

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNAUTHORIZED PRACTICE OF LAW
COMMITTEE,

Plaintiff,

PARSONS TECHNOLOGY, INC d/b/a
QUICKEN FAMILY LAWYER,

Defendant.

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Civil Action No. 3:97-CV-2859-H

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiff's Motion for Summary Judgment and Supporting Brief, filed September 28, 1998; Defendant's Response to the Committee's Motion, filed October 13, 1998; Plaintiff's Reply to the Defendant's Response, filed October 26, 1998; Defendant's Motion for Summary Judgment and Supporting Brief, filed September 28, 1998; Plaintiff's Response to Defendant's Motion, filed October 13, 1998; and Defendant's Reply in Support of Motion for Summary Judgment, filed October 23, 1998. On December 4, 1998, this Court issued an Order striking the Report of Professor Brian Serr as Summary Judgment evidence. The Court heard oral argument on the cross-motions for summary judgment on December 17, 1998.

Having considered the motions, briefs, and arguments of both parties, and for the reasons set forth below, the Court concludes that there are no genuine issues of material fact and that Plaintiff Unauthorized Practice of Law Committee is entitled to judgment as a matter of law. Therefore, Plaintiff's Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied.

I. BACKGROUND

The Plaintiff, the Unauthorized Practice of Law Committee (“the UPLC”), is comprised of six Texas lawyers and three lay citizens appointed by the Supreme Court of Texas. The UPLC is responsible for enforcing Texas’ unauthorized practice of law statute, TEX. GOV’T CODE §§ 81.101-.106 (Vernon’s 1998) (“the Statute”).¹

The Defendant, Parsons Technology, Inc., (“Parsons”) is a California corporation, whose principal place of business is Iowa, and is engaged in the business of developing, publishing and marketing software products, such as *Quicken Financial Software*, *Turbo Tax*, and *Webster’s Talking Dictionary*. Parsons has published and offered for sale through retailers in Texas a computer software program entitled *Quicken Family Lawyer*, version 8.0, and its updated version *Quicken Family Lawyer ‘99* (“QFL”).²

QFL is the product at the center of this controversy. In its most recent version, QFL offers over 100 different legal forms (such as employment agreements, real estate leases,

¹TEX GOV’T CODE § 81.101 defines the practice of law, as follows:

(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.

²Since the UPLC filed suit in this case, Parsons has discontinued selling *Quicken Family Lawyer*, version 8.0, and replaced it with the updated *Quicken Family Lawyer ‘99*.

premarital agreements, and seven different will forms) along with instructions on how to fill out these forms. QFL's packaging represents that the product is "valid in 49 states including the District of Columbia;" is "developed and reviewed by expert attorneys;" and is "updated to reflect recent legislative formats." (Pl's Ex. 1, p. 8.) The packaging also indicates that QFL will have the user "answer a few questions to determine which estate planning and health care documents best meet [the user's] needs;" (Pl's Ex. 1, p. 9), and that QFL will "interview you in a logical order, tailoring documents to your situation." (Pl's Ex. 1, p. 8.) Finally, the packaging reassures the user that "[h]andy hints and comprehensive legal help topics are always available." (Pl's Ex. 1, p. 8.)

The first time a user accesses QFL after installing it on her computer the following disclaimer appears as the initial screen:

This program provides forms and information about the law. We cannot and do not provide specific information for your exact situation.

For example, we can provide a form for a lease, along with information on state law and issues frequently addressed in leases. But we cannot decide that our program's lease is appropriate for you.

Because we cannot decide which forms are best for your individual situation, you must use your own judgment and, to the extent you believe appropriate, the assistance of a lawyer.

This disclaimer does not appear anywhere on QFL's packaging. Additionally, it does not appear on subsequent uses of the program unless the user actively accesses the "Help" pull-down menu at the top of the screen and then selects "Disclaimer."

On the initial use of QFL, or anytime a new user name is created, QFL asks for the user's name and state of residence. It then inquires whether the user would like QFL to suggest

documents to the user. If the user answers “Yes,” QFL’s “Document Advisor” asks the user a few short questions concerning the user’s marital status, number of children, and familiarity with living trusts.³ QFL then displays the entire list of available documents, but marks a few of them as especially appropriate for the user based on her responses.

