IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TODD JANSON, et al., on behalf of themselves and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Case No. 2:10-cv-04018-NKL
LEGALZOOM.COM, INC.	)	
Defendant.	)	

Plaintiffs' Reply Suggestions in Support of Motion to Exclude Expert Testimony

I. Introduction

The proposed "expert" testimony of Professor Burnele Venable Powell should be excluded because it invades the province of the Court and is irrelevant. While LegalZoom asserts that Professor Powell's testimony will assist the jury in understanding the evidence and determining the facts, the opposite is true. If permitted to testify, Professor Powell will confuse the jury as to what facts are to be decided and what law is to be applied to the case.

II. Argument

As some length, LegalZoom argues that Professor Powell's historical analysis of the regulation of the practice of law should be admitted to "help the jury understand the evidence." (Docket No. 103, Sug. in Opp. pg. 9). The report reflects, however, that the historical information is presented not to assist the jury in understanding the evidence, but only to bolster Professor Powell's ultimate legal opinion that "no computer can practice law" and "no computer-

based delivery process falls within the scope of activities that have been historically been understood to be the practice of law." (Report at 2). The historical information is not offered to help the jury understand the evidence, but to argue to the jury that because some legal self-help aids have been considered legal in the past, LegalZoom's conduct is therefore legal as well. This is precisely the type of legal-opinion evidence forbidden by Rule 702.

Underscoring the fact that Professor Powell will be offering opinions on the law, LegalZoom suggests that jurors will benefit from Professor Powell's comparison of the blank forms from the divorce kit in *Thompson* to LegalZoom's use of online questionnaires. (Docket No. 103, Sug. in Opp. pg. 10). The reason for the comparison is obvious. LegalZoom will argue, through Professor Powell, that LegalZoom's conduct is similar to that of the divorce kit seller in *Thompson*, and is therefore lawful. While certainly an appropriate subject for a legal memorandum, such legal conclusions- the application of law to facts- is inadmissible because it does not assist the trier of fact, but, instead, impermissibly invades the role of the court. *Marx & Co. Inc. v. Diners' Club Inc.*, 550 F.2d 505, 510 (2nd Cir. 1977) ("such testimony amounts to no more than an expression of the [witness's] general belief as to how the case should be decided" (citing *McCormick on Evidence*, § 12 at 26-27)).

If LegalZoom's position on the testimony of Professor Powell were taken to its logical conclusion, law professors could opine before juries about how previous cases were decided and how the case before the jury should, in their opinion, be determined. A tort professor, called by a plaintiff in a personal injury suit, might testify about the historical development of proximate causation, and the meaning of the decision in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (1928). The professor could suggest to the jury that the chain of causation in *Palsgraf* compares favorably to the facts of the case to be decided and that therefore the plaintiff should prevail.

While such testimony would certainly be absurd, it is no less absurd than Professor Powell telling a jury that the facts in the *Thompson* case bear a strong resemblance to the conduct of LegalZoom.

Curiously, LegalZoom relies upon the decision in *Police Ret. Sys. of St. Louis v. Midwest Advisory Serv.*, 940 F.2d. 351 (8th Cir. 1991), for the proposition that an expert may opine on the meaning of a law. (Docket No. 103, Sug. in Opp. pg. 13). However, the Eighth Circuit held precisely the opposite, concluding a former official of the Securities and Exchange Commission should not have explained to the jury the meaning of the Securities Exchange Act of 1934:

> This was error. Explaining the law is the judge's job. [The expert] Pickard's extensive law-related expert testimony allowed him to usurp the judge's place. And from that vantage, the System urges, Pickard improperly swayed the jury's decision on the § 28(e) question.

Id. at 357. While finding the error was harmless, the court noted that a single evidentiary error in the context of a nine week trial was not sufficient for reversal. *Id*. In any event, this decision lends no support whatsoever to LegalZoom's position.[1]

Likewise, the decision in *Metropolitan St. Louis Equal Housing Opportunity Council v. Gordon A. Gundaker Real Estate Co., Inc.*, 130 F. Supp. 2d 1074 (E.D. Mo. 2001), also relied upon by LegalZoom, does not lend support to its position. In *Gundaker*, a real estate company was sued under the Fair Housing Act for steering prospective home buyers to particular neighborhoods because of their race. *Id*. at 1078. The court found that the defendant's expert, a real estate professional, could testify as to professional and ethical standards followed by real estate agents in Missouri. *Id*. at 1092. The court specifically noted: "[h]e offers no opinion, legal or otherwise, as to what constitutes compliance with state or federal fair housing laws." *Id*. Thus,

[1] Notably, the Eighth Circuit commented negatively on the trend in some courts to allow experts to testify on legal issues. "We cannot agree that the trend is a good one." 940 F.2d at 357.

in *Gundaker*, the proffered witness offered no opinion as to what constitutes compliance with law.

Here, however, unlike *Gundaker*, the thrust of the proposed expert's testimony is that the LegalZoom is not violating the law:

> For the reasons set forth below, I conclude that Plaintiffs' contention is erroneous: No computer (or owner of a computer) can practice law or render a legal opinion by virtue of providing a mechanism for an individual to record self-generated information.

