1-1-2000

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LEGALITY OF WILL-CREATING SOFTWARE: IS THE SALE OF COMPUTER SOFTWARE TO ASSIST IN DRAFTING WILL DOCUMENTS CONSIDERED THE UNAUTHORIZED PRACTICE OF LAW?

Marie A. Vida*

I. INTRODUCTION

In June 1999, the United States District Court of the Northern District of Texas found Parsons Technology, Inc., maker of the software Quicken Family Lawyer (QFL), version 8.0, and its updated version QFL '99, guilty of the unauthorized practice of law. QFL, a software program offering over one hundred different legal forms along with instructions on how to complete those forms, found itself at the center of the controversy. The Texas Unauthorized Practice of Law Committee (UPLC) filed suit against Parsons Technology claiming that the selling of QFL violated Texas's unauthorized practice of law statute, Texas Government Code section 81.101, which at the time provided:

(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

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2. See id.
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.3

The district court granted summary judgment in favor of
the UPLC.4 Parsons Technology appealed the district court’s
grant of summary judgment and the court’s “subsequent
order permanently enjoining defendant-appellant from selling
and distributing its software programs, QFL Version 8.0 and
QFL '99, within the state of Texas.”5 The district court based
its decision pursuant to the Texas statute on the
unauthorized practice of law.6 Subsequent to the filing of
Parsons Technology’s appeal, the Texas legislature amended
section 81.101 by adding the following clause:

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 . . . .7

The court of appeals vacated the injunction granted by
the district court and entered judgment in favor of Parsons
Technology.8

Among the legal forms available on QFL include those
pertaining to the creation of wills, such as codicils to wills,
trust forms, and pour-over wills.9 Texas courts see many
cases involving the sale of legal forms, such as wills by non-

4. See Parsons Tech., 179 F.3d at 956.
5. Id.
8. See Parsons Tech., 179 F.3d 956 (5th Cir. 1999).
overruled by Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179
F.3d 956 (5th Cir. 1999).
lawyers, and consider it an unauthorized practice of law.° Parsons Technology, however, is the first case concerning the sale of legal forms via software. In fact, no other existing case involves the sale of self-help software as the unauthorized practice of law.

This comment develops the argument that the Texas legislature mistakenly amended section 81.101. Parsons Technology went beyond merely the selling of software that provides will forms; the software rendered legal advice and aided the lay individual in the preparation of a will. In its argument that the publication and sale of QFL constitutes the unauthorized practice of law, the UPLC relied on similar cases where courts ruled that the sale of will forms by non-lawyers constitutes the unauthorized practice of law. The selling of computer software by Parsons Technology is very similar to the sale of will documents by non-lawyers. This comment will focus primarily on the use of software by lay individuals in the creation of such will documents and how the selling of software such as QFL constitutes an unauthorized practice of law.

First, the background section will discuss the case in controversy, Unauthorized Practice of Law v. Parsons Technology, Inc., and will examine it and analogize it to various other self-help materials that courts have considered in the past. Second, the analysis section will examine the advantages and disadvantages of using self-help software in creating will instruments and evaluate the reasons why such software would not benefit the lay individual. Finally, this comment proposes that the Texas legislature mistakenly amended section 81.101 and should have instead followed the district court's decision.

12. See discussion infra Part III-IV.
13. See discussion infra Parts II, IV.
14. See discussion infra Part II.
16. See discussion infra Part II.
17. See discussion infra Part IV.
18. See discussion infra Part V.
II. BACKGROUND

A. Unauthorized Practice of Law Committee v. Parsons Technology, Inc.

The Unauthorized Practice of Law Committee filed suit against Parsons Technology, alleging that it had violated Texas's unauthorized practice of law statute, Texas Government Code section 81.101.19 The software in controversy, QFL, offers over one hundred different legal forms along with instructions on how to complete those forms.20 The packaging of QFL claims that it is a product valid in forty-nine states and developed and reviewed by expert attorneys.21

After first installing QFL on a computer, a disclaimer appears stating that the user should exercise his judgment when choosing the best legal form for his situation and, if necessary, obtain the assistance of an attorney.22 This disclaimer only appears during the initial installation process and cannot be found on the packaging of the software.23 The only other manner in which the disclaimer can once again be displayed is if the user accesses the "Help" menu.24

At the initial use of QFL, the user must enter his name and state of residence, after which QFL asks if the user would like suggestions on specific documents that are available to

20. See id.
21. See id.
22. See id. at *2. Specifically, the disclaimer states:
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.
Id.
23. See id.
him. If the user answers in the affirmative, QFL will ask a few more questions and then display a list of available documents, with emphasis on ones especially appropriate to the user's situation. Upon choosing a document, QFL asks a series of questions relevant to the specific forms and subsequently fills in the appropriate blanks or deletes entire clauses from the form.

