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. 157) TO EXCLUDE EVIDENCE OR ARGUMENT THAT A COMPUTER CANNOT PRACTICE LAW

Defendant LegalZoom.com, Inc. ("LegalZoom"), for its Suggestions in Opposition to Plaintiffs' Motion in Limine to Exclude Evidence or Argument That a Computer Cannot Practice Law ("Motion 157," Doc. 157), states as follows:

In Motion 157, plaintiffs argue evidence that a computer that auto-populates customers' answers into blanks in the template for a legal document is not practicing law is irrelevant and therefore inadmissible. In fact, however, such evidence is not only relevant, it is central to plaintiffs' contentions in the case and to the factual questions before the jury.

In denying LegalZoom summary judgment, the Court found that LegalZoom customers "enter[] answers to questions via a 'branching intake mechanism' (or decision tree)," either "typ[ing] in answers to the questions" or "select[ing] an alternative from a list of choices or checkboxes." Doc. 145 at 3. The Court also found that the templates for the legal documents offered by LegalZoom are drafted to include standardized language by attorneys who are not licensed in Missouri. *Id.* at 4.

The Court further noted that the involvement of LegalZoom's human employees in the process is limited to reviewing customers' answers for "completeness, spelling and grammatical errors, and consistency of names, addresses, and other factual information," to reviewing "the final document for quality in formatting — *e.g.*, correcting word processing 'widows,' 'orphans,' page breaks, and the like," and then "print[ing] and ship[ping] the final, unsigned document to the customer." *Id.* Finally, the Court found that, after a customer completes the questionnaire, "LegalZoom's software creates a completed data file containing the customer's responses," and that "LegalZoom's software automatically enters the information provided by the customer via the online questionnaire into the LegalZoom template that corresponds with the type of document sought by the customer." *Id.*

It is indisputable that reviewing information provided by customers solely for completeness, spelling, grammar, and consistency of names and addresses does not constitute the practice of law. Nor does reviewing the final formatting of a document. It is also plain that printing and mailing the final document cannot constitute the practice of law.

In addition, Missouri case law also makes clear that the drafting of a blank legal form by a non-attorney or an attorney not admitted to practice in Missouri is not the practice of law. *In re Thompson*, 574 S.W.2d 365, 366, 369 (Mo. banc 1978) (preparation and sale of divorce forms not unauthorized practice of law even though "[n]one of the named respondents are attorneys or authorized to practice law in Missouri"); *see also In re First Escrow, Inc.*, 840 S.W.2d 839, 843 n.5 (Mo. banc 1992) (*rejecting* argument of concurrence that "[t]o draw a legal document is to use words to create legally binding rights and obligations and to delineate the boundaries of those rights and obligations. A blank form contract, drafted and approved by an attorney, has already created and defined the legal rights and obligations undertaken by those who wish to

enter into it. The practice of law ends when the contract describing the standard transaction is completed in blank form."); *see also id.* at 849-50 (Robertson, C.J., concurring).[1]

Finally, it is also clear from Missouri case law that the mere gathering of information for use in a legal form, as is done by LegalZoom's automated questionnaire process, is not the practice of law even when done by human beings, let alone a computer. *See In re Mid-America Living Trust Ass'ns, Inc.*, 927 S.W.2d 855, 865 (Mo. banc 1996) ("The trust associates were not merely collecting information to fill in standardized forms as otherwise might have been approved by *Hulse* and *In re First Escrow*.") (citations omitted).

That leaves, as the only remaining element of the LegalZoom process that could conceivably constitute the unauthorized practice of law, the taking of information provided by customers and putting it into the proper blanks of a template for a legal document. As the Court found in denying LegalZoom summary judgment, that process is fully automated — performed by LegalZoom's software and entirely without human involvement. Doc. 145 at 4.

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[1] Indeed, drafting a legal form to be sold on the internet is no different from drafting a form to be sold in a form book. *See* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 947-48 (2000) ("the analytical process involved in the use of legal software is no different from that involved in a self-help book. This is best demonstrated by way of example. Consider a book that requires a reader to answer a yes/no question concerning her personal circumstances. The book advises that if the answer is yes, she should follow the instructions on this page; if not, she should follow the instructions on the next page. Now, compare this with a software program that poses the same yes/no question to the user, and, based on the user's response, displays a different recommendation. There is no plausible, meaningful distinction between these two examples. Each case involves the same analytical process: the author (or programmer) analyzes the law and identifies a legal rule. She then drafts a question that captures which factual circumstances fall on which side of the line, and writes a recommendation applicable for each outcome . . . . [T]he generation of the appropriate recommendation is completely algorithmic. Every 'yes' answer always leads to one particular recommendation, every 'no' answer always leads to another.") (footnotes omitted). It is undisputed that the drafting and sale of form books is not the unauthorized practice of law.

The *unauthorized* practice of law of necessity involves the *practice* of law. Thus, it is a clear element of plaintiffs' case that LegalZoom's automated and computerized taking of customer-provided information and populating it into the blanks of a legal document template is the practice of law. Whether that is a pure fact question or a mixed question of law and fact, it is for the jury. *See In re K-tel Intern., Inc. Sec. Litig.*, 300 F.3d 881, 897 (8th Cir. 2002), citing *Silver v. H & R Block, Inc.*, 105 F.3d 394, 396 (8th Cir. 1997) (mixed question of law and fact is for jury). In order to find against LegalZoom and for the plaintiffs, the jury must conclude that this automated, computerized activity is the practice of law.

Whether a computer is even capable of practicing law could not be more relevant to that inquiry. While plaintiffs argue, somewhat inappositely, that "[a] defendant has no right to offer and a jury has no right to hear inadmissible evidence," Motion 157 at 2 (*citing* the criminal case of *U.S. v. Ceballos*, 593 F. Supp. 2d 1054, 1059 (S.D. Iowa 2009)), the fact of the matter is that, under Rule 402, "[a]ll relevant evidence is admissible."

Moreover, the standard for relevance is not a particularly high one. Under Rule 401, relevant evidence is "evidence having 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." Fed. R. Evid. 401. Whether LegalZoom's automated, computerized, auto-populating process is the practice of law is clearly a fact of consequence to the determination of the action. Whether a computer or computer software actually *can* practice law clearly has a tendency to make more or less probable the determination whether LegalZoom's computers *did in fact* practice law.

And while plaintiffs argue that the Court "has broad discretion in determining the admissibility of evidence," *see* Motion 157 at 2 (*citing Fortune Funding, L.L.C. v. Ceridian*

Corp., 368 F.3d 985, 990 (8th Cir. 2004), they fail to mention that the Federal Rules of Evidence favor admissibility and that the balance under Rule 403 should generally be struck in favor of admission. *U.S. v. Levine*, 477 F.3d 596, 603 (8th Cir. 2007); *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1244 (8th Cir. 1983). Any question as to the admissibility of evidence that a computer cannot practice law should be resolved in favor of admission.

Whether a computer can practice law is relevant to the core issues for the jury in this case. LegalZoom is entitled to present evidence helpful to the determination of that fact. Plaintiffs' Motion 157 therefore should be denied.

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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