(Report at 2). Because Professor Powell's testimony is, in essence, his opinion that LegalZoom is not breaking the law. it should not be presented to the jury.

LegalZoom also cites a bankruptcy case in which a law professor testified that a bankruptcy law firm was engaged in the unlawful practice of law. *In re Brown*, No. 09-44254, 2011 WL 477822 (Bankr. W.D. Mo. Feb. 7, 2011). In *Brown*, the bankruptcy trustee sought sanctions against a law firm for engaging in the unlawful practice of law, for unreasonable fees, and for failing to fully disclose their involvement in the bankruptcy case. Id. at *2. The professor opined at a hearing on sanctions that the law firm was practicing law in its pre-filing consultations with the debtor. *Id*. The *Brown* court did not consider the admissibility of such testimony, as it was not challenged by the law firm. Furthermore, the testimony was not presented to a jury, but to a judge in the context of a motion hearing. Simply stated, the *Brown* decision is not authority on the question of whether experts may testify to juries about the law.

LegalZoom suggests that Professor Powell should be permitted to testify because lawyers are regularly allowed to testify as to the practices and standards applicable to their profession. (Docket No. 103, Sug. in Opp. pg. 15). Certainly, in the context of a legal malpractice action, such testimony may be necessary to establish the requisite standard of care. *See Bross v. Denny*, 791 S.W.2d 416, 421 (Mo. App. 1990). Here, however, plaintiffs do not claim that LegalZoom

breached a professional standard imposed on lawyers. There is no professional standard to be established against which LegalZoom's conduct is to be measured. Rather, the inquiry is whether LegalZoom engaged in the law business by (1) drawing or procuring or assisting in the drawing (2) for a valuable consideration (3) any paper, document or instrument affecting or relating to secular rights. RSMo. § 484.010(2). Professor Powell's historical analysis and opinions about the regulation of the practice of law do not relate to these determinations.

Furthermore, Professor Powell's impressions of his own interactions with the LegalZoom website should be excluded as violating Rule 702 and irrelevant. He opines that his LegalZoom process was "less expensive" than anticipated and that he "understood he was not engaging the services of a lawyer." (Report at 17). He recites the disclaimer on the website proclaiming that "LegalZoom cannot provide legal advice." *Id.* Professor Powell's subjective impressions of his interaction with the Website, while perhaps helpful in an advertising campaign, will not help the jury understand the evidence or determine a fact in issue. Instead, his opinions are simply a means to argue to the jury that LegalZoom's conduct is not the practice of law. Argument in the guise of opinion should be excluded.

V. Conclusion

Because Professor Powell's proposed testimony is legal argument dressed as expert opinion, will not assist the trier of fact, improperly invades the role of this Court, and is irrelevant, the Court should exclude him from providing testimony at trial.

Edward D. Robertson, Jr., # 27183
Mary Doerhoff Winter, # 38328
BARTIMUS, FRICKLETON, ROBERTSON & GORNY
715 Swifts Highway
Jefferson City, MO 65109
573.659.4454, 573.659.4460 (fax)
chiprob@earthlink.net,
marywinter@earthlink.net

Timothy Van Ronzelen, #44382
Matthew A. Clement, #43833
Kari A. Schulte, #57739
COOK, VETTER, DOERHOFF & LANDWEHR, PC
231 Madison
Jefferson City, Missouri 65101
573.635.7977, 573.635.7414 (fax)
tvanronzelen@cvdl.net
mclement@cvdl.net
kschulte@cvdl.net

Steven E. Dyer, #45397
LAW OFFICES OF STEVEN DYER
10850 Sunset Office Drive, Ste. 300
St. Louis, MO 63127
314.898.6715
jdcpamba@gmail.com

/s/ David T. Butsch
David T. Butsch, # 37539
James J. Simeri, #52506
BUTSCH SIMERI FIELDS LLC
231 S. Bemiston Ave., Ste. 260
Clayton, MO 63105
314.863.5700, 314.863.5711 (fax)
butsch@bsflawfirm.com
simeri@bsflawfirm.com

Randall O. Barnes, #39884
RANDALL O. BARNES & ASSOCIATES
219 East Dunklin Street, Suite A
Jefferson City, Missouri 65101
573.634.8884, 573.635.6291 (fax)
rbarnesjclaw@aol.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on May 12, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF system. The system sent notification of this filing to the following:

Party	**Counsel**
Defendant LegalZoom.com, Inc.	Robert M. Thompson James T. Wicks BRYAN CAVE LLP One Kansas City Place 1200 Main Street, Ste. 3500 Kansas City, MO 64105 816.374.3200, 816.374.3300 (fax) John Michael Clear Michael Biggers James Wyrsch BRYAN CAVE LLP One Metropolitan Square, Ste. 3600 211 N. Broadway St. Louis, MO 63102 314.250.2000, 314.259.2020 (fax)

/s/ David T. Butsch