In addition to the specific questions asked by QFL, the user may access another help feature that provides additional legal information. "Ask Arthur Miller," one of the features, allows the user to select a general topic and then ask a specific question, after which either a text-based answer or an image of Arthur Miller answering the question appears on the screen. According to the UPLC, taken as a whole, the aforementioned features of QFL constitute the unauthorized practice of law.

B. The Unauthorized Practice of Law in Texas

The prohibition against the unauthorized practice of law developed from a need to "protect the public from unskilled persons practicing law." As with all other states, Texas regulates the practice of law via a statute and a committee. Courts also possess the authority to control who practices before them. The purpose of the statute is to protect lay individuals from those who attempt to practice law without first obtaining the legal education and certification that would allow them to do so skillfully.

25. See id.
26. See id.
27. See id.
28. See id.
29. See id. 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?"
33. See id. § 81.101(b).
34. See Ries, supra note 31, at 38.
Texas's UPLC consists of nine persons appointed by the Texas Supreme Court, with at least three of the committee members being non-attorneys. Among the duties of the UPLC are to keep the Supreme Court and state bar informed of the unauthorized practice of law by lay individuals, agencies, and attorneys and to eliminate such practice by appropriate methods, including the filing of suits in the name of the committee. Although the definition of the unauthorized practice of law is set forth under Texas Government Code section 81.101, a comprehensive definition of what qualifies as the "practice of law" is unclear, and courts must decide each case based on its own particular set of facts. What is certain is that the practice of law goes beyond merely practicing before the courts, but includes the "drafting of documents which of necessity must be presented to, and their legality passed upon by, the courts." Since Parsons Technology is the first case to discuss the relationship between self-help legal software and the unauthorized practice of law, it is necessary to analogize the software to other self-help materials considered by the courts such as publications, sale of legal forms, and the drafting of legal instruments.

C. Publication and Sale of Legal Documents

The act of giving legal advice goes beyond the form of speaking to a client. A person can also give legal advice through other mediums such as books, pamphlets, and radio broadcasts. When presented with such an issue, the courts often do not look at the medium through which the advice is given, but look at the content of the material and hence the outcome of different decisions by various courts.

Most courts hold that mere publication and sale of material does not constitute the practice of law. In New York County Lawyer's Ass'n v. Dacey, the court of appeals,

35. See TEX. GOV'T CODE ANN. § 81.103 (West 1998).
36. See id. § 81.104.
39. See id.
following Judge Stevens's dissenting opinion from the lower court, held that the publication and sale of a book entitled “How to Avoid Probate,” which contains fifty-five pages of text and 310 pages of forms did not constitute the unauthorized practice of law. In his dissent, Judge Stevens wrote, “It cannot be claimed that the publication of a legal text which purports to say what the law is amounts to legal practice.” The Dacey court further held that the self-help book sold to the general public, without personal contact or relationship to a particular purchaser of the book, does not constitute the practice of law. The book seemed to offer general advice on common estate-planning issues and did not attempt to give personal advice on a specific problem to a designated person.

Similarly in Oregon State Bar v. Gilchrist, the court found that the sale of divorce kits was legal so long as the defendant sellers did not have personal contact with their customers. These two courts focused on personal contact between the defendants and purchasers in finding that the defendants were not in violation of the unauthorized practice of law. Personal contact between the seller and purchaser of the do-it-yourself kits would create a relationship where the customers receive more than just the forms, but advice as well.

Although the Florida Supreme Court in Dacey found that the publication and sale of the book “How to Avoid Probate” was not the practice of law, it reached a different conclusion in Florida Bar v. American Legal & Business Forms, Inc., a case with similar circumstances. According to American Legal & Business Forms, “The printing and sale of legal forms, with nothing more, has been a practice over the years as a convenience.” There is no harm to the public with providing such a service so long as publishers do not provide what purports to be instructions on how to complete such

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41. See id. at 989.
42. Dacey, 287 N.Y.S.2d at 422.
43. Dacey, 283 N.Y.S.2d at 997.
44. See id.
45. See id.
46. 538 P.2d 913 (Or. 1975).
47. See id. at 919.
48. 274 So. 2d 225 (Fla. 1973).
49. Id. at 227.
forms.\(^{50}\) The following year, the Florida Supreme Court ruled in the same manner in *Florida Bar v. Stupica*,\(^{51}\) stating that "it is in the filling out and use of . . . legal forms that legal advice is inextricably involved and that therein lies the danger of injury and damage to the public if not properly done in accordance with law."\(^{52}\)