When the user accesses a document, QFL asks a series of questions relevant to filling in the legal form. With certain questions, a separate text box explaining the relevant legal considerations the user may want to take into account in filling out the form also appears on the screen. As the user proceeds through the questions relevant to the specific form, QFL either fills in the appropriate blanks or adds or deletes entire clauses from the form. For example, in the “Real Estate Lease - Residential” form, depending on how the user answers the question regarding subleasing the apartment, a clause permitting subleasing with the consent of the landlord is either included or excluded from the form.

If a user selects a “health care document” (i.e., a living will, an advance health care directive, or a health care power of attorney) the following screen appears:

Health Care laws vary from state to state. Your state may not offer every type of health care document.

Family Lawyer assumes that you wish to have a health care document based on the laws of your state.

When you select a living will, health care power of attorney, or advance health care directive, Family Lawyer will open the appropriate document based on your state.

³If the user answers “Yes” to the question concerning living trusts, she is asked one additional question concerning the amount of effort the user is willing to put into her estate plan.

When a Texas user selects a health care document a form entitled “Directive to Physicians and Durable Power of Attorney for Health Care” appears.

In addition to the separate text boxes providing question and form specific information, at any time throughout the program, the user may access various other help features which provide additional legal information. One such feature is “Ask Arthur Miller,” where the user selects a general topic and then a specific question,⁴ after which either a text-based answer is provided or, if the user’s computer has a CD-ROM player, a sound card and a video card, a sound and video image of Arthur Miller answering the question appears.

⁴The “Ask Arthur Miller” feature answers a number of predetermined frequently asked legal questions in the general topics of estate planning, family and personal, powers of attorney, health and medical, real estate, employment, financial, corporate, consumer and credit, and common questions. Some of the specific questions contained within these general topics are “What if I have a dispute, but don’t want to go to the expense and delay of bringing a law suit?”, “Why should I go to the trouble of writing a will?”, “What is probate?”, and “Doesn’t a Premarital agreement take the romance out of marriage?”. After the user clicks on the general question, a general response to the question appears. For instance, the response to the question, “Should a real estate lease be in writing?” is:

No matter how friendly the landlord-tenant relationship seems to be, it’s usually best to have a written lease. In most states, an agreement to lease property must be in writing if the term of the lease is longer than one year. But even for shorter leases, a written lease can be very helpful in resolving issues that might arise later. Such issues might include the length of the lease, the amount of the rent, late charges, return of the security deposit, who pays for utilities and repairs, and whether pets are allowed. On the other hand, an oral lease may allow either party to terminate the lease upon much shorter notice.

In addition, it is important to remember that most states have laws regarding the rights and obligations of landlords and tenants. These laws may limit the amount of rent or security deposit that can be charged. They may also spell out the required procedures for removing a tenant, and explain the procedures that must be followed by the landlord before claiming all or a portion of the security deposit. Be sure you understand your state’s landlord and tenant laws.

The UPLC filed this action in state court alleging that the selling of QFL violates Texas' unauthorized practice of law statute, TEX. GOV'T CODE § 81.101⁵ and seeking, among other things, to enjoin the sale of QFL in Texas. Parsons subsequently removed this case to this Court.⁶ Both parties now seek summary judgment. The UPLC argues that Parsons has violated the Statute as a matter of law. Parsons responds that the mere selling of books or software cannot violate the statute because some form of personal contact beyond publisher-

⁵In his Rule 30(b)(6) deposition, the UPLC's representative, James Blume, indicated that the UPLC believed the following forms came within the unauthorized practice of law statute (Blume Depo. at p. 62, attached as Exhibit 2 to Def's Mot. for Summ. J):

1. Codicil to the Will
2. Employment Agreement
3. Employment Agreement short form
4. Equipment Lease
5. General Power of Attorney
6. Joint Living Trust
7. Living Trust
8. Living Will
9. Noncompete Agreement
10. Pour-over Will
11. Premarital Agreement
12. Promissory note
13. Residential Real Estate Lease - Long and Short Form
14. Special Power of Attorney
15. Stock Power
16. The Seven Will Forms

