cannot.

Users are likely to be middle-class because wealthier consumers have too much to lose by relying on software that may be inaccurate, have the means to pay for an attorney, and are more accustomed to seeking legal advice. Those of more modest means generally have neither computers to use the software nor a need to prepare the type of documents (i.e. rental agreements) that software programs typically produce.⁴⁹ Therefore, because the poor are not likely to use legal software, the software does little to close the gap between those who need legal assistance and those who can afford it.⁵⁰

B. Design and Capabilities

The interactive nature of legal software is both an asset and a liability. New programs can provide increasingly specific service and information. But the more interactive software is, the more it appears to practice law.

Document assembly programs like Quicken actually prepare a document for a specific purpose by asking the user questions, displaying forms, and providing instructions on how to fill out the forms.⁵¹ By adding or deleting wording, the program produces a document that is custom-tailored to the user's situation.⁵²

Quicken's ability to tailor a document to a specific user allows much more detail than pre-printed legal forms that are already widely available.⁵³ In addition, Quicken offers a feature that allows users to select a specific question relating to a general topic which is then answered by Harvard Law Professor Arthur Miller in text form or a video image of the Professor himself.⁵⁴ Collectively, these capabilities imply that the software will help with the user's specific problem as opposed to simply providing general education.⁵⁵ More advanced programs actually engage in a degree of legal analysis but they are presently only available to attorneys.⁵⁶

Ultimately, courts must decide whether using interactive software is more like "reading a book," in which case selling the software would be protected, or "talking to a person,"⁵⁷ which would constitute the unauthorized practice of law.

49. See Vincenti, *supra* note 18, at 194.

50. See *id.*

51. See Skinner, *supra* note 30, at 328.

52. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. CIV.A.3:97CV-2859H, available in 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999).

53. See Polly Ross Hughes, *Potential Ban on Legal Software Spurs Reform Call*, HOUSTON CHRON., Feb. 14, 1999, at 1 (citing Robert Schuwerk, a specialist in legal ethics).

54. See *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, No. CIV.A.3:97CV-2859H, 1999 WL 47235, at *2 (N.D. Tex. Jan. 22, 1999).

55. See Vincenti, *supra* note 18, at 205.

56. See Skinner, *supra* note 30, at 329.

57. See Kaufman, *supra* note 12 (quoting Andrew Kaufman, a constitutional law professor and ethics instructor at Harvard Law School).

Self-help legal software poses two problems that are unique in the field of self-help materials. The first problem stems from the advanced technology that legal software utilizes. The second problem is that it is difficult to create software that is widely applicable yet sufficiently user-specific.

Quicken may be “a little too smart for its own good.”⁵⁸ Because Quicken gives legal advice concerning documents⁵⁹ and selects an appropriate document for the user,⁶⁰ the UPLC alleges that this amounts to “interaction”⁶¹ with a “cyberlawyer”⁶² and thus, constitutes the unauthorized practice of law.⁶³ Because it actually analyzes users’ problems,⁶⁴ some argue it is performing a legal task.⁶⁵

Others find this conclusion ridiculous. “What practices law? Does the software practice law? Does the disc? Is that practicing law? Is the hardware practicing law? These are ludicrous questions, but the whole thing is ludicrous[.]”⁶⁶

Aside from interactive capabilities, it is difficult to create a program that is both broad enough to be marketable and precise enough to address the specific needs of the user.⁶⁷ The result is that often programs are created with a “one-size-fits-all mindset.”⁶⁸ Thus:

Simple transactions may be fraught with unforeseeable problems and abstract sub-issues, and while a self-help legal software can provide some measure of protection by providing the user with variations of standard documents, the analysis undertaken by the computer cannot consider the subtle and intricate nuances which exist between conflicting case law and public policy issues.⁶⁹

The UPLC therefore claims that the forms created by legal software such as Quicken are “incorrect and misleading.”⁷⁰

58. Daniel Fisher, *Arrest That Software! A Judge in Texas Has Ordered That the Tide of Technology be Stopped. King Canute Had an Easier Task*, FORBES, Mar. 8, 1999, at 94.

59. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. CIV.A.3:97CV-2859H, available in 1999 WL 47235, at *2 n.4 (N.D. Tex. Jan. 22, 1999).

60. See *id.* at *1.

61. *Id.* at *4 (citing Plaintiff’s Reply to Defendant’s Response to Plaintiff’s Motion at 3).

62. *Id.*

63. See *id.*

64. See Vincenti, *supra* note 18, at 194.

65. See Skinner, *supra* note 30, at 327.

66. Hughes, *supra* note 22, at 1 (quoting Stephen K. Huber, specialist in consumer and contract law).

67. See Vincenti, *supra* note 18, at 190.

68. Jorden, *supra* note 7, at A1 (quoting Phil Shuey, former chair of the bar association’s law practice management section).

69. Vincenti, *supra* note 18, at 194.

70. *Id.* (citing Plaintiff’s Brief in Support of Motion for Summary Judgment at 5).

IV. UNAUTHORIZED PRACTICE OF LAW AND THE INTERESTS SERVED

A. The Unauthorized Practice of Law

Unauthorized practice laws began to appear in the 1920s.⁷¹ The bar began to enforce these laws in the 1930s.⁷² Though drafted by lawyers to address a core concern of lawyers, statutes that proscribe the unauthorized practice of law are notoriously vague.⁷³ These statutes have been criticized as “conclusory, circular, or both.”⁷⁴ The Texas Unauthorized Practice of Law Statute reads:

(a) In this chapter the “practice of law” means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.⁷⁵

While the statute provides broad guidelines, there are no articulated guiding principles. Thus, cases are decided according to their particular facts,⁷⁶ and it is within the court’s discretion to decide what constitutes the unauthorized practice of law.⁷⁷ The unfettered discretion that such a vague statute allows has been sharply criticized: “. . . the statute is so vague that it says, in effect, ‘if any activity of a non lawyer (for example, advising a football player on whether to sign a contract) looks to any Texas judge (who is almost always a lawyer) like something a lawyer should appropriately do, the non lawyer is guilty of UPL.’”⁷⁸

71. Debra Baker, *Is This Woman a Threat to Lawyers?*, A.B.A. J., June 1999, at 55.

72. See Rhode, *supra* note 31, at 3.

73. See Skinner, *supra* note 30, at 321 n.7.

74. Rhode, *supra* note 31, at 97.

75. TEX. GOV’T CODE ANN. § 81.101(a),(b) (West 1998).

76. See *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, No. CIV.A.3:97CV-2859H, 1999 WL 47235, at *4 (N.D. Tex. Jan. 22, 1999) (citing *Unauthorized Practice of Law Committee v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985)) (citing *Palmer v. Unauthorized Practice of Law Committee*, 438 S.W.2d 374, 376 (Tex. App. 1969), *no writ.*).

77. See *id.* at *3 (citing *Unauthorized Practice of Law Committee v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985)).

78. *Unauthorized Practice of Law Background Sheet* (visited Jan. 1, 1999) <http://www.nolo.com/texas/UPL_explained.html>.

B. Precedents

Aside from Texas, states have generally followed New York's approach announced in *New York County Lawyers' Association v. Dacey*.⁷⁹ The issue in *Dacey*, was whether "the writing, publication, advertising, sale and distribution of 'How to Avoid Probate!' constituted the unauthorized practice of law."⁸⁰ The court held it was not, stating:

That [a self-help book] is not palatable to a segment of society which conceives it as an encroachment on their special rights hardly justifies banning the book Books purporting to give advice on the law, and books critical of the law and legal institutions have been and doubtless will continue to be published. Legal forms are available for purchase at many legal stationery stores. Unless we are to extend a rule of suppression beyond the obscene, the libelous, utterances of or tending to incitement, and matters similarly characterized, there is no warrant for the action taken here.⁸¹

Texas has come under strong criticism for its position: "No state, other than Texas, has had the difficulty of understanding the difference between publishing a form book with instructions and information, and meeting someone and counseling them on the law[.]"⁸²

Texas precedent had diverged from other states by 1969 when it decided *Palmer v. Unauthorized Practice of Law Committee*.⁸³ In defining the practice of law, *Palmer* set forth the standard that would guide future cases. *Palmer* defined the unauthorized practice of law broadly, so as to include not only preparing legal forms,⁸⁴ but also selecting which form to use, reasoning that such decisions affect "important legal rights."⁸⁵ In determining that selecting legal forms constitutes the unauthorized practice of law, the *Palmer* court provided the basis upon which *Parsons* would later be decided.