In both *American Legal & Business Forms* and *Stupica*, the court believed that legal forms standing alone do not involve the practice of law, but legal forms coupled with instructions qualify as such.\(^{53}\) In the more recent case of *Fadia v. Unauthorized Practice of Law Committee*,\(^{54}\) a Texas appeals court expanded the rules set forth in *American Legal & Business Forms* and *Stupica*, ruling that the selling of a do-it-yourself will manual was the unauthorized practice of law. The defendant, Vijay Fadia, published and sold a will manual, appropriately titled "You and Your Will: A Do-It-Yourself Manual," which contained information on how to prepare a will.\(^{55}\) The manual covered estate-planning topics such as executors, holographic wills, joint wills, and simultaneous death provisions.\(^{56}\)

In its finding, the Florida Supreme Court relied on a Texas case,\(^ {57}\) but Fadia argued that the court should accept the findings of other jurisdictions and rule that the mere publication and sale of legal self-help kits should not constitute the practice of law.\(^ {58}\) Similar to the defendant in *Dacey*, Fadia claimed that his manual contained general information about wills and encouraged the public to seek legal advice in complicated estate-planning matters.\(^ {59}\) The court, refusing to adopt Fadia's argument, ruled that the will manual went beyond simple layman advice.\(^ {60}\) It contained

50. See id.
51. 300 So. 2d 683 (Fla. 1974).
52. Id. at 686.
55. See id. at 163.
56. See id.
58. See Fadia, 830 S.W.2d at 164; see also Oregon State Bar v. Gilchrist, 538 P.2d 913 (Or. 1975); Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978); People v. Landlords Prof'l Servs., 264 Cal. Rptr. 548 (1989).
59. See Fadia, 830 S.W.2d at 164.
60. See id. at 165.
fill-in-the-blank forms and had a section on creating your own will.61

What constitutes the rendering of legal advice by non-lawyers who merely engage in the business of publishing and selling legal forms or do-it-yourself kits? As mentioned above, the courts have focused on three issues where the line between simple publication and sale crosses into the area of legal advice. Per Dacey and Gilchrist, the line is drawn where there is personal contact between the seller and purchaser of the form.62 According to American Legal & Business Forms and Stupica, the line is crossed when instructions accompany the sale of the legal forms.63 As for the most recent 1992 case, Fadia, the Texas appellate court defines the practice of law as the sale of legal material that includes fill-in-the-blank forms and manuals.64

D. Drafting of Legal Instruments

Another activity that the courts view as an unauthorized practice of law is the actual drafting of legal instruments.65 The drafting of a legal instrument involves the practice of law, and if a lay individual or agency performs the drafting, then it qualifies as an unauthorized practice of the law.66 With regard to pre-made legal forms such as do-it-yourself kits, many courts have held that even filling in the blanks amounts to the drafting of a legal instrument, and therefore as the unauthorized practice of law.67 There are two ways the drafting of a legal instrument occurs:68 when a lay individual either drafts a document or fills in the blanks on his own69 or when one lay individual or agency drafts a document or fills in the blanks for another person.70

Fadia mentioned the first category, where the defendant provided a will manual accompanied by fill-in-the-blank

61. See id.
62. See supra text accompanying notes 40-47.
63. See supra text accompanying notes 48-53.
64. See Fadia, 830 S.W.2d at 165.
67. See Vincenti, supra note 65, at 201 (citing ABA Comm. on Unauthorized Practice of Law, Informative Opinion (1936)).
68. See id.
69. See id.
70. See id at 202.
forms. The Texas court ruled that individuals who provide lay individuals with fill-in-the-blank estate-planning forms are guilty of the unauthorized practice of law. In *Florida Bar v. Brumbaugh*, however, the court ruled that such legal forms and their instructions do not constitute the practice of law if they are sold to the general public. It only constitutes the practice of law if the forms target a specific individual.

The majority of cases regarding the actual drafting of wills falls into the second category, where lay individuals or agencies draft the instruments for other individuals. These cases are further divided into two categories, where an individual or a corporation provides a service and the drafting of legal instruments is incidental to that business, and those cases where an individual or agency provides clerical services in executing a legal document.

In *People v. People's Trust Co.*, the defendant, a trust company, advertised estate-planning services to the public. When customers visited the company with the desire to create a will, the trust company retained an attorney from a regularly retained firm of legal advisers to the trust company. The court found that a corporation was forbidden "to hold itself out to the public as being entitled to practice law, to render or furnish legal services or advice, or to furnish attorneys or counsel to render legal services of any kind." The trust company's estate-planning services were incidental to its trust business. Here, the court's concern was the interests of the lay individuals seeking estate-planning
advice. The defendant furnished an attorney to draft a legal instrument for the defendant's client. These attorneys, however, served the client at the request of the defendant, and in such a situation, the attorneys would probably regard the interests of the corporation over those of the client.