⁶The Court has jurisdiction under 28 U.S.C. § 1441 based on the diversity of citizenship of the parties. As to the amount in controversy requirement, Plaintiff seeks an injunction that would result in a loss of sales to Parsons of \$500,000 and a loss of profits in excess of \$100,000. Neither party has questioned the Court's jurisdiction. The court is mindful of the Fifth Circuit's ruling in *Alfonso v. Hillsborough County Aviation Authority*, 308 F.2d 724 (5th Cir. 1962) that "the value to the plaintiff of the right to be enforced or protected determines the amount in controversy." The Court believes the amount in controversy requirement has been satisfied because it cannot say "to a legal certainty" that Plaintiff's claims are for less than the jurisdictional amount. *Kleibert v. Upjohn Co.*, 915 F.2d 142, 145 (5th Cir. 1990). Moreover, the rule of *Alfonso* has been relaxed by recent Fifth Circuit decisions. *See Webb v. Investacorp, Inc.*, 89 F.3d 252, 256-257 & n.1 (5th Cir. 1996).

consumer is required by a plain reading of the Statute. Alternatively, if the statute is not construed to require some form of personal relationship, Parsons argues that the application of the Statute to the mere sale and distribution of QFL would infringe upon Parsons' speech rights under the United States and Texas Constitutions. Parsons also argues that the Statute, if utilized to prevent the sale and distribution of QFL, should be void for vagueness.

II. RELEVANT STANDARD

Summary judgment is appropriate where the facts and law as represented in the pleadings, affidavits and other summary judgment evidence show that no reasonable trier of fact could possibly find for the nonmoving party as to any material fact. FED.R.CIV.P. 56; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Innovative Database Sys. v. Morales*, 990 F.2d 217 (5th Cir. 1993). "The moving party bears the initial burden of identifying those portions of the pleadings and discovery in the record that it believes demonstrate the absence of a genuine issue of material fact, but is not required to negate elements of the nonmoving party's case." *Lynch Properties, Inc. v. Potomac Ins. Co. of Ill.*, 140 F.3d 622, 625 (5th Cir. 1998) (citing *Celotex*, 477 U.S. at 322-25). If the movant fails to meet its initial burden, the motion must be denied, regardless of the nonmovant's response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

If the movant does meet its burden, the nonmovant must go beyond the pleadings and designate specific facts showing that a genuine issue of material fact exists for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Edwards v. Your Credit, Inc.*,

148 F.3d 427, 431 (5th Cir. 1998). A party opposing summary judgment may not rest on mere conclusory allegations or denials in its pleadings unsupported by specific facts presented in affidavits opposing the motion for summary judgment. FED.R.CIV.P. 56(e); *Lujan*, 497 U.S. at 888; *Hightower v. Texas Hosp. Assn.*, 65 F.3d 443, 447 (5th Cir. 1995).

In determining whether genuine issues of fact exist, “[f]actual controversies are construed in the light most favorable to the nonmovant, but only if both parties have introduced evidence showing that a controversy exists.” *Lynch*, 140 F.3d at 625; *see also Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992). However, in the absence of any proof, the Court will not assume that the nonmoving party could or would prove the necessary facts. *Lynch*, 140 F.3d at 625. A party must do more than simply show some “metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. “If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991).

With these summary judgment standards in mind, the Court turns to the cross-motions for summary judgment.

III. ANALYSIS

A. Determination of This Suit on Summary Judgment.

Under both Texas substantive law and the Federal Rules of Civil Procedure, it is appropriate for this Court to decide this case on summary judgment at this time. Under Texas law, a court may determine whether the undisputed acts of a defendant fall within the statutory definition of the unauthorized practice of law. *Unauthorized Practice of Law Committee v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985). While the right to trial by jury exists where the alleged

acts purportedly constituting the unauthorized practice of law are disputed, the “courts ultimately decide whether certain undisputed activities constitute the unauthorized practice of law.” *Id.* Therefore, if there are no disputed facts, it is appropriate for this Court to decide the issue of whether the undisputed acts fit within the definition of the unauthorized practice of law.

In this case, there are no genuine issues of material fact or disputed acts. Parsons’ act of publishing QFL is undisputed. The contents of QFL are undisputed. All that remains to be determined is the legal consequences, if any, of these undisputed acts, and according to *Cortez*, the power to make this determination ultimately resides with the Court. Therefore, under both Texas law and the traditional federal summary judgment standards, this case is ripe for decision on summary judgment.

