

**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’ MOTION IN LIMINE TO EXCLUDE IMPROPER  
OPINION EVIDENCE FROM JOHN SMALLWOOD**

Come now, Plaintiffs, by and through counsel, and for their Motion in Limine to exclude improper opinion evidence Plaintiffs anticipate LegalZoom.com (“LegalZoom”) will attempt to elicit from witness John Smallwood states as follows:

**I. Introduction**

The crux of this case is whether LegalZoom engages in the unauthorized practice of law in Missouri by violating §§484.010-.020, RSMo. Accordingly, much of the discovery in this case centered on the process by which documents are created via the LegalZoom website. In that vein, Plaintiffs deposed several LegalZoom corporate representatives about the process. In addition, Plaintiffs properly and timely disclosed a witness named John Smallwood, who had several legal documents prepared for him via the LegalZoom website. More specifically, Mr. Smallwood obtained a will, limited liability company documents, a real estate deed and a trademark from LegalZoom. While providing the information to LegalZoom to obtain the documents, Mr. Smallwood (at the request of Plaintiffs’ counsel) captured the various computer

screens that appeared through the process of obtaining the documents so that the process by which documents are created by LegalZoom may be fully demonstrated. .

Mr. Smallwood owns a computer repair company in Jefferson City, but was not disclosed as an expert by any party in this case. He is merely a fact witness as to how documents are created by LegalZoom from the customer's perspective and the process by which the necessary information is gathered. Mr. Smallwood has no degree or certifications in the computer field and is not "licensed" in "Microsoft programs and that sort of thing." *See*, Smallwood depo. 15:17-25, attached as Exhibit 1. He also has no technical knowledge of how the LegalZoom computer process works and has never seen the Legalzip software, which is the software that LegalZoom employs to implement the branching questionnaire process and create the final legal documents. *Id.* at 107:18 – 108:6.

In his deposition, counsel for LegalZoom attempted to elicit improper opinion testimony from Mr. Smallwood in the form of how the LegalZoom process technically works and whether in general computers could give "advice" or "think." *See, e.g.*, Exhibit 1, 95:7 – 100:4 and 108:13-23. As set forth below, such testimony is improper under Federal Rules of Evidence 701 and 702 and is irrelevant under Federal Rule of Evidence 401. Alternatively, it is inadmissible under Federal Rule of Evidence 403, as it will simply confuse the jury about the true issues in this case and cause a waste of time and undue delay in the presentation of evidence.

## **II. Argument**

Pursuant to Federal Rule of Civil Procedure 26(a)(2)(A), "a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703 or 705." No party has disclosed Mr. Smallwood as an expert witness. Thus, any opinions LegalZoom may attempt to elicit regarding how computer software may

work or whether computers can “think” or give “advice” are improper for that reason alone.

Further, such opinions do not comply with the requirements of Federal Rule of Evidence 702 which governs the admissibility of expert testimony. Under Rule 702, an expert opinion is only admissible if “(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Mr. Smallwood testified that has no degrees or certifications and is not licensed in any software programs. *See*, Exhibit 1, 15:17-25. More importantly, he has never seen the Legalzip software LegalZoom uses and has no knowledge of how it works other than that he answered questions regarding the legal documents he was having prepared. *Id.* at 107:18-108:6. As such, there is simply no foundation for him to opine about what the Legalzip software or LegalZoom process is doing with the answers he and the class members give to the questions they are asked by LegalZoom.

Further, such opinions are also improper under Federal Rule Evidence 701 relating to opinions of lay witnesses. Under Rule 701, a lay witness may testify to opinions or inferences, but only if they are “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.” In addition, “it has always been the rule that lay opinion testimony may be elicited only if it is based on the witness’s first-hand knowledge or observations.” *Dijo, Inc. v. Hilton Hotels, Corp.*, 351 F.3d 679, 685 (5<sup>th</sup> Cir. 2003).

The attempted elicitation of opinions from Mr. Smallwood regarding what the Legalzip does or does not do are inadmissible under Rule 701 for several reasons. First, Mr. Smallwood has never seen the Legalzip software and has no knowledge of how it technically works. Thus, it

is not based on his first-hand knowledge. Second, such opinions could not be based on Mr. Smallwood's rationale perception, as he has never seen the software. Third, any assumption he may make on how it works, would necessarily be based on technical or other specialized knowledge, which would require the opinion be admissible pursuant to FRE 702. Therefore, the opinions are not admissible under Rule 701 either.

Further, the opinion testimony LegalZoom attempted to elicit from Mr. Smallwood about whether he believes computers can "think" or render "advice" fail for the same reasons. In addition, such testimony is inadmissible as it is irrelevant under Federal Rules of Evidence 401 and 402. Pursuant to Rule 401, evidence is only relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Whether in Mr. Smallwood's opinion computers can "think" or give "advice" simply does not have anything to do with whether LegalZoom violates Missouri law by "drawing or . . . procuring of or assisting in the drawing for a valuable consideration" of legal documents as set forth in § 484.010.2 – 020, RSMo. That is the crux of this case. Mr. Smallwood's beliefs as to what a computer does or does not do in terms of thinking or giving advice will not assist in the determination of any fact of consequence. Accordingly, it fails the relevancy test of Rule 401.

Finally, even if the opinion were of some slight relevance, it is inadmissible under Federal Rule of Evidence 403, as its slight probative value is substantially outweighed by the confusion it might create with the jury. If LegalZoom is allowed to elicit such general opinions from Mr. Smallwood, Plaintiffs would have to be allowed to probe even further into the code underlying the questionnaire process at LegalZoom and provide the jury with an extremely time consuming explanation of why the way LegalZoom set up the process, the computer is making

decisions about what to include or not to include in the particular legal document. Such opinions would clearly cause the undue delay and may result in the needless presentation of cumulative evidence which is prohibited by Federal Rule of Evidence 403.

### III. Conclusion

For the reasons stated herein, LegalZoom should be prohibited from eliciting opinion evidence from Mr. Smallwood as to what the LegalZoom process does and whether computers can “think” or give “advice” in a general sense.

Respectfully submitted,

/s/Timothy VanRonzelen

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**CERTIFICATE OF SERVICE**

I certify that on August 2, 2011, 2011, I served this paper upon the following via this Court's ECF system:

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