

SUBJECT: Exemptions for legal self-help materials from law practice definition

COMMITTEE: Licensing and Administrative Procedures — favorable, without amendment

VOTE: 6 ayes — Wilson, Yarbrough, Flores, Goolsby, J. Moreno, A. Reyna

0 nays

3 absent — Haggerty, D. Jones, Palmer

WITNESSES: For — Walt Borges, Court Watch; Casey Dobson, Kevin Leek, and Gene S. Goldenberg, Block Financial Corp.; Darrell Jordan, Parsons Technology

Against — None

On — Scott Rozzell, State Bar of Texas

BACKGROUND: The definition of the “practice of law” in Government Code sec. 81.101(a) includes “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.”

Government Code sec. 81.102 prohibits a person from practicing law in Texas unless the person is a member of the State Bar.

The Unauthorized Practice of Law Committee (UPLC) and its regional subcommittees were created to enforce the unauthorized practice of law (UPL) statute and investigate possible violations. The UPLC is appointed by the Supreme Court of Texas.

The U. S. District Judge Barefoot Sanders recently ruled, in *UPLC v. Parsons Technology*, that a computer program called the “Quicken Family Lawyer” violated the unauthorized practice of law statute. The court ordered an injunction on the distribution and sale of the computer program.

The Dallas UPLC subcommittee has begun an investigation into legal self-help computer programs sold by Nolo Press of Berkeley, California. Nolo Press has responded by bringing actions in the Texas Supreme Court and

Travis County District Court for disclosure of the investigatory procedures of the UPLC and a judicial determination of whether UPL laws apply to legal self-help materials.

The current interpretation of the UPL statute is based on the 1992 *Fadia v. UPLC* opinion by the Dallas Court of Appeals (830 S.W.2d 162 (Tex. App. - Dallas 1992, writ denied). In *Fadia*, the court ruled that a self-help manual on wills written by a non-lawyer constituted the unauthorized practice of law. The author of the self-help manual waived his First Amendment argument in the *Fadia* case, so the court did not address free speech issues.

DIGEST: HB 1507 would exempt from the definition of the practice of law the design, creation, publication, distribution or sale of written materials, books, printed forms, Internet sites, and computer software or similar media, as long as the items clearly indicate that they were not prepared by a person licensed to practice law in this state.

HB 1507 would take effect September 1, 1999.

SUPPORTERS SAY: Bans and injunctions on legal self-help materials are restrictions on speech based on content and violate the First Amendment. They will be struck down by the courts if the Legislature does not act first.

Self-help legal materials provide an inexpensive way for people to learn more about the law. Computer programs provide the same information as books, but in a more user-friendly way. The high cost of hiring an attorney keeps many ordinary citizens from learning about and protecting their legal rights. Furthermore, many issues that people face are relatively simple and do not justify going to the expense of hiring an attorney.

There have been no documented consumer complaints regarding self-help legal materials. However, complaints and malpractice cases against licensed attorneys are common.

Similar laws protecting the rights of producers and distributors of legal self-help materials already have been enacted in Colorado, Florida, Indiana, Michigan, New York, and Oregon. Texas is rapidly becoming a high tech center and cannot benefit from becoming known as a state where legal self-help software and books are banned. Without HB 1507, Texans will have to

order legal self-help materials from out of state, taking business away from Texas retail software outlets and book stores.

In reality, there are far too many legal self-help software and Internet sites, along with paper publications, for the UPLC to be effective in regulating them. The result is that only the most successful and widely-known publishers are being singled out to be unfairly targeted.

The warnings required by HB 1507 would ensure that consumers are not duped into thinking that they do not need to consult an attorney. Consumers should be trusted to have enough common sense to realize that a book or computer program is not a substitute for representation by a real attorney. HB 1507 would not put any limits on the UPLC's ability to investigate and bring injunctions against charlatans who impersonate attorneys in court or give false legal advice in person.

Penal Code secs. 38.122 and 38.123 provide criminal penalties for non-lawyers who hold themselves out as attorneys and practice law without a license. These criminal offenses would remain unchanged with enactment of HB 1507. The Penal Code definition of the practice of law is limited to contracts for legal services and advice on the advisability of making claims. This language is much better suited for the actual problem of the unauthorized practice of law.

**OPPONENTS
SAY:**

Technology has become so sophisticated that it provides computer programs featuring "cyber lawyers," that is interactive videos of lawyers or actors portraying lawyers who can ask the user technical questions and give legal opinions based on specific legal issues presented by the user. The term "cyber lawyer" was used in the *Parsons* court case in describing the technological marvels found in the Quicken Family Lawyer software.

When they evaluate facts presented by a consumer and give legal opinions based on these facts, video "lawyers" should be held to the same license requirements as live, licensed attorneys. A cyber lawyer programmed or portrayed by a non-lawyer or a lawyer without a Texas license should not be allowed to give legal advice in Texas.

While information on the law should be free and readily available to the public, the presentation of actual legal advice is a different issue. Legal advice

involves careful consideration of all the factors relevant to a specific legal problem. Licensing requirements are the only way to ensure that legal advice comes from knowledgeable sources.

While self-help materials now prepared by the largest and most successful publishers legally might be accurate, there is no guarantee that inaccurate and harmful legal advice will not be offered by smaller publishers or others who enter the market once all restrictions were removed. There are serious questions whether general materials developed for nationwide distribution would reflect important differences in Texas law and whether consumers would be aware of this.

Under the current law, the UPLC has some power to control the dissemination of legal advice. Under HB 1507, anyone would be free to write and distribute completely inaccurate legal advice without fear of regulation.

HB 1507 would undermine the legitimate goal of the statute prohibiting the unauthorized practice of law. Enforcement of UPL laws against those who impersonate attorneys or practice after a license has been revoked would be severely weakened by this proposal. Unscrupulous people could offer legal services through the mail or the Internet without fear of punishment.

A consumer who is harmed by an incompetent attorney can turn to the courts or the State Bar for assistance, but a consumer who is harmed by inaccurate information from a book or computer program has no such remedy.

**OTHER
OPPONENTS
SAY:**

The warning requirement in HB 1507 is not strong enough because it only would require self-help legal materials to “clearly indicate that they were not prepared by a person licensed to practice law in this state.” The bill includes no description of what sort of indication would be considered “clear” and no prohibition against other labeling that might contradict the warnings.

A computer program could have the required warning even though the rest of the packaging says that the product will take the place of hiring an attorney. It also is not clear what the warning should say if an attorney licensed to practice in Texas actually did contribute to some portion of the book or software.

The entire UPL law is an antiquated concept which should be repealed.
Lawyers should not enjoy a monopoly on access to the law and the courts.

NOTES:

A similar bill, SB 764 by Duncan, would further modify Government Code sec. 81.101(b) by stating that the judicial branch does not retain the power to determine that legal self-help materials constitute the practice of law. SB 764 also would amend Government Code 83.001(b), which allows only licensed attorneys, licensed real estate brokers and salesmen, and those working with mining interests to be paid for the preparation legal instruments affecting titles to real property, to exempt self-help legal materials from those restrictions. SB 764 has been referred to the Senate Jurisprudence Committee.