B. The Violation of the Texas Unauthorized Practice of Law Statute.

The UPLC moves for summary judgment because it claims, as a matter of law, the sale and distribution of QFL violates the Statute. The UPLC argues that QFL gives advice concerning legal documents and selects legal documents for users, both of which involve the use of legal skill and knowledge, and this constitutes the practice of law.⁷ Additionally, the UPLC argues that the Defendant’s forms are misleading and incorrect. (Pl’s Brief in Supp. of Mot. for Summ. J. at 5). In sum, the UPLC alleges that QFL acts as a “high tech lawyer by interacting with its ‘client’ while preparing legal instruments, giving legal advice, and suggesting legal instruments that should be employed by the user.” (Pl’s Reply to Def’s Resp. to Pl’s Mot. at 3.). In other words, QFL is a “cyber-lawyer.”

No one disputes that the practice of law encompasses more than the mere conduct of

⁷Parsons does not dispute that it is not licensed to practice law in the state of Texas.

cases in the courts. See *In re Duncan*, 65 S.E. 210 (S.C. 1909) (finding that the practice of law includes “the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law.”). However, a comprehensive definition of just what qualifies as the practice of law is “impossible,” and “each case must be decided upon its own particular facts.” *Palmer v. Unauthorized Practice of Law Committee*, 438 S.W.2d 374, 376 (Tex. App. — Houston 1969, no writ); see also *State Bar of Michigan v. Cramer*, 249 N.W.2d 1, 7 (Mich. 1976) (“any attempt to formulate a lasting, all encompassing definition of ‘practice of law’ is doomed to failure.”).

The UPLC, in arguing that the publication and sale of QFL constitutes the unauthorized practice of law, relies on two Texas Court of Appeals cases, *Palmer v. Unauthorized Practice of Law Committee*, 438 S.W.2d 374 (Tex. App. — Houston 1969, no writ), and *Fadia v. Unauthorized Practice of Law Committee*, 830 S.W.2d 162 (Tex. App. — Dallas 1992, writ denied).

Palmer held that the sale of will forms containing blanks to be filled in by the user, along with instructions, constituted the unauthorized practice of law. The *Palmer* court observed that the form sold by Mr. Palmer was “almost a will itself” and that the form purported to make specific testamentary bequests. The court feared that the unsuspecting layman “by reading defendants' advertisements, by reading the will form, and by reading the definitions that are attached, ... [would be] led to believe that defendants' will ‘form’ is in fact only a form and that all testamentary dispositions may be thus standardized.” *Id.* at 376. The *Palmer* court held that the preparation of legal instruments of all kinds involves the practice of law. *Palmer* at 376 (citing *Stewart Abstract Co. v. Judicial Commission*, 131 S.W.2d 686 (Tex. App. — Beaumont 1939, no

writ)). The *Palmer* court further held that the exercise of judgment in the proper drafting of legal instruments, or even the selecting of the proper form of instrument, necessarily affects important legal rights, and thus, is the practice of law. *Palmer* at 377 (citing *Cape May County Bar Ass'n v. Ludlam*, 211 A.2d 780, 782 (N.J. 1965) (per curiam)).

In *Fadia*, the *pro se* defendant sold and distributed a manual entitled “You and Your Will: A Do-It-Yourself Manual.” The defendant in *Fadia* attempted to get around *Palmer*’s conclusion that the selling of a will manual constitutes the unauthorized practice of law, by arguing that the court should reject *Palmer* in light of recent state court decisions requiring some form of personal contact or relationship between the alleged unauthorized lawyer and the putative client in order to violate the unauthorized practice of law statute. The court rejected the defendant’s argument, stating that it would not overrule *Palmer* and if there were to be a pre-requisite of personal contact between the parties, such a change to the Statute would have to come from the legislature and not the courts. *Fadia*, 830 S.W.2d at 164. The *Fadia* court went on to hold that because a will secures legal rights and its drafting involves the giving of advice requiring the use of legal skill or knowledge, the preparation of a will involves the practice of law. *Id.* Since the selection of the proper legal form also affects important legal rights, the court reasoned that it too constituted the practice of law. *Id.* at 165. Therefore, since the will manual both purported to advise a layman on how to draft a will and selected a specific form for the layman to use, the court determined that the Defendant’s selling of a will manual qualified as the unauthorized practice of law. *Id.*

As already mentioned, the *Palmer* court found that the preparation of legal instruments of all kinds involves the practice of law. *Palmer* 438 S.W.2d at 376. The Texas Supreme Court has since held that the mere advising of a person as to whether or not to file a form requires legal skill

and knowledge, and therefore, would be the practice of law. *Unauthorized Practice of Law Committee v. Cortez*, 692 S.W.2d 47, 50 (Tex. 1985).