Similarly, in *Grievance Committee of the Bar of Fairfield County v. Dacey*, Dacey's principal business was dealing with shares in mutual funds. If in the discussion with a customer, Dacey concluded that the customer's financial circumstances warranted the creation of a trust or will, Dacey provided him with a booklet entitled "A Modern Plan for Your Tomorrows." The booklet contained information on trusts and wills and a form for drafting the two instruments. "[T]he last twenty-four pages of Dacey's booklet do not contain mere general information but information focused specifically on the Dacey trust arrangement and its component parts, the Dacey trust and the Dacey will..." If the client decided he wanted a trust, he informed Dacey of the manner in which he wanted his property distributed after death, upon which, Dacey supplied a will and a trust patterned after the forms in the booklet and prepared them by filling in the blanks. Like *People's Trust*, Dacey's estate-planning business was incidental to his business of dealing with mutual funds.

*Dacey* also falls within the second category in which a lay individual or agency provides a clerical service by filling out forms for other individuals. According to the court, Dacey did more than provide clerical services by filling out the estate-planning forms.

The determination that a given form without change is as

84. *See id.* at 497-98.
86. *See id.* at 497.
87. *See id.* at 498.
88. 154 Conn. 129 (1966).
89. *See id.* at 132.
90. *See id.*
91. *See id.*
92. *Id.* at 134.
93. *See id.*
94. *See Grievance Comm. v. Dacey*, 154 Conn. 129, 141 (1966); *see also supra* note 70 and accompanying text.
95. *See id.*
much an exercise of legal judgment as is a determination that it should be changed in given particulars. In either case, legal judgment is used in the adaptation of the form to the specific needs and situation of the client.

Similarly, in Florida Bar v. Brumbaugh, the court ruled that the defendant engaged in the unauthorized practice of law when she assisted clients in preparing dissolution forms. California also reached the same conclusion in People v. Landlord’s Professional Services, where the appeals court ruled that clerical services do not amount to the practice of law if not accompanied by the giving of personal advice to the client regarding his specific case.

Texas reached a different conclusion in Unauthorized Practice Committee, State Bar of Texas v. Cortez. Cortez involved defendants engaged in the business of providing immigration and bookkeeping services. The defendants charged a fee for providing, among other things, the preparation of forms and documents necessary for an alien’s embassy interview. The court declared that the act of recording a client’s responses to questions on a form probably did not require legal skill or knowledge, but the act of determining whether the form should be filed did require special legal skills. The court’s concern in Cortez was the repercussions of advising clients on what to do with the legal document on top of the mere preparation of it.

What constitutes the drafting of a legal instrument as an unauthorized practice of law in filling in the blanks? Fadia and Brumbaugh speak to the issue where a lay individual on his own drafts or fills in the blanks to generate a legal instrument. According to Fadia, the selling of forms that allow lay individuals to fill in the blanks in order to “draft” a legal instrument such as a will is enough to constitute the

96. Id.
97. 355 So. 2d 1186 (Fla. 1978).
98. See id. at 1194.
100. See id. at 551.
101. 692 S.W.2d 47 (Tex. 1985).
102. See id. at 48.
103. See id.
104. See id. at 50.
105. See id.
106. See supra text accompanying notes 71-75.
practice of law. The court in Brumbaugh, however, has a different opinion, holding that the selling of the forms must target a particular individual. People's Trust, Dacey, Cortez, and Landlords speak to the issue of a lay individual or corporation drafting or filling in the blanks to produce a legal instrument for another person. According to People's Trust and Dacey, even though a corporation's service was the simple act of filling in the blanks on a form for a client, the courts found that the act was enough to merit the practice of law. The decision to fill out a legal form was enough to amount to legal advice and therefore the practice of law. In Landlords it was asserted that the act by the corporation must be more than clerical, whereas Cortez stated there must exist the issuance of advice in addition to drafting a document for a client in order to constitute the practice of law.

E. The Important Role of Lawyers in Creating Wills

The creation of a will secures legal rights and involves the giving of advice by a person who has legal skill or knowledge. In Oregon State Bar v. John H. Miller & Co., the defendant offered a service to aid in the financial and estate planning of individuals. In examining whether the defendant was guilty of the unauthorized practice of law, the court stated that much of the advice that the defendant included in his report to the client "could not be given without an understanding of various aspects of the law, principally the law of taxation." There is a profound legal awareness that is necessary for a person to draft wills, hence the importance of securing a lawyer to prepare such instruments.