*Fadia v. Unauthorized Practice of Law Committee*⁸⁶ revisited this issue in a 1992 case involving a "Do-It-Yourself" will manual. In finding that selling such a manual amounted to the unauthorized practice of law, the *Fadia* court further broadened the definition of the unauthorized practice of law by overruling earlier state court decisions requiring personal contact or a relationship between the seller and the user of the manual.⁸⁷ The court again em-

79. 283 N.Y.S.2d 984 (N.Y.A.D. 1967), *rev'd on dissenting opinion*, 287 N.Y.S.2d 422 (1967).

80. *Id.* at 997.

81. *Id.* at 1000-01.

82. Wendy R. Leibowitz, *Regulators Crack Down on "Cyberlawyers,"* N.Y.L.J., Feb. 23, 1999 at 5 (quoting Peter D. Kennedy, attorney for Parsons and Nolo Press).

83. 438 S.W.2d 374 (Tex. App. 1969), *no writ*.

84. *See id.* at 376 (citing *Stewart Abstract Co. v. Judicial Commission*, 131 S.W.2d 686 (Tex. App. 1939), *no writ*).

85. *Id.* at 377 (citing *Cape May County Bar Ass'n v. Ludlam*, 211 A.2d 780, 782 (N.J. 1965) (per curiam)).

86. 830 S.W.2d 162 (Tex. App. 1992), *writ denied*.

87. *Id.* at 164.

phasized that selecting a form that affects legal rights and offering advice on how to fill it out amounts to the practice of law.⁸⁸

Given the decisions in *Palmer* and *Fadia*, the *Parsons* holding was not surprising. The *Parsons* court found that Quicken violates the unauthorized practice of law statute by going beyond merely providing forms and actually selecting a document⁸⁹ and customizing it for the user.⁹⁰ The court also alluded to the fact that the wording on the package may lead users to rely too heavily on the document.⁹¹

While the holding in *Parsons* was consistent with Texas precedent, it relied upon a definition of the unauthorized practice of law that other states have refused to adopt. This definition fails to serve the purposes for which laws prohibiting the unauthorized practice of law were created: to protect the public from harm.

C. Assessing the Danger of Harm

Some contend that a layperson's filling out legal forms carries the same risks as a barber performing brain surgery⁹² or a blacksmith performing open-heart surgery.⁹³ And as Michael Newman, reporter for the Pittsburgh Post-Gazette, puts it, "God knows we don't want people going around suing each other based on what they learned from MicrosoftTort 98."⁹⁴ But hyperbole aside, the nature and likelihood of harm that accompanies the use of self-help materials should be a substantial factor in determining whether to ban their sale.

The theory underlying many arguments for banning self-help materials seems to be that the cure may be worse than the disease. For example, a user may receive incompetent advice⁹⁵ that results in an injury for which the user has no adequate remedy.⁹⁶ But evidence supporting this proposition is anecdotal.

88. *See id.* at 165.

89. *See* Unauthorized Practice of Law Committee v. Parsons Technology, Inc., No. CIV.A.3:97CV-2859H, 1999 WL 47235, at *6 (N.D. Tex. Jan. 22, 1999) "QFL purports to select the appropriate health care document for an individual based upon the state in which she lives." *Id.*

90. *See id.*

91. *See id.* "[T]he packaging tells the user that the forms are valid in 49 states and that they have been updated by legal experts. This creates an air of reliability about the documents, which increases the likelihood that an individual user will be misled into relying on them." *Id.*

92. *See* Rhode, *supra* note 31, at 61.

93. *See id.* at 61 n.223.

