

No. 99-10388

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**UNAUTHORIZED PRACTICE OF LAW COMMITTEE,
Plaintiff-Appellee,**

v.

**PARSONS TECHNOLOGY, INC., d/b/a
QUICKEN FAMILY LAWYER,
Defendant-Appellant.**

**On Appeal from the United States District Court
for the Northern District of Texas**

**BRIEF OF *AMICUS CURIAE*
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Introduction

The key issue presented in this case is whether new technologies will be harnessed to provide accurate information about the legal system to the millions of Americans who are presently denied access to courts. There is an overriding public interest in helping people understand and use the legal system, which can be achieved by preserving the availability of self-help law books and software such as *Quicken Family Lawyer*. The judicial branch has a responsibility to adapt to technological changes and innovations. In a sweeping opinion that mischaracterizes self-help legal software as constituting a “cyberlawyer,” the District Court for the Northern District of Texas has failed to fulfill this responsibility.

Amicus curiae HALT -- *An Organization of Americans for Legal Reform* further submits that the court below misconstrued the Texas unauthorized practice statute when it enjoined the sale and distribution of *Quicken Family Lawyer*, a misreading which the state legislature addressed through emergency legislation signed into law earlier this month. The judicial branch has the authority to regulate the conduct of lawyers and those who hold themselves out to be lawyers, not publishers, software programmers or private citizens who wish to purchase their products. Self-help law books and software make it clear that they are not acting as attorneys, and consumers who buy and use these products know that they are getting an aid for their use, not a lawyer. The District Court’s misguided judicial

activism misconstrued the Texas unauthorized practice statute to enjoin the sale and distribution of self-help law books and software.

Finally, as a national, non-profit public interest organization HALT has long provided self-help legal materials to its members, and advocated reforms that empower consumers to handle their own simple and routine legal needs. The First Amendment protects not only Americans' right to publish and speak, but also our right to read and listen. The rights of over 2,800 HALT members in Texas to buy, read and use self-help law books and software, such as *Quicken Family Lawyer*, are being violated by the decision below.

I. The Public Interest in Helping People Understand and Use the Legal System Outweighs the Unsubstantiated Claims That Self-Help Law Books and Software Are Dangerous.

According to the American Bar Association, each year thirty-eight million low and moderate income households nationwide need legal help, but are denied access to the American civil justice system.^{1/} Today, cost and complexity remain the largest barriers that prevent access to the civil justice system. Tens of millions of low and moderate income Americans cannot afford to hire a lawyer when they have a legal problem, and millions of others are intimidated by even the prospect of trying to deal with the system on their own.

^{1/} See *Agenda for Access: The American People and Civil Justice -- Final Report on the Implications of the Comprehensive Legal Needs Study*, Consortium on Legal Services and the Public, American Bar Association, Chicago, Illinois (1996).

One way to reduce costs is to increase consumer choice and encourage the development of innovative methods of delivering legal services.^{1/} Empowering citizens with self-help books and software that allow them to handle routine matters *pro se* is a critical innovation that can help expand access.^{1/} Recently, more sophisticated software packages, which include legal forms on compact disks and a state-of-the-art user interface, have greatly improved the resources available to help consumers deal

^{2/} The importance of encouraging innovative methods of delivering legal services despite the continued hurdles erected by unauthorized practice rules has been stressed by two separate American Bar Association Commissions. *See Nonlawyer Activity in Law Related Situations: A Report with Recommendations*, Commission on Nonlawyer Practice, ABA, Chicago, IL (1995); see also, *Report to the House of Delegates*, Commission on Multidisciplinary Practice, ABA, Chicago, IL (1999).

^{3/} As a result of the high cost of hiring a lawyer, the percentage of people handling their legal matters *pro se*, either with aid of self-help legal publications and software or independent paralegals, is on the rise. Recent HALT interviews with practitioners in Arizona, California and Florida revealed that *pro se* cases in those states far exceed those with traditional lawyer representation. In fact, in recent years,

with their legal needs *pro se*.^{1/}

at least eighty percent of domestic cases filed in California were filed *pro se*.

^{1/} *Do-it-Yourself Law: HALT's Guide to Self-Help Books, Kits & Software* (HALT, 1999) reviews and rates 58 of the most popular self-help products.