In Palmer v. Unauthorized Practice Committee of the

107. See supra text accompanying note 72.
108. See supra text accompanying notes 73-75.
109. See supra text accompanying notes 76-105.
110. See supra text accompanying notes 79-93.
111. See supra text accompanying note 96.
112. See supra text accompanying notes 99-100.
113. See supra text accompanying notes 100-105.
115. 235 Or. 341 (1963).
116. See id. at 343.
117. Id.
118. See People ex rel. Committee on Grievances v. Denver Clearing House Banks Performing Trust Functions, 59 P.2d 468, 469 (Colo. 1936).
State Bar of Texas," the defendant offered for sale to the general public wills and will forms containing blanks for the user to fill in. A licensed attorney created the will form for the defendant, but the defendant himself had no license to practice law. In finding the defendant guilty of the unauthorized practice of law, the appellate court discussed the role of lawyers in wills drafting:

By a will legal rights are secured. In giving instructions, confidential communications regarding family relations are often necessary. There is no phase of the law which requires more profound learning than on the subject of trusts, powers, the law of taxation, legal and equitable estates, perpetuities, etc. These duties cannot be performed by an unlicensed person, not an attorney, and who is untrained in such complex legal subjects.

The Texas courts have expressed, via Palmer, the necessity of lawyers in the creation of successful wills. With the growing trend of will-creating software, however, is the legal assistance of lawyers still an essential part of will creation?

III. IDENTIFICATION OF THE PROBLEM

There is no doubt that available legal software, on its face, provides the lay individual with an easy and convenient manner with which to create a will. Upon purchasing will-creating software, an individual can install the software on his computer and generate a will, all within the comfort of his own home and without the assistance of an attorney. The software is "designed to consider the facts fed into it, draft a legal instrument appropriate for the particular situation, and provide instructions to the user on how to fill out the drafted instrument - in essence, everything a lawyer would do for a client."

The legal problem arises when the lay individual who buys the software relies on it to create what he believes to be

120. See id. at 375.
121. See id.
122. See id. at 377.
123. Id. at 376.
124. See id.
125. See supra text accompanying notes 22-29.
126. Vincenti, supra note 65, at 205.
an accurate and customized will. However, a will cannot be standardized. As the Palmer court discussed, a form that purports to make specific testamentary bequests will lead an unsuspecting lay individual into believing that such a form is standard. Similarly, QFL leads the user to believe that the forms contained in the software are standard and can thus create a general will for any situation. A will is unlike other legal documents that can be standardized such as lease and deed forms sold in stationary stores. As stated above, the act of drafting wills, more than any other legal document, requires the expertise and knowledge of a trained attorney. Therefore, lay individuals cannot and should not rely on such software, because it leads them to falsely believe that they can in fact rely upon it. From the previous discussion, it should be evident that QFL provides more than a simple standardized will form with general estate planning information.

IV. ANALYSIS

According to the UPLC, 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." As discussed in Part II, strong similarities exist between QFL and the pre-made legal forms that courts have analyzed in the past. And much like the sellers of the pre-made forms, Parsons Technology argued that QFL provides no harmful consequences to its user. The Texas legislature accepted Parsons Technology's argument, but was it correct in doing

128. See id.
130. See Palmer, 438 S.W.2d at 376.
131. See supra text accompanying note 118.
132. See discussion supra Part II.
133. See discussion supra Part II.
135. See discussion supra Part II.
136. See discussion supra Part II.
so?

A. Advantages of Will-Creating Software

Sixty to seventy-five percent of Americans die without a will. One factor preventing individuals from creating wills is a lack of resources necessary to pay for an attorney-drafted will. From the perspective of a person who lacks such funds, will-creating software provides a low cost alternative to paying an attorney to draft a simple will. The software also allows an individual to add codicils to his will or make a new will as his financial situation changes. Another advantage of using will-creating software is the security an individual feels with having drafted his own will. The individual may feel that he has more control over his affairs and the eventual fate of his estate.