94. Michael Newman, *Legally, It's Software After All*, PITTSBURGH POST-GAZETTE, Feb. 7, 1999, at F5.

95. *See* Vincenti, *supra* note 18, at 203; The UPLC charges that forms produced by Quicken are "incorrect and misleading." Unauthorized Practice of Law Committee v. Parsons Technology, Inc., No. CIV.A.3:97CV-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999) (citing Plaintiff's Brief in Support of Motion for Summary Judgment at 5).

96. *See* Vincenti, *supra* note 18, at 203.

total at best. A former chair of a state bar's unauthorized practice of law committee claimed to have seen serious problems stemming from the use of legal software. "It was truly an exercise in public damage control. There were cases of lost custody rights, incorrectly drafted deeds adversely affecting property rights, packaged wills with horrendous tax consequences, immigration misdeeds, and so on. Hardly a day passed without another horror story."⁹⁷

But Nolo points out that there has never been a published court decision arising from an injury caused by self-help materials.⁹⁸ In fact, a 1979 study found that while most unauthorized practice of law activities revolved around form preparation and advice giving,⁹⁹ such activities rarely resulted in reported consumer grievances.¹⁰⁰ The same is true outside the United States.¹⁰¹ Lay practitioners who specialize in areas such as pro se divorce and administrative agency representation not only have performed as effectively as lawyers, but have also received higher client satisfaction ratings.¹⁰²

While these facts alone do not ensure that future injuries will not occur, they do suggest that these "cookie-cutter tasks"¹⁰³ (i.e. preparing certain legal forms) do not require the expensive services of an attorney. Therefore, to the extent that the past is an indicator of the future, it is doubtful that the use of self-help materials in form preparation will result in serious consumer injury.

In assessing the risk of harm from self-help materials, it is important to keep in mind that the possibility of receiving incorrect information is not unique to software; just as a software program may give faulty legal advice, so may a licensed attorney.¹⁰⁴ In addition, there are devices for protecting the consumer. For example, applying the Deceptive Trade Practices Act to legal software may provide the same protection afforded by legal malpractice actions.¹⁰⁵

In sum, there is little evidence to support the idea that banning self-help materials is necessary in order to protect the public.

D. Attorneys' Vested Self Interest

Woe unto you, lawyers for ye have taken away the key of knowledge: ye

97. Ostertag, *supra* note 21, at 116.

98. *See Self-Help Law Books and Software, supra* note 8.

99. *See Rhode, supra* note 31, at 45.

100. A mere two percent of 1188 inquiries, investigations, and complaints for which data were available. *See id.* at 43.

101. *See Rhode, supra* note 5, at 104.

102. *See id.*

103. Greenwald, *supra* note 34.

104. *See Hughes, supra* note 53, at 1 (citing Robert Schuwerk, a specialist in legal ethics).

105. *See id.*

*entered not in yourselves, and them that were entering in ye hindered.*¹⁰⁶

Enforcing unauthorized practice statutes has always been described by proponents as a “selfless enterprise” seeking to protect the public.¹⁰⁷ As the UPLC points out, there are legitimate reasons for prohibiting non-lawyers from practicing law:

The practice of law is a matter of vital interest to the public. The lawyers primarily engage in the protection and preservation of the liberties and property rights of the people and the administration of justice among them, which is one of the primary purposes of good government. As society has become more compact the law has necessarily become more complex, requiring increased skill in its application. The Legislature, in recognition of this fact, has from time to time increased the prelegal and legal attainment requirements for admission to the Bar It is readily apparent that it would serve no useful purpose to require high standards of efficiency from members of the legal profession if those who have not obtained these standards of efficiency are to be permitted to practice the arts of the profession.¹⁰⁸

Mark Ticer, chair of the subcommittee of the UPLC, who represented the UPLC, compares “cyberlawyers” to “cyberdoctors” or “cyberaccountants” and believes that if interactive software continues to replace “human-to-human contact” the result will be not more information, but more unlicensed practicing of professions.¹⁰⁹

