

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

TODD JANSON, GERALD T. ARDREY, CHAD M.
FERRELL, and C & J REMODELING LLC, on behalf of
themselves and on behalf of all others similarly situated,

Plaintiffs,

v.

LEGALZOOM.COM, INC.,

Defendant.

Case No. 2:10-cv-04018-NKL

**SUGGESTIONS IN OPPOSITION TO PLAINTIFFS'
MOTION IN LIMINE (DOC. NO. 156) TO EXCLUDE
OPINION EVIDENCE FROM JOHN SMALLWOOD**

Defendant LegalZoom.com, Inc. (“LegalZoom”), for its Suggestions in Opposition to Plaintiffs’ Motion in Limine to Exclude Opinion Evidence From John Smallwood (“Motion 156,” Doc. 156), states as follows:

Plaintiffs wholly mischaracterize the nature and purpose of John Smallwood’s (“Smallwood”) anticipated testimony and, based on this mischaracterization, fabricate the present motion in limine to exclude “improper opinion evidence.”

The most obvious fallacy in Plaintiffs’ argument is that LegalZoom does not intend to elicit any expert opinions from Smallwood, nor has LegalZoom given any indication of an intent to do so. To the contrary, as acknowledged in Motion 156, Smallwood was named as a witness by *Plaintiffs*, who hired Smallwood to access LegalZoom’s website and prepare documents and screen captures. *See* Motion 156 at 1-2.

Smallwood is the President and owner of Smallwood Technologies, a company that provides computer support and software installation, repair and support to small businesses in the

Jefferson City area. Exhibit 1, 9:22-10:16, 14:17-15:16. Smallwood has a Bachelor of Science in Industrial Technology. *Id.*, 11:18-24. Smallwood, who describes himself as “self-taught,” started “messing with” computers in 1982 and “[s]eriously got into them around 1998.” *Id.* at 11:13-12:14. Smallwood worked as a computer-aided draftsman for Frates Engineering, converting development plates for auto parts into digital format. *Id.* at 17:5-16. After that, Smallwood worked at Jefferson City Medical Group working with the facility’s Windows computers. *Id.* at 20:10-21:19. Smallwood’s primary duties at Jefferson City Medical Group were “Windows ’95, Windows ’98 support,” serving as communications director, maintaining and running the Siemens phone system, long distance, cell phones, and pagers. *Id.* at 21:22-22:13. Smallwood started Smallwood Technologies in 2002. *Id.* at 22:21-23.

Motion 156 seeks to downplay Smallwood’s experience by saying that he owns a “computer repair company” and “is merely a fact witness as to how documents are created by LegalZoom from a customer’s perspective and the process by which the necessary information is gathered.” Motion 156 at 2. Certainly, Plaintiffs themselves could testify to the customer’s perspective and the information gathered by LegalZoom. But Plaintiffs sought out Smallwood, who describes himself as a “subcontractor” of Plaintiffs’ counsel’s firm, and paid him \$85 an hour to prepare documents on LegalZoom’s website and provide testimony regarding the same. Exhibit 1, 103:25-105:12. Smallwood’s experience in the computer industry is presumably why Plaintiffs retained him as a witness. And as a result of Plaintiffs’ retention of Smallwood, Smallwood now has personal experience creating documents on LegalZoom’s website.

The testimony LegalZoom intends to present will be limited to Smallwood’s personal experience using the LegalZoom website and his perceptions regarding the same based on his experience in the computer industry. Such testimony is permitted under Federal Rules of

Evidence 701 and 702. *See Allied Sys., Ltd. v. Teamsters Auto. Transport Chauffeurs, Demonstrators & Helpers*, 304 F.3d 785, 792 (8th Cir. 2002) (“‘Personal knowledge or perception acquired through review of records prepared in the ordinary course of business, or perceptions based on industry experience’” provide foundation for lay testimony.) (*quoting Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1004-1005 (8th Cir. 1986)). Plaintiffs hired Smallwood — a computer businessman — to prepare documents on LegalZoom’s website, thereby giving him personal experience. They disclosed Smallwood as a fact witness regarding the process of preparing documents using LegalZoom. But now they seek to prevent LegalZoom from questioning Smallwood regarding this experience. Plaintiffs should not be permitted to have their cake and eat it too.

Plaintiffs’ argument that Smallwood’s testimony should be excluded because he has not been disclosed as an expert witness is likewise without merit. Rule 26’s expert disclosure requirements apply to opinions “*acquired or developed in anticipation of litigation or for trial . . .*” *See Dallas v. Marion Power Shovel Co., Inc.*, 126 F.R.D. 539, 540 (S.D. Ill. 1989) (emphasis in original). Because Plaintiffs have failed to show that Smallwood’s opinions were developed in anticipation of trial, their argument fails. *See id.* “Although [Smallwood] may have expert knowledge within the field of [computers],” that knowledge was not procured “for litigation purposes.” *Id.* As such, LegalZoom “is not attempting to [elicit] expert opinions that have been acquired as part of trial preparation.” *Id.* Rather, LegalZoom seeks only to elicit Smallwood’s opinion based on his general computer knowledge and his experience preparing documents on LegalZoom’s website. As such, Smallwood is not a witness whose disclosure is required by Rule 26(a)(2). *Id.*

Smallwood was disclosed as Plaintiffs' own witness, LegalZoom does not intend to elicit any expert testimony from Smallwood, and the lay opinion testimony LegalZoom intends to elicit is permitted under the Federal Rules of Evidence. *See Eckelkamp v. Beste*, 315 F.3d 863, 872 (8th Cir. 2002) (affirming district court's refusal to strike affidavits that plaintiffs claimed were "undisclosed expert opinion" because "'perceptions based on industry experience' provide foundation for lay testimony.") (*quoting Burlington N. R.R. Co.*, 802 F.2d at 1004). Certainly, Smallwood has sufficient computer experience to form a conclusion as to whether a computer can think. *See Katoch v. Mediqa/PRN Life Support Servs., Inc.*, No. 4:04-CV-938-CAS, 2006 WL 516843, at *3 (W.D. Mo. Mar. 2, 2006) ("A lay witness's testimony in the form of opinions or inferences need only be rationally based on perception and helpful to a determination of a fact issue.") (*quoting Burlington N. R.R. Co.*, 802 F.2d at 1004).

CONCLUSION

For the reasons set forth above, LegalZoom respectfully requests that the Court deny Plaintiffs' Motion in Limine to Exclude Opinion Evidence From John Smallwood.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2011, I electronically filed the above and foregoing with the clerk of court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

s/ James T. Wicks