B. Disadvantages of Will-Creating Software

Although the lay individual may find the above advantages significant, far greater disadvantages exist with using QFL. First, QFL's system of filling in blanks and adding or deleting entire clauses based on the user's responses to software generated questions may result in an inaccurate will if the user mistakenly responds to one of the questions. Second, the users of QFL will have a false sense of security, because in this age of technology, there is very little that cannot be performed by the use of a computer. Finally, QFL will unlikely be able to duplicate the precise drafting of an attorney. If the user relies on QFL and makes a mistake in creating his own will, he has no redress, whereas a client may sue an attorney for malpractice if he gives unsound advice and the client relies on that advice to his

138. See id. at 15.
139. See Vincenti, supra note 65, at 189.
140. See id.
141. See id. at 190.
142. See id.
144. See discussion infra Part IV.B.1.
145. See discussion infra Part IV.B.2.
WILL-CREATING SOFTWARE

1. Ineffectiveness of Formatted Questions

When drafting a will, the QFL software asks the user certain relevant questions upon which QFL will tailor the document based on the user’s responses.\(^{147}\) If a user inappropriately answers a “yes” or “no” question, it will result in an imprecise will. “Even if the program only requires simple yes or no responses, since the subsequent questions posed to the user will vary depending upon the previous response, one inaccurate response may substantially change the resulting analysis and perhaps the document itself.”\(^{148}\) Will-creating software performs analysis of the law based on the user’s specific situation, but that analysis will likely be incomplete if the software merely goes through a checklist of questions in drafting the instrument.\(^{149}\) When a person consults an attorney for assistance, the attorney analyzes the situation based on his knowledge of the legal problem and the authorities that may support it.\(^{150}\) In contrast, QFL assumes too much about the law and standardizes the user’s unique situation.\(^{151}\) “[W]hile [software] may be able to perform deductive legal analysis by drawing a legal conclusion from a particular fact situation . . . , it cannot consider additional factors not programmed into it.”\(^{152}\)

2. The User’s False Sense of Security

In the eyes of a lay individual, a software program providing complex legal advice and documents that would otherwise cost a large amount of money is a blessing. Parsons Technology represents that QFL is “valid in forty-nine states including the District of Columbia and is developed and reviewed by expert attorneys.”\(^{153}\) Software

\(^{146}\) See discussion infra Part IV.B.3; see also Vincenti, supra note 65, at 203.
\(^{148}\) Vincenti, supra note 65, at 191.
\(^{149}\) See id. at 192.
\(^{150}\) See id.
\(^{151}\) See id.
\(^{152}\) Id. at 193 (citing Jeffrey A. Meldman, A Structural Model for Computer Aided Legal Analysis, 6 Rutgers J. Computer & Tech. L.J. 27, 30 (1977)).
such as QFL "appear to be offering legal advice and making complex decisions based upon the specific facts fed into it." The user may believe that all relevant legal issues pertaining to his situation have been relevantly explored. What if legislation changes in the course of the years? QFL claims that it is "updated to reflect recent legislative formats." If the user chooses to change his will fifteen years after using QFL, will the software still be valid or will the user have to purchase a new and improved version? If the latter is the case, then the funds saved by the user in avoiding costly estate-planning attorneys will merely go towards the upgrading of his will-creating software. On the other hand, the user's false sense of security may prompt him to rely on the software as he originally did without a second thought about the possible legislative changes, in which case he is no better off than he was prior to the purchase of the software.

Despite the reliability that the user has with QFL, it is possible that he may be unhappy with the results of the software. In this scenario, the user has three options: return the software for a refund, trust the will that it has generated, or consult a lawyer to make sure that he has created a correct and valid will. Regardless of which option the user chooses to pursue, the fact remains that he is no better off than he was prior to purchasing the software.

3. Remedies to the Software User

As stated above, a user cannot fully rely on will-creating software to be accurate in its analysis and creation of a will. Licensed lawyers can make mistakes in analyzing and drafting wills as well, but clients can take legal action against lawyers. "When a lawyer gives unsound legal advice to a client, and the client relies on the advice to his detriment, not only can the lawyer be sued for malpractice, the lawyer may

overruled by Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999).

154. Vincenti, supra note 65, at 192-93.
155. See id.
157. See Vincenti, supra note 65, at 193.
158. See discussion supra Part IV.B.1-2.
159. See Vincenti, supra note 65, at 203.
be disciplined by the state bar as well."\textsuperscript{160} The lay individual has a remedy when a lawyer makes an error detrimental to his client's suggested desires. In contrast, a lay individual has no available remedy if he makes an error while creating his own will.\textsuperscript{161} It is the duty of the courts to protect lay individuals from the incompetent actions of lawyers and non-lawyers.\textsuperscript{162} With the recent change to Texas Government Code section 81.101, the lay individual who uses QFL and similar products is no longer protected from such incompetence.