After emphasizing the vital public interests that are served by preventing the unauthorized practice of law in its brief to the Texas Supreme Court,¹¹⁰ the UPLC states: “Any lawyer, by definition, would have an interest in preserving the integrity of the practice of law and in ensuring that only licensed individuals be allowed to do so.”¹¹¹ Ticer feels that the UPLC’s actions are justified:

We’re just the first state that has moved on this We can either wait until the damage is done, or move to prevent damage now Nothing prevents people from accessing free legal resources on the Web We think people should have access to legal information . . . but if I didn’t intercede on this until after people were ripped off, I’d be criticized.¹¹²

106. Reiber, *supra* note 1 (quoting Luke 11:52).

107. Rhode, *supra* note 31, at 3. “The fight to stop [the unauthorized practice of law] is the public’s fight.” *Id.* (citing a former American Bar Association President in the ABA Committee on Evaluation of the National Conference on the Unauthorized Practice of Law 153 (1962).

108. Unauthorized Practice of Law Committee, Brief on the Merits, at 23-24.

109. Kaufman, *supra* note 12.

110. Unauthorized Practice of Law Committee, Brief on the Merits, at 12.

111. *Id.* at 23.

112. Leibowitz, *supra* note 82 (citing Mark A. Ticer, attorney representing the UPLC).

But many believe that attorneys are driven purely by self interest.¹¹³ Some have gone so far as to charge lawyers with trying to “maintain a closed shop”¹¹⁴ or to “protect their turf.”¹¹⁵ Nolo maintains that the UPLC is “simply a government agency that is given the powers of investigation and enforcement for the purpose of maintaining the State Bar of Texas’ legalized monopoly on the provision of legal services within Texas.”¹¹⁶ Nolo describes the unauthorized practice of law as “a Depression era prohibition designed to protect the legal profession from competitors.”¹¹⁷

Steven Gillers, a New York University law professor who specializes in legal ethics, echoed Nolo’s charges: “When you realize how routinized legal work is, and how much information you can pack into an interactive CD-ROM, then you recognize how easy it is to substitute a computer for a lawyer. That’s the threat.”¹¹⁸

Not only may attorneys regulating their own monopoly erode public trust, it may have unintended consequences such as capping legal fees or forcing attorneys to do more pro-bono work for segments that would be served by others.¹¹⁹ Although attorneys who oppose legal software may be well intentioned,¹²⁰ it is unclear whether the UPLC’s efforts will be interpreted as trying to protect the public or have the effect of further alienating it.¹²¹

V. ALTERNATIVES

A policy that seeks to ban all certain forms of legal self-help information may be too reactionary.

Courts and legislatures should consider whether particular nonlawyer activities present significant risks of harm to the public, whether consumers can evaluate those risks, and whether regulating rather than banning lay

113. “After all, the most sacred legal rule in our courts is, ‘First, the lawyer gets paid.’” Jim Barlow, *Lawyers Want Law Kept to Themselves*, HOUSTON CHRON., May 31, 1998, at 1. See also *Exclusive Club/A Judge Defends His Profession’s Turf; Consumers, Free Speech Pay a Price*, COLORADO SPRINGS GAZETTE TELEGRAPH, Feb. 16, 1999, available in 1999 WL 6188325.

114. John A. DeVault, III, *Trusts, Adoptions, Divorces—Cheaper Without a Lawyer?*, FLA. BAR J., May 1996, at 8.

115. Brief on the Merits of Relator Nolo Press, at 14.

116. *Id.*

117. *Will Nolo Press and Self-Help Law Become Outlaws in Texas?* (visited Jan. 31, 1999) <<http://www.nolo.com/texas/>>.

118. Greenwald, *supra* note 34.

119. See Rhode, *supra* note 5, at 104.

120. Socialization as well as financial interest may incline the bar toward greater paternalism than the general public would prefer. After extended professional training and acculturation, individuals may tend to overvalue their contribution in a variety of occupational contexts. See Rhode, *supra* note 31, at 61.

121. See Barbara Whitaker, *Texas Moving to Outlaw Quicken Legal Software*, THE SACRAMENTO BEE, Feb. 7, 1999, at A10.

practice would serve the public.¹²²

One commentator points out that, at least with legal software, a complete ban may be too restrictive.¹²³ In these situations, auditing¹²⁴ or testing¹²⁵ may be a practical compromise.