Unfortunately, unauthorized practice statutes have been used by Texas and other states to attack these and other innovations that expand citizen access to the civil justice system.^{1/} These abuses of unauthorized practice rules to constrain consumer choice of alternatives to hiring a lawyer represent vestiges of an era when the organized bar acted, sometimes unlawfully, to protect lawyers' economic interests rather than to further the public interest in having an affordable and accessible legal system.

Ironically, this kind of abuse of unauthorized practice statutes has been rejected by responsible lawyers and jurists since the late 1960s. In 1967, the New York Bar charged that the publication and sale of Norman Dacey's book, *How to Avoid Probate*, constituted unauthorized practice. The New York Court of Appeals disagreed, ruling that writing and publishing self-help legal materials and forms is not the practice of law. *New York County Lawyers Ass'n v. Dacey*, 282 N.Y.S.2d 985, *reversed*, 234 N.E.2d 459 (N.Y. 1967).

^{5/} In addition to this case, the Texas Committee also brought an unauthorized practice proceeding against Arthur Andersen based on the tax advisory services provided by its lawyers and accountants. Although this proceeding was terminated, other accounting firms have received similar unauthorized practice of law inquiries. See *Report to the House of Delegates*, Appendix C, Reporter's Notes at C10, Commission on Multidisciplinary Practice, ABA, Chicago, IL (1999).

The impact of this kind of abuse of unauthorized practice rules upon those who lack access to the legal system is starkly illustrated in an unauthorized practice proceeding now pending in Delaware. In 1996, the Delaware Disciplinary Counsel filed a lawsuit against Marilyn Arons for providing services, free-of-charge, to parents of disabled children in "due process" educational placement hearings in that state. Incredibly, the complaint against Arons did not come from the parents or children she serves, but from lawyers from the school districts that have lost numerous cases to her. *In the Matter of Marilyn Arons, et al.*, Supreme Court of Delaware No. UPL-4 (1996).

Another example of a recent misuse of unauthorized practice rules to reduce access to the civil justice system involved independent paralegal Robin Smith, who helped some ten thousand people prepare their own uncontested divorce papers for nine years without one consumer complaint, but whose service was shut down by the Oregon State Bar. *Smith v. Oregon Bar*, 942 P.2d 793 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1055 (1998).

The hallmark of this recent wave of abusive unauthorized practice cases is that they are victimless — there is no consumer who has sought the intervention of Bar authorities. Rather these cases have been spawned by attorneys in adversarial positions, unsupervised Bar Committees or individual lawyers who think they are losing business to less expensive alternatives. In fact, Stanford University legal historian and past president of the American Association of Law Schools, Deborah

Rhode, found that only two percent of complaints against non-lawyer practice involved any claim of injury. *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

Finally, in this case, Appellee concedes that no user of *Quicken Family Lawyer* has sought its intervention or claimed that they were misled by the product, despite the fact that an estimated 100,000 copies have been sold in Texas since 1990 (Brief for Appellant, pp. 5, 7-8 n.4). It is patently absurd to claim, as does the Texas Unauthorized Practice Committee, that its abusive actions somehow further the public interest by protecting consumers. Invoking unauthorized practice statutes to attack perceived economic competition, or to silence an adversary who cannot afford a lawyer, demonstrates that this public service rationale is being grossly perverted.

Americans have an undisputed right to handle their own legal problems *pro se*. *Faretta v. California*, 422 U.S. 806, 832 (1975) (fundamental constitutional right of all persons to represent themselves in court proceedings); see also, *Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1192 (Fl. 1978). To meaningfully exercise that right, citizens need access to books and software products that help them understand and deal with the civil justice system. Particularly in light of the current crisis, where literally millions of Americans have no viable alternative to handling their legal matters themselves, *amicus curiae* HALT submits that there is an overriding public interest in protecting the availability of self-help law books and software.

The decision of the Court below ignores this critical public interest and denies Texans access to innovative computer software, because it offers them too much help. This perverse result cannot be allowed to stand.

II. The Court Below Misconstrued the Texas Unauthorized Practice Statute to Ban Self-Help Law Books and Software.

The judicial branch has the authority to regulate the conduct of lawyers and those who hold themselves out to be lawyers, not publishers, software programmers or private citizens who wish to purchase their products. The Texas unauthorized practice statute explicitly recognizes that its provisions must be construed consistent with this authority of the judicial branch (*see* Texas Gov't Code Ann. § 81.101(b)).