C. Software as the Unauthorized Practice of Law

As mentioned in Part II, the sale of legal software is analogous to the sale of other legal forms.\textsuperscript{163} It is obvious that the sale of legal software, much like the sale of pre-made legal forms does more than provide general information regarding will creation.\textsuperscript{164} The software offers legal advice similar to an attorney retained by a lay individual to draft a will.\textsuperscript{165} The Parsons Technology court went so far as to call QFL a "cyber-lawyer."\textsuperscript{166}

The courts have previously ruled that the publication and sale of will forms constitutes the unauthorized practice of law when they go beyond simple publication and into the area of legal advice.\textsuperscript{167} Will-creating software does go into the area of legal advice, as Parsons Technology demonstrates.\textsuperscript{168} Not only did Parsons Technology publish and sell a "do it yourself" will form via QFL, but the software filled in the blanks for the lay individual as well.\textsuperscript{169} In addition to filling in the blanks, QFL also rendered legal advice by way of merely choosing the

\textsuperscript{160} Id.
\textsuperscript{161} See id.
\textsuperscript{162} See id.
\textsuperscript{163} See discussion supra Part II.
\textsuperscript{164} See discussion supra Part II.
\textsuperscript{165} See discussion supra Part II.
\textsuperscript{167} See discussion supra Part II.C.
\textsuperscript{169} The court explained, "As the user proceeds through the questions relevant to the specific form, QFL either fills in the appropriate blanks or adds or deletes clauses from the form." Id.
necessary forms for the user.\textsuperscript{170} QFL goes beyond merely instructing someone how to fill in a blank form.\textsuperscript{171} 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.\textsuperscript{172}

Because of the depth of involvement required in creating a will, its preparation necessarily involves the practice of law\textsuperscript{173} even if preparation was by a software program. In considering the issue of will-creating software, the courts and legislature must focus first and foremost on the welfare of the lay individual. Makers of legal software claim that the software usually provides disclaimers telling the user to retain an attorney if the user deems it appropriate.\textsuperscript{174} "Software publishers are in effect saying that the results obtained with their software may not survive a legal challenge and for those cases it is best to retain a lawyer."\textsuperscript{175} Retaining a lawyer when a user has purchased legal software seems to defeat the purpose of purchasing the software to begin with. In short, the sale of legal software to assist in drafting will documents constitutes the unauthorized practice of law due to the problems associated with its use.\textsuperscript{176}

The Unauthorized Practice of Law regulations seek to protect lay individuals. "The paramount purpose of UPL law is the protection of the people from the inexperienced and unlearned who attempt to practice law without first qualifying themselves through a course of study and training or who may be morally unfit to enjoy the privileges of a legal practice."\textsuperscript{177} The Texas UPLC, in its suit against Parsons Technology, attempted to protect lay individuals from such an occurrence.\textsuperscript{178} The Texas legislature, by amending Texas

\begin{itemize}
\item \textsuperscript{170} See supra text accompanying note 96.
\item \textsuperscript{171} Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 1999 WL 47235, at *1, *6.
\item \textsuperscript{172} See id.
\item \textsuperscript{173} See id. at *5.
\item \textsuperscript{174} See id. at *2.
\item \textsuperscript{175} Vincenti, supra note 65, at 207.
\item \textsuperscript{176} See discussion supra Part IV.B.
\item \textsuperscript{177} Ries, supra note 31, at 37.
\end{itemize}
Government Code section 81.101 has unnecessarily harmed lay individuals seeking to create their own wills.\textsuperscript{179}

V. PROPOSAL

The above analysis discussed the advantages and disadvantages associated with will-creation software, such as QFL.\textsuperscript{180} This comment proposes that the Texas legislature should once again amend section 81.101 to read as it did prior to \textit{Parsons Technology}.\textsuperscript{181} The long line of cases brought before the Texas court and other jurisdictions, prior to \textit{Parsons Technology}, have all steered towards the direction that the sale of self-help legal forms (including software) constitutes the unauthorized practice of law.\textsuperscript{182}

The sale of will-creating forms is not an issue unknown to the courts,\textsuperscript{183} but only now when software is an issue has the legislature stepped in and overturned a court's ruling.\textsuperscript{184} In \textit{Fadia}, the defendant asked the court to reject the decision held in \textit{Palmer} and to "accept the new age of legal self-help clinics."\textsuperscript{185} The court in \textit{Fadia} stated that "to grant [the defendant's] request to overrule \textit{Palmer} would require us to legislate from the bench. Changes to section 81.101, however, must come from the legislature."\textsuperscript{186} The amendment by the legislature did come, but not until five years later with \textit{Parsons Technology}.\textsuperscript{187}