Alternatively, licensing may be the better option. The bar could require a license to sell legal software just as it requires a license to practice law. Before granting a license, attorneys could review legal software for competence and accuracy. Just as an attorney's license may be revoked, a license to sell legal software could be revoked if and when the software fails to meet standards set by the bar. This would serve a dual purpose. By refusing to license legal software that produces forms that are misleading or inaccurate, the bar could protect the public from the potential dangers of using such forms. At the same time, this would protect the public's right to choose to use legal software.¹²⁶

Shifting the role of enforcement to parties outside the bar who may be capable of making more objective decisions should also be considered.¹²⁷ But this idea entails problems of its own: "What bureaucracies are to govern nonlawyer practice? Who is to oversee the quality of it? Who is to discipline nonlawyer practitioners who transgress—how and with what resources? Who is to provide compensation for nonlawyer defalcations?"¹²⁸ This is not a simple solution. But it would, at the very least, serve to remove the appearance of impropriety.¹²⁹

122. Rhode, *supra* note 5, at 104.

123. See Skinner, *supra* note 30, at 335.

124. See *id.* at 335 n.108.

125. See *id.* at 335 n.109.

126. Rhode, *supra* note 5, at 104.

127. "Enforcement of sweeping prohibitions has rested with those least capable of disinterested actions." Rhode, *supra* note 31, at 97.

128. Ostertag, *supra* note 21, at 116.

129.

Particularly at a time when lawyers are justifiably concerned about their public image, the bar itself has much to gain from abdicating its role as self-appointed guardian of the professional monopoly. Given mounting popular skepticism about unauthorized practice enforcement, prudential as well as policy considerations argue for greater consumer choice . . . Where there are demonstrable grounds for paternalism, it should emanate from institutions other than the organized bar. A profession strongly committed to maintaining both the fact and appearance of impartiality in other contexts should recognize the value of more dispassionate decisionmaking in unauthorized practice enforcement. If, as bar spokesman repeatedly insist, the 'fight to stop [lay practice] is the public's fight,' it is time for the profession to relinquish the barricades.

Rhode, *supra* note 31, at 98-99.

CONCLUSION

*I can't decide which is more pathetic: Lawyers worried that they can be replaced by software, or clients hoping that software can replace lawyers.*¹³⁰

While some consider the whole debate laughable, the issue is a difficult one because it requires balancing competing interests: those of consumers, who have a legitimate need for affordable legal services, and those of professionals, who have an interest in maintaining high professional standards.¹³¹ But these interests may not receive equal consideration. At least one study suggests that chairmen of unauthorized practice of law committees take a lawyer-knows-best approach and do not adequately consider the interests of the public.¹³² Thus, "[a]t every level of enforcement, the consumer's need for protection has been proclaimed rather than proven."¹³³

Changing lawyer's views and roles in the legal system, as well as educating the public about the judicial system, are important steps towards providing the general population with access to the courts.¹³⁴ Lawyers should concentrate on addressing the issues that create the need for self-help legal information instead of seeking to ban it.¹³⁵

To date, the American Bar Association has not announced a position on the issue.¹³⁶ But the following excerpt from a 1995 ABA Report makes the most salient point of the entire debate:

Americans are independent-minded and historically value choice in purchasing services of any kind. Government efforts to restrict individual choice are, thus, unpopular in this country. Further, we can reasonably assume that when consumers know the pros and cons of the choices of assistance, they will make reasonable ones with which government need not unduly interfere.¹³⁷

Even though unauthorized practice of law statutes are vague,¹³⁸ they are

130. Newman, *supra* note 94, at F5.

131. See Jorden, *supra* note 7, at A1 (citing Phil Shuey, former chair of the bar association's law practice management section).

132. Although a third of bar committee chairmen emphasized their role in *protecting* the public, only three (7%) mentioned any responsibility to accommodate public preferences or to balance the harms of lay assistance against its advantages. See Rhode, *supra* note 31, at 61.

133. *Id.* at 97.