The District Court erred in concluding that self-help law books and software, which are nowhere enumerated in Section 81.101(a), could nonetheless be included in its definition of the “practice of law.” Just as the judicial branch's authority is rooted in its power to regulate the conduct of lawyers and those who hold themselves out to be lawyers, the Texas unauthorized practice statute limits its reach to services or advice “requiring the use of legal skill or knowledge,” *i.e.*, those that lawyers are specially trained to provide. This qualifying language is critical — it reflects a commitment to ensure that members of the public are actually getting services from a lawyer when they believe they are getting services from a lawyer.

Self-help law books and software provide information that the reader or user decides how to use; they do not purport to give the advice or services that require the

use of legal skills of an attorney. HALT's most recent Citizens Legal Manual, *Do-it-Yourself Law: HALT's Guide to Self-Help Books, Kits & Software*, reviews the major products in this field. Virtually every product contains explicit guidance about its limitations and the difference between *pro se* self-help and hiring a lawyer. For example, products from Nolo Press typically include the following plain language explanation (*See, Do-it-Yourself Law*, review of 101 Law Forms for Personal Use, p.19):

We've done our best to give you useful and accurate information in this book. But laws and procedures change frequently and are subject to differing interpretations. If you want legal advice backed by a guarantee, see a lawyer. If you use this book, it's your responsibility to make sure that the facts and general advice contained in it are applicable to your situation.

Similarly, products from Block Financial typically include the following explanation (*See, Do-it-Yourself Law*, review of Kiplinger's Home Legal Advisor 98, p. 23):

The user acknowledges that Block Financial Corporation, The Kiplinger Washington Editors, Inc. and Teneron Corporation do not practice law or provide legal advice, are not engaged in rendering legal, accounting or other professional services and are not rendering such professional services with regard to Kiplinger's Home Legal Advisor. The user acknowledges that laws vary from state to state and change over time. The final documents should be reviewed by a lawyer before use. Where a document is to be negotiated with another party, the user should consult an attorney prior to the start of negotiations. Use of Kiplinger's Home Legal Advisor constitutes agreement to the foregoing.

Finally, products from Appellant Parsons Technology typically include even more extensive explanations (*See, Do-it-Yourself Law*, review of Quicken Family

Lawyer 99 Deluxe, p. 26):

This program provides forms and information about the law. We cannot and do not provide information about your exact situation. For example, we can provide a form for a lease, along with information on state laws 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.

Family Lawyer is designed to provide information and forms you may find helpful. It is provided to you with the understanding that Parsons Technology is not engaged in providing legal advice or other professional services. It is not intended to replace legal advice and if legal advice or other expert assistance is required, the services of a competent and qualified lawyer or other professional should be sought.

Self-help law books and software make it clear that they are not acting as attorneys, and consumers who buy and use these products know that they are getting an aid for their use, not a lawyer. Consumers are not being deceived.

Despite the explicit explanations that *Quicken Family Lawyer* "is not intended to replace legal advice and if legal advice or other expert assistance is required, the services of a competent and qualified lawyer or other professional should be sought," the Court below enjoined its sale and distribution in Texas. In doing so, Judge Sanders acted like a legislature and added a new prohibition to the Texas unauthorized practice statute, which goes far afield from regulating lawyers and those who hold themselves out to be lawyers.

The Texas State Legislature promptly acted to correct this misguided judicial

activism by passing House Bill 1507.^{1/} On June 19, 1999, Governor Bush signed this legislation, which amended the Texas unauthorized practice statute by adding the following subsection (c) to Texas Gov't Code Ann. § 81.101:

In this chapter, the "practice of law" does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney. This subsection does not authorize the use of the products or similar media in violation of Chapter 83 and does not affect the applicability or enforce ability of that chapter.

While this corrective legislation should curtail future abuses of the Texas unauthorized practice statute, this Court should similarly correct the District Court's mistaken interpretation of that statute and remand with instructions to vacate the injunction against the sale and distribution of *Quicken Family Lawyer*.

III. Enjoining the Sale and Distribution of *Quicken Family Lawyer* Violates the First Amendment Rights of Texans to Buy, Read and Use Self-Help Law Books and Software.

The First Amendment protects not only Americans' right to publish and speak, but also our right to read and listen. *Virginia State Bd. of Pharmacy v. Virginia*

^{1/} This bill was adopted as emergency legislation under a suspension of the rules in both houses of the Texas State Legislature (H.B. 1507 § 2).