\textit{Fadia} involved a will manual, which provided fill-in-the-blank forms for the lay individual to use in creating his own will.\textsuperscript{188} The user of the \textit{Parsons Technology} software, however,

\begin{footnotesize}
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\item \textsuperscript{179} See Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999).
\item \textsuperscript{180} See discussion supra Part IV.
\item \textsuperscript{181} See supra text accompanying note 3.
\item \textsuperscript{183} See id.; see also New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984 (1967), rev'd, 287 N.Y.S.2d 422 (1967).
\item \textsuperscript{184} See Parsons Tech., 179 F.3d 956.
\item \textsuperscript{185} Fadia, 830 S.W.2d at 164.
\item \textsuperscript{186} Id.
\item \textsuperscript{187} Parsons Tech., 179 F.3d 956.
\end{itemize}
\end{footnotesize}
had only to answer some relevant questions, after which the software generated the will for him.\textsuperscript{189} The program "filled-in" all the relevant information and basically "drafted" the will for the user.\textsuperscript{190} If anything, the legislature should have overturned the decision in \textit{Fadia} because there was actually more involvement and analysis by the lay individual in the preparation of his own will.\textsuperscript{191} The lay individual who purchased the will manual in \textit{Fadia} had to go beyond the answering of questions, but analyzed his particular situation.\textsuperscript{192} In \textit{Parsons Technology}, QFL rather than the lay individual, had a great deal more involvement in the advising and preparation of the will.\textsuperscript{193} \textit{Fadia} was clearly less involved in the 'practice of law' than was \textit{Parsons Technology}, yet the legislature chose to overturn the court's decision in \textit{Parsons Technology} rather than in \textit{Fadia}.\textsuperscript{194}

The courts' main concern in all the cases that speak to this issue is the protection of lay individuals who seek to create legal instruments via pre-made self-help forms rather than consulting an attorney. Because the states have an interest in protecting the public from incompetent legal assistance,\textsuperscript{195} there should be more concern with the rise in popularity of will-creation software that purports to have knowledge of legal matters pertaining to estate planning. As discussed by the court in \textit{Palmer} regarding the issue of wills,

\begin{quote}
[t]here is no phase of the law which requires more profound learning than on the subject of trusts, powers, the law of taxation, legal and equitable estates, perpetuities, etc. These duties cannot be performed by an unlicensed person, who is not an attorney, and is untrained in such complex legal matters.\textsuperscript{196}
\end{quote}

Will-creating software such as QFL falls within the category that the \textit{Palmer} court speaks of. The legislature

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overruled by Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999).
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189. \textit{See id.}
190. \textit{See id.}
192. \textit{See id.}
193. \textit{See Parsons Tech., 1999 WL 47235, at *1-*2.}
194. \textit{See Fadia, 830 S.W.2d 162, 164 (Tex. App. 1992); see also id.}
195. \textit{See Vincenti, supra note 65, at 208.}
WILL-CREATING SOFTWARE

must not overlook the shortcomings of will-creating software. The benefits of using software to draft wills must be weighed against potential harm the reliance on software may have on its users. "Individuals who rely on legal software may suffer far greater harm in the long run than if they had initially consulted a lawyer." If the Texas legislature is at all concerned with protecting lay individuals and preventing inadequate or ineffective legal advice, it must amend Texas Government Code section 81.101 by restoring it to its form prior to Parsons Technology.

VI. CONCLUSION

In analogizing the sale of will-creating software to the sale of pre-made will forms from the past, it can be said that software used to draft will instruments falls within the category of unauthorized practice of law. In comparing the two instruments, the software goes beyond providing a will form by advising the user via the questions it asks and the suggestions made of what forms he should use. The Texas legislature appears to have mistakenly allowed the continuing use of such software by amending section 81.101. "If unauthorized practice of law concerns are irrelevant (and software quality and public harm are non-issue), then legal education would be largely unnecessary and all substantive aspects of legal document practice could be reduced to treatment by algorithms of a computer program." In the interest of protecting society from the unauthorized practice of law, the legislature, as well as the courts, must prevent the use of will-creating software and the inconsistencies it provides.

The proponents of will-creating software argue that it is a convenient and less costly fashion of preparing a will. However, it is not a viable alternative to the services of an attorney. "Although the need for low cost legal advice is

197. Vincenti, supra note 65, at 211.
198. See discussion supra Part IV.
199. See discussion supra Part VI.
200. See discussion supra Part VI; see also TEX. GOV'T CODE ANN § 81.101 (West Supp. 1999).
202. See discussion supra Part VI.
203. See discussion supra Part VI.
great, society should not lower its standards to fulfill that need. Instead, society should be more vigilant, to ensure that any steps toward the goal of affordable legal assistance maintain those high standards.\textsuperscript{204} If courts and the legislature truly want to protect lay individuals from those inexperienced to practice law, then they must prevent the use of will-creating software such as that manufactured by Parsons Technology. Specifically, the Texas legislature must again amend Texas Government Code section 81.101 to read as it did prior to \textit{Parsons Technology}. 

\begin{quote}
204. Vincenti, \textit{supra} note 65, at 211.
\end{quote}