Based on the interpretations of the Statute by the Texas courts, QFL falls within the range of conduct that Texas courts have determined to be the unauthorized practice of law. For instance, QFL purports to select the appropriate health care document for an individual based upon the state in which she lives. QFL customizes the documents, by adding or removing entire clauses, depending upon the particular responses given by the user to a set of questions posed by the program. The packaging of QFL represents that QFL will “interview you in a logical order, tailoring documents to your situation.” Additionally, the 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. This false impression is not diminished by QFL’s disclaimer. The disclaimer only actively appears the first-time the program is used after it is installed, and there is no guarantee that the person who initially uses the program is the same person who will later use and rely upon the program.

QFL goes beyond merely instructing someone how to fill in a blank form. While no single one of QFL’s acts, in and of itself, may constitute the practice of law, taken as a whole Parsons, through QFL, has gone beyond publishing a sample form book with instructions, and has ventured into the unauthorized practice of law.

Parsons attempts to avoid the conclusion that it is guilty of the unauthorized practice of law by arguing that the Statute requires personal contact or a lawyer-client relationship. Parsons bases its argument first on the language of the Statute, which it contends requires that the

prohibited services must be provided “on behalf of a client” in order to be the practice of law.

Even assuming that Parsons is correct that paragraph (a) of the Statute requires the prohibited services to be completed “on behalf of” a client, paragraph (a) of the Statute is not an exclusive definition of the unauthorized practice of law. Paragraph (b) of the Statute gives the Court the authority to determine that other acts constitute the unauthorized practice of law. Therefore, a judge could legitimately determine, under the authority granted in paragraph (b), that services provided to the public as a whole, as opposed to a singular client, qualify as the practice of law.

Next, Parsons argues that this Court should require a personal relationship between the party charged with the unauthorized practice of law and the party who benefits from the “advice” since this is the logic of almost every other court to consider the issue. (*See* Def’s. Resp. to Pl’s Mot. for Summ. J. at 6); *see also, e.g., New York County Lawyers’ Association v. Dacey*, 283 N.Y.S.2d 984, 999 (N.Y. App. Div.) *overruled and dissenting opinion adopted by, New York County Lawyers’ Association v. Dacey*, 234 N.E.2d 459 (N.Y. 1967). However, as noted above, the *pro se* defendant in *Fadia* made this exact argument and the Texas Court of Appeals rejected it. *Fadia*, 830 S.W.2d at 164.

Nonetheless, Parsons contends that if the Texas Supreme Court were to consider the issue it would follow the lead of the other states. Although this Court is not *Erie* bound to follow the *Fadia* decision, it believes the Texas Supreme Court would find the *Fadia* decision a persuasive precedent. *See Hall v. Dow Corning Corp.*, 114 F.3d 73, 77 (5th Cir. 1997). For this Court to be the first to impose a new interpretation of a state statute which has been on the books in its current form since 1987, and some form since 1939, would fly in the face of generally accepted

notions of federal-state comity. If Parsons believes such a personal contact requirement should be included in the Statute, it should address these concerns to the Texas legislature. It is not appropriate for this Court to be the first to read such a requirement into the Statute.

Parsons' arguments to the contrary notwithstanding, QFL is far more than a static form with instructions on how to fill in the blanks. For instance, QFL adapts the content of the form to the responses given by the user. QFL purports to select the appropriate health care document for an individual based upon the state in which she lives. The packaging of QFL makes various representations as to the accuracy and specificity of the forms. In sum, Parsons has violated the unauthorized practice of law statute.

C. Does the Statute Withstand Scrutiny Under the United States Constitution?

Having determined that the publication of QFL violates the Texas unauthorized practice of law statute, the Court must now examine whether applying the Statute in such a manner infringes upon the rights guaranteed by the First Amendment of the United States Constitution. The First Amendment is plainly implicated by the UPLC's desire to halt the sale of QFL in the state of Texas. While there is no right of unlicensed laymen to represent another under the First Amendment's guarantees of freedom of association and freedom to petition one's government, *Turner v. American Bar Ass'n*, 407 F. Supp. 451, 478 (N.D. Tex. 1975), Parsons' rights under the First Amendment's protections of a free press still apply.