134. See Varnetta L. Walker, *Legal Needs of the Public in the Future*, FLA. BAR J., May 1997, at 42.

135. See Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 383 (1994).

136. See Jorden, *supra* note 7, at A1 (quoting Angela Burke, A.B.A. spokeswoman).

137. *Non-lawyer Activity in Law-Related Situations*, A.B.A. Report, 1995.

138. See Skinner, *supra* note 30, at 321 n.7.

clearly intended to protect the public.¹³⁹ Courts should be mindful of this and consider whether a danger to the public truly exists when defining the unauthorized practice of law. A definition that fails to consider this does not give effect to the intent of the law. Accordingly, the unauthorized practice of law should be defined, and statutes should be enforced, so as to further this goal.

In 1995, then-president of the ABA George E. Bushnell commissioned a panel to make recommendations regarding the unauthorized practice of law.¹⁴⁰ Herbert Rosenthal, former executive director of the California State Bar Association and chair of the 1995 ABA nonlawyer activity commission explains the recommendations: "We offered an approach on how to analyze unauthorized practice of law situations and to determine when it applies . . . We had a whole set of standards."¹⁴¹ The suggested analysis entailed considering the risk to the consumer, the skill of the nonlawyer, and "a balance of the benefits and risks."¹⁴² Although the recommendations were sent to the Board of Governors, they were never acted upon.¹⁴³ Instead, the bar has continued to focus its unauthorized practice of law actions on lay form preparation and related activities¹⁴⁴ that rarely result in reported consumer grievances.¹⁴⁵

In light of the relatively innocuous effects of self-help materials¹⁴⁶ there is little justification for banning their sale, at least until the costs are shown to outweigh the benefits.¹⁴⁷ Until then, individuals should be presented with options and vested with the power to decide which types of legal services are most appropriate.¹⁴⁸

There are already plans underway to ensure that self-help materials will remain available to those who want to use them.¹⁴⁹ And with the increasing popularity of the Internet, any attempt to prevent consumers from obtaining

139. See Unauthorized Practice of Law Committee, Brief on the Merits, at 12.

140. See Baker, *supra* note 71, at 57.

141. *Id.*

142. See *id.*

143. See *id.*

144. "Three-quarters of bar committee inquiries, investigations, and complaints, and 68% of reported cases, involved such activities." Rhode, *supra* note 31, at 43. More recent unauthorized practice actions have also focused on form preparation: preparing paperwork for divorces, bankruptcies and other noncontested matters in Oregon; account representative negotiating an agreement that "reaffirmed" the credit-card debt of a Chapter 7 debtor in California; and charging a fee for preparing documents such as death certificates, Social Security forms, and others in Alabama. See Baker, *supra* note 71, at 56.

145. See Rhode, *supra* note 31, at 43.

146. See *Self-Help Law Books and Software*, *supra* note 8.

147. See *Self-Help/Legal Software Ban Overdoing It on Consumer Protection*, HOUSTON CHRON., Feb. 9, 1999, at 20.

148. See Rhode, *supra* note 31, at 98.

149. State Representative Steve Wolens, a Democrat from Dallas has introduced House Bill 1507 which would exclude legal self-help materials from the practice of law. See Hughes, *supra* note 22, at 29.

legal software seems to be an exercise in futility.¹⁵⁰

As the future of legal services seems destined for change, it behooves the bar to actively involve itself in the change rather than standing staunchly opposed to it.¹⁵¹

The more knowledgeable about the law the public is, the more the work of lawyers will be valued and appreciated. Requiring the public to pay attorneys to prepare forms which may easily be created using legal software does not protect the public, it alienates it. The UPLC should decide not to pursue Nolo and instead, serve the public's real interest and concentrate on reform and regulation, not forbidding.¹⁵²

William H. Brown *

150. Quicken may be downloaded from Parson's Web site at www.parsonstech.com. "There's no way to police this. It's inevitable that this kind of software will become more available. This is Custer's last stand." Fisher, *supra* note 58, at 94 (quoting Deborah Rhode, professor at Stanford Law School).

151. *See* Rhode, *supra* note 5, at 104.

152. *See id.*

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