Citizens Consumer Council, 425 U.S. 748, 756-57 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 758 (1976); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). As this Court recognized in *Moore v. City of Kilgore*, 877 F.2d 364, 370 (1989), “A listener’s interest enjoys protection just as the speaker’s interest finds refuge behind the shield of the First Amendment.”

The District Court action enjoining the sale and distribution of *Quicken Family Lawyer* unconstitutionally abridges the First Amendment right of Americans to read and use materials that help them deal with the legal system.

The District Court’s decision is predicated on the content of *Quicken Family Lawyer*; if this product addressed health questions, income tax preparation, accounting, home improvements, car repairs or any of the myriad of other topics covered by popular self-help books and software, the court would never have attempted to apply the Texas unauthorized practice statute. But in this one area — legal self-help — the District Court decided that the *content* of a publication should be suppressed and issued an injunction that restricts Texans’ ability to purchase and use that product.

Such a content-based regulation of protected speech is subject to strict judicial scrutiny. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 99 (1972); *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105, 116-17 (1991). The District Court’s action cannot survive such scrutiny, because it is not narrowly tailored to advance a compelling governmental interest. *See Perry Education*

Ass'n v. Perry Local Education Ass'n, 460 U.S. 33, 45 (1983). As detailed in Section II of this brief, the interest in protecting the public from being misled is already being met by the careful and thorough explanations included in self-help law books and software. Moreover, as detailed in Section I of this brief, there is another governmental interest at stake here — facilitating access to the civil justice system for all Americans. Clearly informing consumers that they are not receiving the services of a lawyer when they use self-help law materials is a far less restrictive alternative to a wholesale ban on these products. The State of Texas and the District Court cannot require more without violating the First Amendment.

Self-help law materials inherently express a point of view — that consumers should be empowered to handle their own simple and routine legal needs. Since its founding twenty-one years ago, *amicus curiae* HALT has worked to advance this straightforward proposition and overcome the resistance to reforms that facilitate access to the civil justice system.

During the past two decades, court after court has been persuaded that this point of view is correct and recognized that self-help law materials are not the same as personal services provided by a lawyer. See *Oregon State Bar v. Gilchrist* 538 P.2d 913, 916 (Ore. 1975); *State Bar v. Cramer*, 249 N.W.2d 1, 9 (Mich. 1976); *Kansas v. Schneider*, 573 P.2d 1078, 1079 (Kan. 1978); *In re Thompson*, 574 S.W.2d 365, 369 (Mo. 1978); *State ex. rel. Indiana State Bar Ass'n. v. Indiana Real Estate Ass'n.*, 191 N.E.2d 711, 717 (Ind. 1963); *New York v. Winder*, 42 A.D.2d 1039,

1040 (N.Y. 1973); *People v. Landlords Prof'l. Serv.*, 215 Cal. Rptr. 548, 552 (1989); *Florida Bar v. Brumbaugh*, 355 So.2d 1186, 1194 (Fla. 1978).

The District Court not only painted over this important distinction, it also failed to grasp the fact that *Quicken Family Lawyer* and other software products represent the fruit of the self-help law movement's advocating that consumers should be empowered to handle their own simple and routine legal needs. The decision below is thus the antithesis of a content-neutral regulation; it is a suppression of a specific point of view, the most pernicious form of governmental interference with First Amendment rights.

On behalf of consumers in Texas and nationwide, *amicus curiae* HALT urges this Court to vindicate Americans' First Amendment right to buy, read and use self-help law books and software.

Conclusion

For the foregoing reasons, *Amicus Curiae* HALT, Inc. -- *An Organization of Americans for Legal Reform* respectfully requests that this Court reverse the decision of the United States District Court for the Northern District of Texas, vacate that Court's Order enjoining the sale and distribution of *Quicken Family Lawyer*, and remand this case with instructions to dismiss the Complaint against Appellant.

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CERTIFICATE OF SERVICE

This is to certify that on this 25th day of June, 1999, a true and correct copy of the foregoing pleading was mailed to the Clerk of the Court with a copy of the brief on 3 ½ PC disk in Corel Wordperfect 7.0 format, and a true copy was mailed, certified mail, return receipt requested, to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies that this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Including all portions, the brief contains 4,107 words.
2. The brief has been prepared in proportionally spaced typeface using Corel WordPerfect 7.0 in Times New Roman, Font Size 14.
3. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the court's striking the brief and imposing sanctions against the person signing the brief.

Signature of filing party