1. Determining the Appropriate Level of Scrutiny: Content-Neutral v. Content-Based

The Court's initial First Amendment inquiry is to determine whether the Statute is a content-neutral or content-based restriction of speech because this answer will determine the level of scrutiny to which the Statute and its application will be subjected. If the Statute is determined

to prevent speech based on its content, it is subject to strict scrutiny. If the Statute is merely a content-neutral restriction on speech, it is subject only to intermediate scrutiny.

The principal inquiry in determining content neutrality in speech cases is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). If the answer is “no,” then the statute is content-neutral and subject only to intermediate scrutiny. The government’s purpose is the controlling consideration in this inquiry. A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *Id.*, at 791.

Parsons vehemently asserts that the Statute’s prohibition is a content-based restriction on speech. It bases this assertion, not on the general purpose of the Statute, but on the deposition testimony of the UPLC’s designated representative that the UPLC would not prosecute Parsons for the publication of its non-legal software titles. (Def’s Mot. for Summ. J. at 14 & Exhibit 2, pp. 75-76, 78-80). Thus, according to Parsons, since only its legal titles are subject to restriction, the Statute is based on the content of the software title, and therefore, the Statute is subject to strict scrutiny.

However, it is not what specific speech (or conduct) the Statute prohibits, but whether the government is evidencing a disagreement with the speaker’s message, as well as the underlying purpose behind the statute, which determines content-neutrality. The mere fact that the Statute sanctions speech-based conduct does not make the Statute content-based. *See Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part

initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”)

The Statute at issue is aimed at eradicating the unauthorized practice of law. The Statute’s purpose has nothing to do with suppressing speech. The UPLC’s decision to challenge some of Parsons’ software titles but not others has less to do with their content than with the likelihood that the title has possibly violated the unauthorized practice of law statute. Of course, the UPLC would not subject Parson’s non-legal titles to scrutiny under the Statute; it is unlikely that the *Life Application Bible* engages in the prohibited conduct of practicing law without a license. Such discrimination between products does not evidence a disagreement with the message of Parsons’ software.

There being no other arguments that the Statute is anything but content-neutral, the Court finds that the Statute is aimed at the noncommunicative impact of Parsons’ speech, and therefore, is a content-neutral regulation which only incidentally affects speech and therefore is subject only to intermediate scrutiny.

2. Determining Whether a Content-Neutral Statute Overburdens Protected Speech Rights

Having determined that the Statute is content-neutral, the Court must still decide whether the Statute nonetheless overburdens protected speech. To make this determination, the Court subjects the Statute to intermediate scrutiny and the four part test of *United States v. O’Brien*, 391 U.S. 367 (1968).⁸ Under *O’Brien*, the UPLC must establish that:

⁸The Supreme Court has identified seven different tests for determining the constitutionality of content-neutral regulations of speech. Geoffrey Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 49 (1987). Other than the 4-part *O’Brien* test, courts most often describe the test for intermediate scrutiny as a 3-part test: (1) Are the restrictions justified without reference to the content of regulated speech; (2) Are they narrowly tailored to serve a significant government interest; and (3) Do the regulations leave open ample alternative channels

- 1) The regulation is within the constitutional power of the state;
- 2) It furthers an important or substantial government interest;
- 3) The government interest is unrelated to the suppression of free expression; and
- 4) The incidental restriction of speech is no greater than is essential to the furtherance of that interest.

The Court will examine each of the *O'Brien* factors in turn.

a. Is the Statute is Within the Constitutional Power of the State?

The first prong of *O'Brien* requires that the government have the constitutional power to enact the regulation in question. *O'Brien*, 391 U.S. at 371. Parsons does not dispute that the state of Texas has the power to prohibit the unauthorized practice of law. Therefore, the first prong of *O'Brien* is satisfied.

b. Does the Statute Further an Important Government Interest?

The State has a significant interest in regulating the practice of law and protecting its citizens from being misled. The Supreme Court has said that states have a “substantial interest in regulating the practice of law within the State.” *Sperry v. Florida*, 373 U.S. 379, 383 (1963). Therefore, the second prong of *O'Brien* is satisfied.

c. Is the government interest unrelated to the suppression of free expression?

A regulation satisfies *O'Brien*'s third criterion if it can be justified without reference to the content of the regulated speech. *J&B Entertainment v. City of Jackson*, 152 F.3d 362, 376 (5th

of communication. This is specifically the test for a time, place or manner restriction. The Supreme Court has held that the *O'Brien* test “in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). The *O'Brien* test is generally used for regulations which prohibit conduct with a speech element. Additionally, it is hard to argue that the unauthorized practice of law statute is a time, place, or manner restriction. Therefore, the Court will utilize the *O'Brien* test in determining the constitutionality of the Statute.

Cir. 1998). This criterion is essentially no different than the initial test to establish if the regulation was content-neutral. Since the Statute can be justified on the need to prevent people who are not lawyers from giving legal advice and harming the citizens of Texas, the Statute satisfies the third prong of *O'Brien*.

d. Is the incidental restriction of speech no greater than is essential to the furtherance of the governmental interest?

A regulation satisfies the final prong, often referred to as “the narrow tailoring requirement,” “so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *United States v. Albertini*, 472 U.S. 675, 689 (1985). The regulation must also “not burden substantially more speech than is necessary to further the government’s legitimate interest.” *Ward*, 491 U.S. at 799.

The version of the narrow tailoring requirement for intermediate scrutiny does *not* require the government to choose the “least-restrictive alternative” in achieving its interests. *Ward*, 491 U.S. at 798. Furthermore, a court should not invalidate the government’s preferred remedial scheme because some alternative solution is marginally less intrusive on a speaker’s First Amendment interests. *Turner Broadcasting System, Inc. v. F.C.C.*, 117 S.Ct. 1174, 1200 (1997) (Turner II). A statute should be struck down under intermediate scrutiny only when a “substantial portion of the burden on speech does not serve to advance [the State’s content-neutral goals].” *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. at 122 n.* (quoting *Ward*, 491 U.S. at 799).

While the Court recognizes that the issue is close, it is of the opinion that the Statute does not “substantially burden” more speech than necessary, and that the government’s interest would

be achieved less effectively absent the regulation. Absent the regulation, as it is being applied in this case, the State’s ability to combat the unauthorized practice of law in the computer age would be hindered. The State possesses an interest in protecting the uninformed and unwary from overly-simplistic legal advice. The UPLC does not seek to prevent the simple provision of information concerning legal rights; rather, it seeks to prevent the citizens of Texas from being lulled into a false sense of security that if they use QFL they will have a “legally valid” document that’s “tailored to [their] situation” and “best meets their needs.” If the UPLC is prevented from prosecuting Parsons, the State’s interests in preventing those who are not authorized to practice law from giving legal advice would be less effectively achieved. Additionally, while the Statute burdens some speech, that burden does not rise to the level of a *substantial* burden. Moreover, the burden which the Statute does place on speech is necessary to serve the State’s legitimate content-neutral interests. Thus, the Statute satisfies the fourth prong of *O’Brien*.

Since the Statute meets all four of *O’Brien*’s requirements, it survives review under intermediate scrutiny. The Statute does not violate the First Amendment to the United States Constitution.

D. Speech Rights Under the Texas Constitution

Parsons also alleges that the UPLC’s actions in enforcing the Statute against it violates Parsons’ rights to free speech under Article I, Section 8 of the Texas Constitution.⁹ It does not.

⁹Article 1, Section 8 of the Texas Constitution states:

Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence.

Granted, *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992), requires a showing of immediate and irreparable harm before issuing an injunction. This test is more stringent than the test under federal law. However, the cases since *Davenport* have limited this higher standard under the Texas Constitution to cases which “have involved prior restraints in the form of court orders prohibiting or restricting speech.” *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 434 (Tex. 1998). Furthermore, the Fifth Circuit has refused to expand the *Davenport*’s heightened standard outside of the narrow areas specifically addressed by the Texas Supreme Court, *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995), and the Court will not do so here. Furthermore, the UPLC has made a sufficient showing of immediate and irreparable harm to the citizens of Texas from the sale and publication of QFL that the heightened standard of *Davenport* has been satisfied.

Since the injunction this Court will issue will be limited to only *Quicken Family Lawyer*, version 8.0, and *Quicken Family Lawyer ‘99*, which have already been published, the injunction is not a “prior restraint,” and the heightened standards of *Davenport* should not apply. “Not all injunctions that may incidentally affect expression are ‘prior restraints.’” *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 763 n.2 (1994). When an injunction issues “not because of the content of petitioners’ expression ... but because of their prior unlawful conduct,” it is not a prior restraint. *Id.*; see also *Securities & Exchange Commission v. Wall Street Publishing, Inc.*, 851 F.2d 365, 370 (D.C. Cir. 1988) (finding that the prior restraint doctrine is the wrong analytical

And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

framework if the injunction is imposed only after full judicial review on the merits). The injunction that will issue in accordance with this Memorandum Opinion and Order will not be the broad relief sought by the UPLC.¹⁰ Rather, this Court will limit relief to enjoining the sale and distribution of *Quicken Family Lawyer*, version 8.0, and *Quicken Family Lawyer '99* within the state of Texas.

Thus, enforcement of the Statute here does not violate the Texas Constitution.

E. Is the Statute Unconstitutionally Vague as Applied to Parsons?

Finally, Parsons challenges the Statute as being impermissibly vague as it is being applied to them. This challenge also fails.

Vagueness is a constitutional infirmity rooted in due process. “An enactment is void for vagueness if its prohibitions are not clearly defined.” *J&B Entertainment*, 152 F.3d at 367

¹⁰The UPLC seeks an injunction prohibiting Parsons from the following:

1. contracting with persons to provide legal forms including but not limited to promissory notes, leases, wills, trusts, and employment agreements;
2. advising, expressly and/or implicitly, persons as to their rights and the advisability of the suitability and/or enforceability of such forms;
3. advising, either expressly and/or implicitly, persons of their rights, duties, and privileges under the law;
4. advising, expressly and/or implicitly, individuals to employ such forms;
5. choosing proper form and language for individuals to use for various transactions, contracts and arrangements; and
6. advising an individual whether to use such forms.

(quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)); see also *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994) (upholding federal drug paraphernalia law against a void-for-vagueness challenge). Vague laws are prohibited because they do not give citizens fair warning that their conduct is illegal. In determining whether a statute is vague, we view the law from the standpoint of a person of ordinary intelligence. *J&B Entertainment*, 152 F.3d at 367.

This Statute was challenged for vagueness in *Drew v. Unauthorized Practice of Law Comm.*, 970 S.W.2d 152 (Tex. App. -- Austin 1998, writ denied). Mr. Drew, a non-lawyer, had filed habeas corpus petitions on behalf of people who believed they had been denied their rights. An order was entered enjoining Mr. Drew from practicing law. On appeal, he challenged the Statute as being void for vagueness. The Court of Appeals concluded that “the statute is sufficiently specific as concerns the actions the court enjoined, including preparation of pleadings, giving legal advice, preparing legal documents, and attempting to appear before a judge on behalf of another.” *Id.* at 155. This holding is consistent with every other court which has considered a vagueness challenge to a state’s unauthorized practice law. See *State v. Rogers*, 705 A.2d 397, 401 (N.J. Sup. Ct. 1998) (citing cases upholding unauthorized practice of law statutes against vagueness challenges); see also *Lawline v. American Bar Assn.* 956 F.2d 1378 (7th Cir. 1992) (upholding against a vagueness challenge state ethical rule prohibiting lawyers from assisting others in the unauthorized practice of law).

While the Statute is not a model of clarity, “condemned to the use of words, we can never expect mathematical certainty from our language.” *Grayned*, 408 U.S. at 110. The Statute and the surrounding case law set forth a core of prohibited conduct with sufficient definiteness to guide those who must interpret it. The Statute speaks of the preparation of a will or contract or

other legal instrument as being potentially prohibited conduct. This should have put Parsons or anyone else who assists others in the preparation of a legal document on notice that they may run afoul of the unauthorized practice of law statute. Moreover, while Parsons may believe it to be wrongly decided, *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162 (Tex. App. -- Dallas 1992, writ denied), should have also placed Parsons on notice that in Texas the selling of forms, without more, may be considered the unauthorized practice of law. The acts prohibited by the Statute were sufficiently defined that Parsons had fair warning that the publication and sale of QFL was potentially illegal in Texas. Consequently, Parsons' claim that the Statute is unconstitutionally vague as applied fails.

III. CONCLUSION

Plaintiff's Motion for Summary Judgment is **GRANTED**. Defendant's Motion for Summary Judgment is **DENIED**.

Plaintiff will submit a proposed judgment conforming with this order.

SO ORDERED.

DATED: January 22, 1999

BAREFOOT SANDERS, SENIOR JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS