Janson et al v. LegalZoom.com, Inc. Doc. 87

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.	)	

Suggestions in Support of Plaintiffs' Motion to Exclude Expert Testimony

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Plaintiffs Todd Janson, Gerald T. Ardrey, Chad M. Ferrell, C & J Remodeling LLC, and the certified Plaintiffs' class ("Plaintiffs"), move for an order excluding the testimony of LegalZoom's designated expert Burnele Venable Powell. In support of this motion, Plaintiffs submit the following memorandum in support.

I. Introduction

Plaintiffs move for an order of this Court excluding the testimony of witness Professor Burnele Venable Powell, a law professor, whom LegalZoom has identified as an "expert witness" it intends to call at trial. Professor Powell offers nothing more than impermissible opinions of law, and applications of his view of the law to the facts as alleged by LegalZoom. Presentation of this legal argument – in the guise of purported "expert testimony" – will only waste time and unduly delay the trial proceedings in this case. More importantly, by offering this so-called "evidence" LegalZoom improperly attempts to usurp the role of this Court. Lastly, Professor Powell's should be excluded as irrelevant.

II. Statement of Facts

1. On February 15, 2011, Defendant LegalZoom produced a report containing the opinions of its sole designated expert, Burnele Venable Powell. The report is attached hereto as Exhibit 1.

2. Professor Powell is a former law school dean who teaches professional responsibility at the University of South Carolina School of Law. (Report at 2).

3. Legalzoom asked Professor Powell to complete two tasks in this case. First, he was asked "to analyze the concept that it is the practice of law to offer customers a software platform that allows them to choose a product or services suitable to their needs; that allows customers to enter information in response to questions on a questionnaire; that then populates

that information into blanks in a predrafted form; and that prints the form for mailing to the customer, who can then use it to advance his or her legal interests." (Report at 2).

4. Professor Powell, at the request of Legalzoom, was also "asked to describe the use, in states other than Missouri, of less restrictive enforcement alternatives to a complete prohibition on computerized filing in of forms." (Report at 2).

5. In answering the first question, Professor Powell opines:

a. ". . . 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).

b. ". . . no computer-based delivery process falls within the scope of activities that have historically been understood to be the practice of law or that his historically been targeted for regulation as to the unauthorized practice of law." (Report at 2).

c. "Provision of an electronic formal for users to fill in the blanks in the manner that the user dictates – whether it involves the use of pre-formatted hard-copy pages of paper, pre-formatted electronic facsimilies of a page of paper, or the uploading of responses to questions that will be recorded electronically and subsequently printed out as pre-formatted electronic facsimilies of a page of paper—has not been what the legal profession has focused on as the practice of law." (Report at 3).

d. ". . . self-help aids should not be treated as the unauthorized practice of law. (Report at 14).

6. In answer to the second issue, Professor Powell found "no approach that simply seeks to deny nonlawyers a role in extending legal services to the public is likely to work." (Report at 25-26).

7. Through the course of his report, Professor Powell discusses various subjects, including the history of the regulation of the practice of law, the history of legal "self-help," and the alternatives to a prohibition on use of computerized forms. (Report at 3, 19, 25).

III. Background

This case is about LegalZoom's unauthorized practice of law in the state of Missouri. As set forth in Plaintiffs' complaint, Legalzoom's business practice of charging Missouri consumers a fee for completing various legal documents violates Missouri law**.** The starting place for the analysis is the statute, which both defines the "practice of law" and the "law business," and states who may — and who may not — lawfully engage in those activities in Missouri.

A. The Statutory Basis of Plaintiffs' Claim for the Unauthorized Practice of Law

Section 484.010 defines the practice of law and the law business, stating:

> 1. The "practice of the law" is hereby defined to be and is the appearance as an advocate in a representative capacity or **the drawing of papers**, pleadings **or documents** or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.
>
> 2. The "law business" is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or **the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights** or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.

§ 484.010, RSMo. (emphasis added).

Section 484.020 states who is and who is not authorized to practice law and engage in the law business in Missouri:

> No person shall engage in the practice of law or do law business, as defined in section 484.010, or both, unless he shall have been duly licensed therefor and while his license therefor is in full force

> and effect, **nor shall any association, partnership, limited liability company or corporation**, except a professional corporation organized pursuant to the provisions of chapter 356, RSMo, a limited liability company organized and registered pursuant to the provisions of chapter 347, RSMo, or a limited liability partnership organized or registered pursuant to the provisions of chapter 358, RSMo, **engage in the practice of the law or do law business as defined in section 484.010, or both**.

§ 484.020, RSMo. (emphasis added).

Lastly, Section 484.020.2 provides for a civil cause of action for treble the fee paid against any person or entity engaged in the unauthorized practice of law. § 484.020.2 RSMo.

Section 484.010.2, which defines the "doing of the law business" is of particular importance here. For Plaintiffs to prevail, they must only establish that LegalZoom, for a valuable consideration, drew or assisted in the drawing of "any paper, document or instrument affecting or relating to secular rights." § 484.010.2 RSMo.

LegalZoom's sole designated expert witness is Burnele Venable Powell. Professor Powell intends to testify about the law he wants the Court to apply in this case, and how the Court should treat LegalZoom's conduct under that law.

B. The Content of Professor Powell's Report

Burnele Venable Powell is currently a professor at the University of South Carolina School of Law, where he teaches courses in professional responsibility. Professor Powell's report, which serves as a preview of his trial testimony, consists of nothing but legal analysis and application of his view of the law to his view of the facts of this case. The report contains citations to numerous cases and sets forth how Professor Powell would decide this case if he were the judge.

Professor Powell describes the history of the regulation of the practice of law from

colonial times to the modern era, asserting that historically our regulatory system has been able to "accommodate . . . individuals operating *pro se* with the assistance of self-help providers." (Report at 15). He also describes his experience using the LegalZoom website, (Report at 16), and opines that legal forms are widely available on the internet from a variety of sources, including courts. He favorably compares the services of LegalZoom to those provided by the divorce kit seller in *In re Thompson*, 574 S.W.2d 635 (Mo. banc 1978), suggesting LegalZoom's conduct is not illegal.[1]

The following excerpts from Mr. Powell's report confirm each of the opinions was derived by Mr. Powell solely by applying his interpretation of the law, not as it is, but as it should be, to his view of the facts in this case. Rather than offering "scientific, technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue" as contemplated by Rule 702, he rejects the Plaintiffs' theory of the case and offers his personal opinion as to what should properly be considered the practice of 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).

- Central to the error of misapplying unauthorized practice of law analysis to computer-based delivery processes is a failure to appreciate that to aid an individual in handling her personal legal affairs by providing her with forms—whether the forms are paper or otherwise—has not historically been deemed to be the practical focus of unauthorized practice of law oversight . . . (Report at 3).

- Provision of an electronic formal for users to fill in the blanks in the manner that the user dictates – whether it involves the use of pre-formatted hard-copy pages of paper, pre-formatted electronic facsimilies of a page of paper, or the

[1] Remarkably, Professor Powell completely ignores the most recent opinions of the Missouri Supreme Court concerning the practice of law and further, fails altogether to reference the Missouri statutes governing the practice of law.

> uploading of responses to questions that will be recorded electronically and subsequently printed out as pre-formatted electronic facsimilies of a page of paper—has not been what the legal profession has focused on as the practice of law. (Report at 3).

- . . . self-help aids should not be treated as the unauthorized practice of law. (Report at 14).

Perhaps these arguments could be advanced to persuade the Missouri legislature or Supreme Court that the statutes regulating the unauthorized practice of law in Missouri should be modified. They are not, however, the proper subject of testimony for an expert witness.

IV. ARGUMENT

This Court has "broad discretion to exclude expert opinion evidence about the law that would impinge on the roles of the judge and the jury." *Pelletier v. Main Street Textiles*, LP 470 F.3d 48, 54 - 55 (1st Cir. 2006). *See also Abbott Laboratories v. Brennan* 952 F.2d 1346, 1352 (Fed. Cir. 1991) (trial court has broad discretion to admit or exclude expert testimony). The burden to show that an expert witness should not be excluded is on the party offering the expert. *See, e.g., United States v. Vargas*, 471 F.3d 255, 265 (1st Cir. 2006). Here, the "expert legal opinions" of Professor Powell clearly impinge on the role of this Court, are irrelevant and should be excluded.

A. Professor Powell's Testimony, Which Consists of Opinion Testimony on the Law, Is not Admissible Under Federal Rule of Evidence 702, Because it Will not Assist the Trier of Fact Understand the Evidence or Determine a Fact in Issue.

Rule 702 of the Federal Rules of Evidence governs expert testimony, and limits the scope of such testimony to specialized knowledge regarding factual matters:

> If scientific, technical, or other specialized knowledge *will assist the trier of fact* to understand the evidence or to determine *a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . .

Fed R. Evid. 702 (emphasis added).

In construing this rule, the Court of Appeals for the Sixth Circuit succinctly described the proper scope of expert testimony:

> Experts are supposed to interpret and analyze factual evidence. They do not testify about the law because the judge's special knowledge is presumed to be sufficient . . .

United States v. Curtis, 782 F.2d 593, 599 (6th Cir. 1986). Indeed, it is an "axiomatic principle" that expert testimony about law is not admissible. *See, e.g.*, *The Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1042 (D. Ariz. 2005) ("The principle that opinion evidence concerning the law is inadmissible is so well-established that it is often deemed a basic premise or assumption of evidence law – a kind of axiomatic principle") (internal quotations omitted). As the court in *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1213 (D.C. Cir. 1997), stated, "Each courtroom comes equipped with a 'legal expert,' called a judge."[2] Similarly, testimony that consists of 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. *See, e.g., Farmland Indus. v. Frazier-Parrott Commodities, Inc.*, 871 F.2d 1402, 1409 (8th Cir. 1989) ([t]he special legal knowledge of the judge makes the witness'

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[2] Thus, courts have uniformly prohibited testimony on legal issues. *See, e.g.*, *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir. 1997); *Marx & Co., Inc. v. Diners' Club*,550 F.2d 505, 509-10 (2nd Cir. 1977); *United States v. Leo*, 941 F.2d 181, 196 (3rd Cir. 1991); *Adalman v. Baker*, *Watts & Co.*, 807 F.2d 359, 365-68 (4th Cir. 1986); *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983); *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986); *Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969); *Peterson v. City of Plymouth*, 60 F.3d 469, 475(8th Cir. 1995); *Ward v. Westland Plastics, Inc.*, 651 F.2d 1266, 1270 (9th Cir. 1980); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990); *Burkhart v. Washington Metropolitan Area Transit Authority*,112 F.3d 1207 (D.C. Cir. 1997), 112 F.3d at 1213 (D.C. Cir.); *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) ("Every circuit has explicitly held that experts may not invade the court's province by testifying on issues of law") (citing cases).

testimony superfluous [and] [t]he admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case) (quoting *Marx & Co. v. Diner's Club, Inc.,* 550 F.2d 505, 510 (2d Cir. 1977)). Here, the Court should not permit Professor Powell to tell the jury, as described in his report, that LegalZoom's conduct is "self-help" and not the unauthorized practice of law.

The case of *Casper v. SMG*, 389 F.Supp.2d 618 (D.N.J. 2005), is directly on point. In *Casper,* an antitrust case, plaintiff sought to have a law professor testify as an expert witness. The expert in *Casper* "relie[d] on case law and statutes, applying them to the contemporaneous documentary record and oral testimony ... to answer legal questions." *Id.* at 621. The court in *Casper* held that the proposed testimony, whether it was characterized as addressing an issue of fact or law, was inadmissible. The court concluded by saying that plaintiff "is free when the time comes to make such arguments and offer such conclusions in legal memoranda, [but] he may not do so through the expert testimony of a law professor." *Id*. at 622. *See also Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (proposed legal expert's testimony that "articulates and applies the relevant law" is inadmissible). Likewise, LegalZoom should not be allowed to argue legal issues through the testimony of Professor Powell.

B. Professor Powell's Testimony Fails to Meet the Relevancy Test of Federal Rule of Evidence 401 and is Therefore Inadmissible.

Professor Powell's opinions are not relevant to any disputed factual issues and therefore should be excluded. "'Relevant evidence' means 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. "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "A defendant has no right to offer and a jury has

no right to hear inadmissible evidence." U.*S. v. Ceballos*, 593 F. Supp. 2d 1054, 1059 (S.D. Iowa 2009). This court has broad discretion in determining the admissibility of evidence, *Fortune Funding, LLC v. Ceridian Corp.*, 368 F.3d 985, 990 (8th Cir. 2004), and should exercise its discretion to exclude Powell's irrelevant opinion testimony.

Professor Powell's report fails the basic relevancy rule enunciated in *Polski v. Quigley Corp.,* 538 F.3d 836, 839 (8th Cir. 2008) that expert testimony "be useful to the finder of fact in deciding the ultimate issue of fact." His report includes:

- the history of the regulation of the practice of law (Report at 3);
- the history of legal "self-help" (Report at 19);
- the advancement of communication and information technology (Report at 21); and,
- the alternatives to an outright prohibition on the use of computerized forms (Report at 25).

As previously discussed, the statutory underpinning of Plaintiffs' cause of action is Section 484.020.1 RSMo, which prohibits "the drawing" or "assisting in the drawing for a valuable consideration" of "any paper, document or instrument affecting or relating to secular rights." The various subjects that constitute Professor Powell's report do not make any of these factual determinations more or less probable.

Expert testimony, like Professor Powell's, which simply suggests to a jury what the law should be and how it should be applied, is properly excludable as irrelevant.

V. Conclusion

Because Professor Powell's proposed testimony is legal argument dressed as expert opinion, will not assist the trier of fact, improperly invade the role of this Court, and are

irrelevant, the Court should properly exclude him from providing testimony at trial.

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CERTIFICATE OF SERVICE

I certify that on April 8, 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:

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/s/ David T. Butsch

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

TODD JANSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 10-04018-CV-C-NKL**
	)	
LEGALZOOM.COM, INC.,	)	
	)	
Defendant.	)	

EXPERT WITNESS REPORT

Prepared by Burnele Venable Powell
pursuant to Federal Rule of Civil Procedure 26(a)(2)

February 15, 2011

I. INTRODUCTION

A. Qualifications

1. My name is Burnele Venable Powell. I am a Professor of Law and holder of the Ann and Miles Loadholt Chair at the University of South Carolina School of Law. I have been a professor of law at the University of South Carolina since January 2004, serving initially as Dean of the School of Law and in 2006 returning to fulltime teaching. Prior to coming to the University of South Carolina, I served as Dean of the University of Missouri – Kansas City School of Law (1994-2003) and as a member of the faculty, at successive ranks, at the University of North Carolina School of Law (UNC-Chapel Hill, 1979-1994).

Since approximately 1985, I have taught courses and seminars in Professional Responsibility – the subject matter of which focuses on mastery of the legal ethics and practices of the legal profession, including the role of the courts and the concerns of the public. I am coauthor of a casebook on legal ethics, entitled LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS, and teach professional school (graduate-level) students, regularly lecture to lawyers and judges about legal ethics and the state of the legal profession, and serve as an outside reader for the Multistate Professional Responsibility Exam Drafting Committee, the committee that drafts the questions used nationally as part of various states' bar examinations. I have been published widely in major law reviews and journals and quoted nationally in newspapers and magazines on a broad range of topics, including lawyer regulatory reform, lawyers and consumer interests, and the morality of lawyer ethics. For 16 years (1993-2009), I served on the Board of Directors of Consumers Union, the publishers of Consumer Reports Magazine. And I have also served in various volunteer leadership roles with the American Bar Association, including serving as the founding Chair of the ABA Center for Professional Responsibility Coordinating Council, the committee that coordinates the work of the ABA's presidentially appointed committees

with respect to such matters as lawyer ethics and professionalism, discipline and regulation, and client services.

My studies, teaching, lecturing, and publishing have specifically included matters related to the practice of law and the unauthorized practice of law.

2. My *curriculum vitae* is attached as Exhibit 1. It lists all publications I have authored in the previous ten years.

3. Exhibit 2 is a list of all other cases in which I have testified as an expert at trial or by deposition during the previous four years.

B. Assignment

1. I have been asked by Defendant LegalZoom.com, Inc. to analyze the concept that it is the practice of law to offer customers a software platform that allows them to choose a product or service suitable to their needs; that allows customers to enter information in response to questions on a questionnaire; that then populates that information into blanks in a pre-drafted form; and that prints the form for mailing to the customer, who can then use it to advance his or her legal interests. I have also been asked to describe the use, in states other than Missouri, of less restrictive enforcement alternatives to a complete prohibition on computerized filling in of forms.

For reasons set forth more fully 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. Moreover, absent fraud or misrepresentation about the attorney status of the person operating such a computer-based, self-generating information source, no computer-based delivery process falls within the scope of activities that have historically been understood to be the practice of law or that have historically been targeted for regulation as the unauthorized practice of law. I have reached this conclusion after reviewing historical facts and forms and also after personally using the LegalZoom website and applying my

historical understanding of the regulations to these facts. Provision of an electronic format for users to fill in the blanks in the manner that the user dictates – whether it involves the use of pre-formatted hard-copy pages of paper, pre-formatted electronic facsimiles of a page of paper, or the uploading of responses to questions that will be recorded electronically and subsequently printed out as pre-formatted electronic facsimiles of a page of paper – has not been what the legal profession has focused on as the practice of law.

I also conclude that there are a number of alternatives that would increase the access of the lower and middle classes to computer-created legal documents while still adequately protecting the public from potential harm. These range from subjecting providers of legal documents to a spectrum of potential liability, to licensing and regulating such providers.

2. A list of the documents (complaint, answer, depositions) and other materials I have considered in forming my opinions is presented in Exhibit 3.

3. I am being compensated for my study of the issues and my testimony in the case at the rate of $500 per hour. This compensation does not depend on the outcome of this litigation.

4. A list of exhibits that will be used to summarize or support my opinions is presented in Exhibit 4.

II. DISCUSSION OF OPINIONS

A. History of the Enforcement of Restrictions on the Unauthorized Practice of Law

1. INTRODUCTION — FILLING IN FORMS HAS NOT BEEN HISTORICALLY REGARDED AS THE UNAUTHORIZED PRACTICE OF LAW

Central to the error of misapplying unauthorized practice of law analysis to computer-based delivery processes is a failure to appreciate that to aid an individual in handling her personal legal affairs by providing her with forms – whether the forms are paper or otherwise – has not historically been deemed to be the practical focus of unauthorized practice of law oversight, either in terms of (a) the legal professions' recognition of the

continually shifting shared-contours of legal information-giving, or (b) the legal profession's growing understanding of the workings of computer technology.

At a time when, nationally, there are more lawyers dealing with increasingly more complex regulatory and social issues than at any time in the history of the profession, it is ironic that demands by lawyers for — and equally importantly, court enforcement of — initiatives to expand the definition of the unauthorized practice of law have decreased. This counter-intuitive development (or viewed more sanguinely – this unexpected lack of increased activity in support of more aggressive enforcement of unauthorized practice laws) is explained by considerations grounded in prior historical eras (*i.e.*, the *Colonial, Industrial Expansion*, and *Modern Eras*) that reflect the process of lawyer regulation leading up to the *Computer and Information Era* in which law is currently practiced.

When considering calls for more vigorous sanctions, restraints, or injunctions against individuals alleged to have been engaged in the unauthorized practice of law, lawyers have increasingly recognized that, historically-speaking, the law has not been hostile to legal assistance by individuals who lacked formal training as lawyers. Rather, aided by judicial guidance, lawyers have come increasingly to recognize that nonlawyers have always played a vital role in expanding the delivery of legal information.

2. THE COLONIAL ERA (1770-1870) — AN UNREGULATED PROFESSION

From the earliest days of lawyer regulation in the American colonies – the so-called *Colonial Era* extending until just after the Civil War (roughly 1770-1870) – the environment was one in which the practice of law was "marked by an unregulated legal profession."[1] Such efforts as there were to regulate the legal profession were primarily

[1] ABA Commission on NonLawyer Practice, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 13-15 & nn. 31, 32 (August 1995) [hereinafter, NONLAWYER ACTIVITY], citing CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 212-19 (1911) on Massachusetts legislation.

aimed at lawyers themselves – not at nonlawyers.[2] In fact, in some instances the effort was to bolster nonlawyers' practice by legislating guarantees recognizing individuals' rights to be represented by whomever they pleased, "whether regular attorney or not."[3]

3. THE ERA OF INDUSTRIAL EXPANSION (1870-1920) — A TRUCE BETWEEN LAWYERS AND NONLAWYERS

Such early regulation as did emerge in the next era — what is called the *Era of Industrial Expansion* and encompasses the post-Civil War period running up to the eve of the Great Depression (approximately, 1870-1920)[4] — was most prominently focused on competition in the economic marketplace. Thus, lawyers' efforts were aimed at differentiating the quality of the services they viewed themselves as delivering from the services they characterized as being delivered by their competitors: pettifoggers (who, although trained in the law, seemed committed to carrying on law as a petty, shifty, or unethical business) and nonlawyers (regardless of the quality of their training).

Even as a consumer-protection concern, however, enforcement in the *Era of Industrial Expansion* was not about stamping out nonlawyer providers of legal information, *per se*. The reality was too plain that the American tradition, although primarily organized around lawyers, nevertheless included substantial numbers of law providers whose services overlapped the legal services provided by lawyers. These included individuals in banking, insurance, and real estate, to name a few. With the notable exception that they were not permitted to appear in court — because of judges' needs to be able unequivocally to presume the ready expertise of their officers — nonlawyers were viewed as simply too

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2 As one commentator has pointed out, vested political and economic interest in many instances sought to assure that lawyers would not stir up trouble or acquire sufficient wealth sufficient to enable them to become rivals to power. BARLOW F. CHRISTENSEN, THE UNAUTHORIZED PRACTICE OF LAW: DO GOOD FENCES REALLY MAKE GOOD NEIGHBORS—OR EVEN GOOD SENSE?, 1980 Am. B. Found. Res. J. 159, 163-64 (1980).

3 NONLAWYER ACTIVITY 15.

4 The era is sometimes called the *Second Industrial Revolution*. *See*, "Historical Eras: Most Popular Searches," http://www.u-s-history.com/pages/eras.html [Last visited February 1, 2011].

important to the carrying out of many of society's low clerical functions to be disallowed. Moreover, with consumers benefiting and few complaints about ancillary providers and publishers – not to mention the growing economic and political clout of nonlawyer assisters – efforts to restrain what was by many viewed as a traditional aspect of the market presented an enormous challenge. Not surprisingly, the solution was simply to declare a truce between lawyers and other professionals. No camp would press for or concede ground to the other, although coexistence was the most that would be acknowledged.

4. The Modern Era (1930-1970)

a. Introduction — Unauthorized Practice Enforcement as Protection of the Interests of the Legal Profession

To the benefit of lawyers, nonlawyers, and the public alike, the Colonial Era's balancing of interests approach remained the impetus of unauthorized practice enforcement efforts, even as the country was transforming itself from an agrarian to an industrial society. What the newly dominant and complex economy of the *Modern Era* (1930-1970) brought, however, was recognition of the need for more lawyers – or at least for the legal information possessed by lawyers to be made more widely available. As a result, educational endeavors concerning the law, in the form of books and documents providing information helpful to the conduct of legal business, including books of do-it-yourself legal forms such as Norman F. Dacey's 310 page HOW TO AVOID PROBATE!, grew in usefulness and sophistication to meet the demand. It is not surprising, therefore, that the public reacted consistently with the tolerance that had been arrived at in the Colonia Era. But nor was the legal profession's reaction a surprise. The *Modern Era* saw the beginnings of organized and concerted efforts by lawyer to secure a monopoly on the provision of legal information to the public. Flexing new strength built largely upon the growth of bar associations across the nation, the legal profession sought to control or shut down all potentially competitive sources of legal

information. The rhetoric of the unauthorized practice of law's proponents remained what it had been in earlier eras – preventing the stirring up of litigation, weeding out incompetence, and preventing the charging of excessive fees[5] – but now the focus was on those outside the legal profession and the rationale was defensive. The individuals who had to be stopped were those engaged in simple, easily standardized, but common transactions – the kinds of transactions that in many instances lawyers might handle by assigning the task to a paralegal and then providing oversight.

Still, the *Modern Era*, like the prior one, shared two basic understandings: First was that much of the work done by lawyers required neither unique skills nor special measures to safeguard the practice of law; second, was that what regulation as did advance during the era should resemble "the narrowly tailored pre-1870 laws that regulated court appearances or prohibited the practice of law by court clerks, sheriffs and other public officials."[6] In other words, the legal profession did not view legal activities by nonlawyers in areas involving professional overlap or self-help as of major concern. As a result, unauthorized practice of law provisions continued to reflect a tension between regulation aimed at acknowledging the usefulness of non-lawyer practice, on the one hand, and the organized bar's efforts to increase the quality of its delivery of legal services, on the other.

Thus, it was not until the *Modern Era* that unauthorized practice of law initiatives could be characterized primarily as tools to remove nonlawyers (except in their *pro se* roles) from the national legal services landscape. Especially targeted were individuals thought to have the potential to compete directly as lawyers' economic competitors. Once grudgingly tolerated as practical and therefore permissible, nonlawyer services

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5 BARLOW F. CHRISTENSEN, THE UNAUTHORIZED PRACTICE OF LAW: DO GOOD FENCES REALLY MAKE GOOD NEIGHBORS—OR EVEN GOOD SENSE?, 1980 Am. B. Found. Res. J. at 164.

6 NONLAWYER ACTIVITY, *supra* note 1 at 16.

overlapping with those provided by lawyers were now to be barred as threats to the public. As a result, the *Modern Era* brought demands for wider and more stringently enforced unauthorized practice of law initiatives. This was so even in the absence of evidence that the public or anyone else was at increased risk of harm — an accusation conspicuously absent from virtually every case alleging the unauthorized practice of law in this and other eras. Stronger regulation of attempts by nonlawyers to provide legal assistance were demanded, whether the alleged wrongdoer was someone fraudulently presenting himself as a lawyer, a traditional ancillary provider, or the publisher of self-help materials. In the new regulatory environment, little distinction needed to be made between interlopers. What was claimed to be "lawyers' work" essentially meant that by providing legal information, someone who was not a lawyer was depriving a lawyer of a potential engagement by a client. It no longer seemed to matter whether the potential representation involved a matter so routine that a lawyer was unnecessary as a practical matter, or whether an individual was simply trying to save the cost of a lawyer by handling the work themselves *pro se*.

The *Modern Era's* impetus to regulate and limit the ranks of who could do legal work, which in the prior eras would have given way to a pragmatic recognition of the public interest, can best be understood as a product of the United States' growing industrial and economic power, and the regulatory shift that came in the wake of the Great Depression, two world wars, and the emerging view that government should regulate the marketplace to promote fairness, safety, and efficiency. In that context, it is understandable that an ever more robustly organized bar would seek to protect not simply clients and the judicial processes, but something of increasingly more practical significance in a competitive economic system – the legal profession's own economic interests.

b. The Four Pillars of Unauthorized Practice Enforcement in the Modern Era

i. The First Three Pillars — Nonlawyers in the Courts, Holding Oneself Out as a Lawyer, and "Statements of Principles" Between Professions

During the Modern Era, organized interests within the legal profession pushed for stronger regulation of all whom it viewed as competitors engaged in delivering legal services. If left unchecked, they urged, nonlawyers would overcharge for the value of their services, endanger clients through incompetence or inadvertence, and stir up litigation that might have been avoided under the regulatory oversight of the bar.

In the Modern Era, the attempt to isolate, cordon off, and silence competing providers of legal information in the name of unauthorized practice of law is best visualized as a structure resting on four pillars. The first pillar was the courtroom, which was to remain sacrosanct. None other than lawyers (or an individual acting *pro se* under court oversight) was to be allowed to represent a client in court.

The second pillar was the prohibition against anyone misrepresenting himself or herself as a lawyer. This activity was targeted on the theory that commercial transactions cannot be based on deception, whether the misrepresentation occurred inside or outside of the court.

The third pillar was be the prohibition against engaging in the unauthorized practice of law in violation of interdisciplinary "statements of principles" pursuant to which lawyers and other professions decided who could perform what quasi-legal work without fear of being accused of unauthorized practice.[7] Negotiated

[7] The ABA study in NONLAWYER ACTIVITY put the statements of principle in context:

> Even though courts have found it difficult to arrive at a generally acceptable definition of the practice of law, the bar at one time found another method of defining the boundaries that could not be crossed by nonlawyers. By negotiation agreements with associations representing other professions, it was possible to lessen the friction that was created through the enforcement of UPL by judicial or quasi-judicial means.

between state bar associations aided by the ABA, and the professional associations of nonlawyers, such statements envisioned that the boundaries of ancillary lawyering could be set by mutual agreement. Nonlawyers would be allowed to do legal work that was incidental to their professional responsibilities, and the bar would not seek to prosecute them for the unauthorized practice of law. Under such agreed statements of principle, bankers, insurance representatives, real estate brokers, and others could complete legal documents when necessary in the performance of their professional duties, but were required to desist from any broader practice. Moreover, such practice agreements were to be strictly interpreted with respect to the kind and amount of work that the nonlawyer professional would be allowed to do.

ii. The Fourth Pillar — Assisting those Engaged in Self-Help

The fourth pillar in the *Modern Era* was an effort in some states to prohibit nonlawyers from aiding individuals seeking to exercise self-help to advance their legal interests. The theory was that, although individuals could represent themselves in legal matters, it was impermissible for another person (including lawyers it was sometimes urged) to aid an individual in any way in representing themselves. Under the rationale of protecting unsophisticated and gullible clients from untrained advice-givers (and themselves), proponents argued that members of the public needed to be protected from publishers of materials intended to aid nonlawyers in the practice of law. Accordingly, in these states providers of self-help aids, such as "how-to" books and forms, were to be highly scrutinized, strictly limited, and silenced when possible. The mere communication of information

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Some of the first agreements were negotiated at a local level in the mid-1920s while national agreements . . . were negotiated by the ABA beginning in the early 1930s."

NONLAWYER ACTIVITY, *supra* note 1 at 10.

aimed at assisting clients other than through a lawyer was presumed to be the unauthorized practice of law.

5. THE COMPUTER AND INFORMATION ERA (THE MID-1970S TO THE PRESENT) — DECLINE IN ENFORCEMENT OF UNAUTHORIZED PRACTICE PROHIBITIONS UNDER THE THIRD AND FOURTH PILLARS: INTERDISCIPLINARY "STATEMENTS OF PRINCIPLES" AND ASSISTING IN LEGAL SELF-HELP

a. The First Three Pillars in the Computer and Information Age

The four-pillar strategy for containing and ending the unauthorized practice of law encountered difficulties from the start, however. These difficulties only intensified with the dawning of the present age, the *Computer and Information Era* (beginning about the mid-1970s and continuing to the present). The chief difficulty with the four-pillar approach was that it had a clear objective (*i.e.*, to eliminate potential economic competitors), but no compelling rationale. Whereas its first two pillars, protecting the court room and protecting the public from fraud, represented historical norms that had been affirmed by experience, the same could not be said of either the interdisciplinary statements of principles or the effort to eliminate "how to" assistance. In fact, under intense threat of antitrust prosecution from the United States Department of Justice and the Federal Trade Commission, in the 1970s and 1980s the American Bar Association *voluntarily* ceased its efforts to negotiate statements of principles with professional associations and the various state bar associations soon followed suit.[8] Today, such protocols play no meaningful role in efforts to regulate the unauthorized practice of law; only efforts to prohibit nonlawyer representation in the courtroom and to prevent

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[8] One study concluded:

> Most notably, the American Bar Association House of Delegates, at its February 1980 Midyear meeting, rescinded statements of principles with the American Institute of Architects, the National Society of Professional Engineers, the American Land Title Association, and various publishers; other actions were also taken relative to statements of principles and to conference groups with other professions and businesses.

BARLOW F. CHRISTENSEN, THE UNAUTHORIZED PRACTICE OF LAW: DO GOOD FENCES REALLY MAKE GOOD NEIGHBORS—OR EVEN GOOD SENSE?, 1980 Am. B. Found. Res. J. at 200.

representations based on untruthful, fraudulent, or misleading actions continue to have vitality.

b. The Fourth Pillar in the Computer and Information Era — Forms and Instructions Are Not the (Unauthorized) Practice of Law

The highest courts of a number of states have held during this period that the creation, publication, and sale of forms, divorce kits, and form books, with or without instructions either as to filling out the forms or explaining general legal practice and procedure, does not constitute the unauthorized practice of law.[9] These courts have recognized that the identifying factor in the practice of law is the giving of "personal advice to specific problems to a readily identifiable person,"[10] or "personal contact . . . in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's . . . problems."[11] Indeed, when a federal district court in Texas held that a popular software package, *Quicken Family Lawyer*, constituted the unauthorized practice of law because it contained forms and interactive instructions for filling them,[12] the Texas legislature responded to the public outcry by amending the statute before the Fifth Circuit could

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[9] *See New York County Lawyers Association v. Dacey*, 234 N.E.2d 459 (N.Y. 1967) (publication and sale of legal forms was a common activity, and sale of book entitled "How to Avoid Probate", which included forms for use by lay people and advised them how to avoid having an estate distributed though probate, was not unauthorized practice of law); *Oregon State Bar v. Gilchrist*, 538 P.2d 913, 919 (Or. 1975), ("We conclude that in the advertising and selling of their divorce kits the defendants are not engaged in the practice of law and may not be enjoined from engaging in that part of their business."); *State Bar v. Cramer*, 249 N.W.2d 1, 9 (Mich. 1976) ("[t]he advertisement and distribution to the general public of forms and documents utilized to obtain a divorce together with any related textual instructions does not constitute the practice of law."); *In re Thompson*, 574 S.W.2d 365, 369 (Mo. banc. 1978) ("the advertisement and sale by the respondents of the divorce kits does not constitute the unauthorized practice of law so long as the respondents and other[s] similarly situated refrain from giving personal advice as to legal remedies or the consequences flowing therefrom.").

[10] *In re Thompson*, 574 S.W.2d at 368, citing *State v. Winder*, 348 N.Y.S.2d 270 (N.Y. App. Div. 1973).

[11] *Id.* at 367, citing *State Bar v. Cramer*, 249 N.W.2d 1.

[12] *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, 1999 WL 47235 (N.D.Tex. Jan. 22, 1999).

decide the appeal. It was a victory for the public interest and reason enough to remand the appeal as moot.[13]

Perhaps not coincidentally, the Computer and Information Era has also seen a number of studies showing that the majority of middle-income consumers have been effectively priced out of the legal market.[14] These studies show that nearly two-thirds of the routine legal needs of middle-income consumers are going unmet.[15]

Central to efforts to halt "how-to" assistance has been the absence of three things – the three "No's," if you will. Those proposing to treat such aid as constituting the unauthorized practice of law have identified: *no* definition of the practice of law; *no* significant injuries to self-help consumers or the general public; and *no* credible explanation why an individual user who knows that she is not utilizing the services of a lawyer should nevertheless be treated as though she has used the services of a lawyer.

Of the three "No's," it is undoubtedly the lack of a useful definition of the practice of law that has proven most troubling. Absent such definition, those who have attempted to ban self-help aids have essentially been reduced to asserting that the unauthorized practice of law requires the elimination of any activity that they believe ought not to be authorized. The breadth and circularity of that non-definition, however, raises profound problems. It means either that everything lawyers typically do should be treated as constituting the practice of law when done by nonlawyers, or that there

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13 *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, 179 F.2d 956 (5th Cir. 1999).

14 *See, e.g.*, NONLAWYER ACTIVITY, *supra* note 1, at 73-78. *See also*, AMERICAN BAR ASSOCIATION CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY, at 27-28 (1994)

15 AMERICAN BAR ASSOCIATION CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE, A SURVEY OF AMERICANS, MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY, at 27-28 ("Approximately half of low- and moderate-income American households are facing one or more situations that could be addressed by the system of civil justice. Nearly three quarters (71 percent) of these situations faced by low-income households are not finding their way to the justice system. For moderate-income households, the proportion is nearly two thirds (61 percent). The most common legal needs of low- and moderate-income American households pertain to personal finances, consumer issues, housing (both owned and rental), and other real property.")

should be a forthright acknowledgement that, in many areas, the activities of lawyers and nonlawyers necessarily overlap. But, since vagueness dooms the first choice as a reasonable approach, the only practicable solution is to conclude that – no matter how inconvenient they may be as matter of market-place competition – self-help aids should not be treated as the unauthorized practice of law.

As the Arkansas Supreme Court put it in *Pope County Bar Association v. Suggs*, 274 Ark. 250, 624 S.W.2d 828, 255 (Ark. 1981), "The ultimate issue . . . is not so much whether realtors are practicing law when filing out these routine forms but whether it is in the best interest of the public to allow them to do so." So too, the best interest of the public has remained the ultimate issue when it comes to self-help aids. Moreover, the lack of public demand that how-to aids be banned only serves to underscore that the historic need for such assistance remains, as it has been in every era, high and, if anything, growing. There is no catastrophic result, harmful pattern of abuse, or record of failure that can be pointed to as justification for banning self-help materials, whether such materials are presented in hardcopy or electronic formats.

What has preserved the salutary effects of self-help aids, in other words, is not that they have been regulated or that they have been pigeon-holed into particular formats. Rather, it is that the public (and the courts regulating on behalf of the public) have consistently recognized that the essence of what is being provided by self-help aids is a product – not a fiduciary relationship. Accordingly, when self-help aids have been offered to the public in company with clearly announced disclaimers that what is provided is not legal advice, surrogate lawyering, or any kind of lawyer-client relationship, the public has understood that use of the product involves taking on responsibility for (and the risk of) operating without a lawyer. Era to era, therefore, such users have asked those seeking to expand the application of unauthorized practice of law provisions the question that they have been unable to answer satisfactorily:

"Why should I be restrained from aid in organizing information of legal relevance simply because I have turned down or cannot afford the services of a lawyer after determining that such services are neither needed, wanted, or affordable?"

6. Conclusions on the History of Enforcement of Unauthorized Practice

In different eras different accommodations have been reached between those who would expansively apply unauthorized practice of law restrictions and those who have sought to limit their scope. Whether the target of the expanded scope was lawyers themselves, or nonlawyers seeking to represent themselves or to assist others who were seeking to represent themselves, the unauthorized practice laws have always had to be applied in a manner that balanced personal rights of liberty, the public interest, and the practical necessities of the marketplace. The accommodation that has made the regulation of the practice of law work has been recognition by all concerned (*i.e.*, the courts, the legal profession, and nonlawyer providers) that unauthorized practice of law restrictions do not exist to protect the economic interests of lawyers. They exist to protect the public, the operations of the courts, and the legal profession (to the extent that lawyers are called upon to serve the public through the courts). That limited regulatory purpose is why, except in times of acute economic stress, such as the Great Depression, a balance of interests has prevailed.

As a nation, we have been able to accommodate lawyers and nonlawyer, *pro se* representatives, and individuals operating *pro se* with the assistance of self-help providers. That accommodation is why, even as the formats and technologies associated with the practice of law have changed, the basic relationships among the players have not. It is widely acknowledged that the direction of unauthorized practice of law regulation has been – and will likely continue to be – towards recognizing that our system requires nonlawyers as well as lawyers.

Our system allows for such nonlawyer assistance subject only to the most basic constraints: that those assisting nonlawyers do not attempt, as a primary matter, to counsel, advise about, recommend, or explain the law on an individual basis. It is in that sense, therefore, that I am confident in saying, as I did at the outset, that in historical and cultural terms the legal profession and the nation have agreed that: "No computer . . . can practice law or render a legal opinion by virtue of providing a mechanism for an individual to record self-generated information."

B. The Increasing Application of Computer Technology Does Not Transform the Time-Honored Activity of Filling Out Legal Forms Into the Practice of Law

There is a second, independent reason why, despite the increase in the number of lawyers in the United States and the growing complexity of legal services, there continues to be a decline in the number of claims that the use of self-help aids such as computer-enabled document generation constitutes the unauthorized practice of law. It is that lawyers better understand the value and workings of computers. Today, most legal documents are generated by computer, as are most documents associated with finance and commerce. From that fact alone, it is now more widely understood that computers can be programmed to engage in narrow and discrete functions. Thus, they can be precluded from performing any of the functions necessary to constitute the practice of law, under even the most expansive definitions of the practice of law.

1. Using the LegalZoom Website

On January 21, 2011, I personally utilized the LegalZoom.com website to complete Missouri forms for the creation of (1) a last will and testament and (2) a limited liability company. In addition, on February 11, 2011, I personally used the website to create (3) a durable power of attorney.

a. Cost

My experience with the LegalZoom website revealed that LegalZoom has created an easy process for filling out the kinds of forms associated with these three common legal matters. With respect to the will – the one instance where I have had recent experience – I found that the process was less expensive than I had anticipated. The cost of the LegalZoom form for a will that I selected, for example was $69.00, as compared to the will that I actually purchased from a lawyer, which cost about $1500.00 (with a discount).

I do not suggest, however, that my personal will and the will that I generated using LegalZoom's forms were substantively comparable – only that it was clear to me that, on an hourly rate basis, the cost of the services charged by my attorney were substantially higher than the cost I would have incurred had I used LegalZoom to complete the forms necessary to make a will, rather than a lawyer. But that was precisely the point: In using the LegalZoom website, I understood that I was not engaging the services of a lawyer; I was doing it myself. Accordingly, since LegalZoom's service of providing information to fill out the forms did not include the cost of a lawyer's mental processes, warranties of service, and office and personnel overhead, the charge that I paid was less.

b. Lack of Personal Interaction

Cost was not the only factor that made it clear that what LegalZoom provides is not the service that either I or most lawyers would identify as the practice of law. Most important in differentiating LegalZoom's services from the services provided by lawyers engaged in the practice of law is that LegalZoom is a website. No reasonable person who is seeking counsel, advice, recommendations, or explanations would turn to a website, where the most that they could expect to receive is impersonal,

generalized, information that is placed into a form, but not focused on the discrete needs of an individualized client.

c. Disclaimer

Moreover, even if an individual was unsure about whether he or she was consulting a lawyer when using LegalZoom's forms, such confusion would be quickly resolved, because LegalZoom begins each formatting session by prominently and clearly advising on the opening page as follows:

> Disclaimer: The information provided in this site is not legal advice, but general information on legal issues commonly encountered. LegalZoom is not a law firm and is not a substitute for an attorney or law firm. Communications between you and LegalZoom are protected by our Privacy Policy, but are not protected by the attorney-client privilege or work product doctrine. LegalZoom cannot provide legal advice and can only provide self-help services at your specific direction. Please note that your access to and use of LegalZoom.com is subject to additional terms and conditions. LegalZoom.com, Inc. is a registered and bonded legal document assistant, #0104, Los Angeles County (exp. 12/11) and is located at 101 N. Brand Blvd., 11th Floor, Glendale, CA 91203.

2. USING COMPUTERS TO FILL OUT LEGAL FORMS APPLIES AMERICAN SELF-RELIANCE AND READY ADOPTION OF NEW TECHNOLOGY TO LONG-APPROVED PRACTICE

Still, it might be asked why the very existence of a process that asks questions of an individual, inserts her answers in a form, and then generates a document that can be filed for legal purposes would not be viewed by lawyers and the public as the practice of law. In other words, why doesn't the very phenomenon of a question-answer process create what lawyers and the public would view as the practice of law? It is a fair question. But the answer is an easy one. It lies in the reason why, despite increases over time in the number of such question-answer self-help aids, claims alleging unauthorized practice of law in connection with such self-help processes have continued to decline. Those reasons are two-fold.

First, historically the use of forms by individuals representing themselves *pro se* has been permitted for decades, if not centuries.[16] This reflects acceptance that the public interest is served by sharing with lawyers and nonlawyers information that helps them, respectively, in representing clients and themselves in legal matters. Hence the advice that law professors like myself have for generations given to students readying themselves to become novice lawyers: "If you want to know how to handle a matter, begin by going to your firm's files or to the clerk of court to get a copy of a good filing and study it."

The LegalZoom website, therefore, is but a recent example of a long tradition of reform carried out by executive agencies, the courts, and the private sector (primarily publishers). It is within a tradition that has evolved in a sufficiently open-minded way that by the mid-1800s it already allowed for non-lawyer aid to citizens through such publications as Wells' EVERY MAN HIS OWN LAWYER AND UNITED STATES FORM BOOK: BEING A COMPLETE GUIDE IN ALL MATTERS OF LAW AND BUSINESS NEGOTIATIONS FOR EVERY STATE IN THE UNION.[17]

It is a tradition that has its roots in the ancient writs system, under which pleadings were by special form so that the courthouse was blocked to any who could not frame their

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[16] One commentator noted that, "Layman's law was nothing new. It was part of a tradition that went back to colonial times." He then went on to recount that Eldon Revare James had said in his book, A List of Legal Treatises Printed in the British Colonies and the American States Before 1801, that between 1687 and 1788 all of the law treatises published were for nonlawyers – and not a single one was for lawyers. Mort Rieber, "300 Years of Self-help Law Books." (Retrieved from 2000 Website of Nolo Press *via* Internet Archive, http://www.archive.org/web/web.php.)

[17] Wells, Every Man His Own Lawyer 7 (1866). Wells was clear about what he was attempting to accomplish:

> "The utility of a volume of this character is too obvious to need commendation. The design in its preparation has been to offer the professional man, the farmer, the mechanic, and the business man, a comprehensive and reliable work, which will enable him to draw up any instrument in writing that may be required in the course of business, in a legal form; to furnish him with all such legal information as is usually called for in the various avocations of life; and to make a plain, common-sense work, that every body can understand, and which will enable any man or woman to be his or her own lawyer. To make such a work is no small task; but patience and industry are equal to every enterprise, no matter how difficult, and the result of our labor is in the present volume."

case in the traditional manner.[18] Because in modern times we have rejected the notion that the form of pleadings represents anything special about the law, we are today fortunate to be beyond the sophistry of the 1300's. Courts and administrative agencies go out of their way today to encourage access by all and they do so by encouraging lawyers and nonlawyers, alike, to understand and use forms that the court itself has widely disseminated. Using systems that are very much similar to LegalZoom's, for example, courts in Illinois and Idaho have begun experimenting with their own online self-help aids using document-assembly technology.[19]

The State of Missouri, acting through its Secretary of State, provides online access to more than 100 pages of forms[20] and instructions[21] for the use of the public, and specifically for individuals acting *pro se*. Among others, the Secretary of State's forms include those for the formation of a limited liability company, limited partnership, limited liability partnerships, trademarks and service marks, not for profit corporations, and fictitious names.

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18 As one commentator summed up the ancient era:

> "[B]y the end of the 1300s, England's writ system had become increasingly popular within English society. Through the use of writs, the king's subjects petitioned the crown to hear grievances, rather than the feudal lords, the courts of the hundred, or the courts of the shire. As the writ was a royal document, or rather a 'royal command based upon the king's authority,' which summarized a particular grievance of a suitor and ordered royal justices to try that particular suitor's case, the writ enabled many suitors to purchase the privilege to have the Chancellor's office render judgment in the courts of the king."

Jack Moser, The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies, 26 Cap. U. L. Rev. 483, 528 (1997).

19 *See* Ronald W. Staudt, *All The Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1130-32 (2009).

20 The Limited Liability packet of forms can be found at www.sos.mo.gov/forms/corp/llc1.pdf [last visited, February 12, 2011].

21 The instructions regarding the forms appear as the first two pages of the limited liability company packet, "Article of Organization for a Limited Liability Company."

The Missouri Supreme Court's website, *Your Missouri Courts*, has gone even further in some instances with respect to its willingness to provide the public with forms to aid self-representation. It not only mandates that "every party not represented by counsel who participates in a family law case shall use the forms approved by the Supreme Court,"[22] but also provides the forms to be used. In addition, with respect to other matters that might come before the courts, it provides forms for "Election of Surviving Spouse,"[23] "Application to Amend Order Refusing Letters,"[24] "Petition for Order of Child Protection,"[25] "Lien Request (*viz.*, to file a lien against real property owned by a person who owes child support or maintenance);[26] and small claims court forms (for which it provides specific notice that "clerks will provide assistance in completing these forms").[27]

And there is yet another reason why, despite increases over the years in the use of question-answer self-help aids, claims alleging unauthorized practice of law as a result of them have continued to decline. In modern American society, self-help approaches and aids to facilitate them have become ubiquitous. In every area of our lives, from home and auto repair to landscaping, from office clerical work to high-end sales presentations, from personal finance management to investing in global financial markets, and from daily ledgers to tax-preparation, we have experienced revolutions in our capacities and expectations because of advances in communications and information technology. Modern Americans are simply increasingly more comfortable doing "whatever" for themselves.

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22 "Representing Yourself in Missouri Courts: Access to Family Courts," www.courts.mo.gov/page.jsp?id=38346 [last visited, February 12, 2011].

23 "Your Missouri Courts," www.courts.mo.gov/page.jsp?id=662 [last visited, February 12, 2011].

24 "Your Missouri Courts," www.courts.mo.gov/file.jsp?id=658. [Last visited, February 12, 2011].

25 "Your Missouri Courts," www.courts.mo.gov/file.jsp?id=443. [Last visited, February 12, 2011].

26 "Your Missouri Courts," www.courts.mo.gov/file.jsp?id=580. [Last visited, February 12, 2011].

27 "Your Missouri Courts," www.courts.mo.gov/page.jsp?id=704. [Last visited, February 12, 2011].

3. Comparison of the LegalZoom Website with the Form Kits Approved in Missouri

a. The "Divorce Kit" In *In re Thompson*

Like many of its competitors,[28] LegalZoom has tapped into that desire. The LegalZoom website is exceptionally user-friendly and informative. It asks users for the same basic information as did the "divorce kit" the Missouri Supreme Court approved in *In re Thompson*, 574 S.W.2d 365 (Mo. banc 1978). That kit consisted of various forms pertaining to an action for an uncontested dissolution of marriage. Blank spaces were provided for the insertion of specific items applicable to the parties involved, and instructions on practice forms instructed users to cross out (for clauses) or remove (for whole pages) items that did not apply. In addition to instructions on the practice forms themselves, the forms were accompanied by a set of general procedural instructions designed to instruct as to what forms to file, in what order, and where, as well as instructions on how to prepare the forms.[29]

b. The LegalZoom Website

LegalZoom builds on the form-book presentation of *In re Thompson* by creating a personal interface that allows the user to walk through the creation of the document without the burden of attempting to decipher it. After customers select the document they want, the LegalZoom website asks them to answer what are in essence the same types of basic questions implied by the forms reviewed in *In re Thompson* – What is

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[28] Among LegalZoom's dozens of competitors are The Company Corporation (www.incorporate.com), Intuit's MyCorporation.com (www.mycorporation.com), Wolters Kluwer's Bizfilings (www.bizfilings.com), LegalDocs.com, DirectLawConnect.com, Nolo.com, FindLegalForms.com, LawHelpInteractive.org, and USLegalForms.com, to name but a few.

[29] The Missouri Supreme Court held that the publishing, advertisement, and sale of the divorce kit in *In re Thompson* was not the unauthorized practice of law because the respondents did not give personalized legal advice as to legal remedies or consequences. 574 S.W.2d at 369.

your name? In what county do you live? Is there real estate to distribute? Are you are filing a joint petition and need to cross these words out? and so forth.

Furthermore, the LegalZoom website enables the user to answer questions related to the form in a direct manner, so that by answering an empirical inquiry or choosing between "Yes" or "No" the user is able to instruct the computer to take exactly his or her desired course of action. For example, questions for the Durable Power of Attorney form included:

1. Who will serve as your agent?
2. In case your first choice is unable to serve, who would you like to name as your alternate?
3. When would you like this Power of Attorney to become effective?
4. Will your power of attorney continue to be effective if you become mentally incapacitated and cannot handle your own financial affairs?
5. What powers would you like to give your agent?

What is significant about LegalZoom's interface with the user, however, is more than that it simplifies the production of the form by allowing the user to focus on the desired content of the form spaces, rather than the form itself. Most important is that it enables the user to instruct the computer on the basis of choices that the user makes – not the computer. Thus, the user can either provide information (*e.g.*, name, address, telephone number); choose between basic alternatives (*e.g.*, an alternative holder of a power of attorney, or not); or indicate preferences from a list of choices.[30]

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[30] LegalZoom's Durable Power of Attorney questionnaire asks "What powers would you like to give your agent?" and then asks the user to check all that apply from a list of options:

Real Estate Matters
The power to buy, sell, rent and manage property, take out mortgages, and execute deeds.

Personal Property Matters
The power to buy, sell and manage all types of goods such as vehicles, furniture, jewelry and other types of personal property.

Banking Transactions

4. Conclusion

Accordingly, it is understandable that the historical trend among the bar and the public has continued to evolve in favor of expanding aid to individuals seeking to exercise self-help to advance their legal interests. The advent of the computer has made the process significantly easier, but it has not substantially changed its substance. Computer-based systems may present users with their options in a clearer manner by organizing the information and presenting it with better graphics, but the task of making decisions about what the user wants remains where it has always been – with the user. Given the public's clear lack of dissatisfaction with this trend and the growing acknowledgement among the legal profession that the practice of law is not diminished, but is rather enhanced, by increased access by the public to legal resources, it will continue to be an uninviting task for the courts to intervene so long as their mission is not impeded.

The power to sign checks, withdraw funds, open accounts, borrow money and remove items from your safe deposit box.

Stock and Bond Transactions
The power to buy, sell, and exchange stocks, bonds and mutual funds, and vote as a shareholder.

Business Operating Transactions
The power to manage, operate and sell any businesses you own, including partnerships and closely-held corporations; to buy or expand businesses; and to exercise rights as a business partner or bond holder.

Retirement Plans
The power to manage your retirement and pension plans, including exercising investment powers, designating beneficiaries, making contributions, and borrowing against or selling assets.

Insurance and Annuities
The power to take out insurance policies for yourself or your family, modify them, borrow against them, and surrender them for their present cash value.

C. Alternatives to the Outright Prohibition of Computerized Provision of Legal Forms

I have also been asked to describe the use of less restrictive enforcement alternatives to a complete prohibition on computerized filling in of forms.[31] If the publisher of an electronic form dispenser, such as LegalZoom, commits malpractice or misfeasance, some commentators have urged that, to avoid constitutional concerns about imposing a ban on publishers of legal self-help materials, the correct course would be for courts to rely on the tort liability system and simply allow civil suits rather than pursuing criminal or civil sanctions.[32] Other commentators have urged that it would be most prudent for courts simply to bar the door to individuals seeking damages or injunctive relief as a result of having knowingly and willingly utilized nonlawyer legal services in an effort to avoid the more protective fiduciary-based representation of a lawyer.

The State of California, on the other hand, has decided to regulate its publishers of legal materials, rather than attempt to prosecute them.[33] Thus, California is able to achieve a high level of scrutiny of the work of its publishers without infringing on publishers' First Amendment rights to free speech.

Any of these strategies or even a combination of them may work. What is important, though, is to appreciate that no approach that simply seeks to deny nonlawyers a role in

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[31] Speech, publication, and self-representation are all constitutionally protected activities. Plaintiffs' request that the Court read the Missouri unauthorized practice statute to require a blanket prohibition of computerized filling in of legal forms in order to protect the public must therefore withstand constitutional scrutiny. Regulations of speech must be tailored to use the least restrictive alternative that achieves the government interest. As described in text, there are other enforcement methods that protect the public interest without imposing a total prohibition on the computerized filling in of legal forms.

[32] In the *In re Thompson* opinion, for example, the Missouri Supreme Court observed that "respondents by entering their product in the stream of commerce may be liable to the consumers if they are negligently damaged by the use of the product." 575 S.W.2d at 369. *See also* Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 Utah L. Rev. 87 (2007); Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 St. Mary's L.J. 891 (2009).

[33] *See* California Business and Professions Code §§ 6400-6401.6.

extending legal services to the public is likely to work. Even in the case of relatively new modes of providing self-help aid, such as LegalZoom's computer-based providing of forms, such services have now been extended for too long and have operated too well to end them. Moreover, like the computer, they hold every promise of performing even better in the years to come.

The above report represents my opinions in this case. I reserve the right to augment or modify my conclusions if more information becomes available.

Date: 2/14/11

Burnele Venable Powell

EXHIBIT 1

Curriculum Vitae

BURNELE VENABLE POWELL

Miles and Ann Loadholt Professor of Law
University of South Carolina School of Law

701 S. Main Street
(803) 777-4155 (803) 777-5544
powell@law.sc.edu/bvpowell@msn.com

PERSONAL DATA:

Born: Kansas City, Missouri, March 5, 1947

Family: Brenda Venable Powell; Children: Bradley (27) and Berkeley (25)

Home address: 615 Lyngate Court
Lexington, South Carolina 29072
(803) 356-4870

I am the Miles and Ann Loadholt Professor of Law at the University of South Carolina School of Law, where I currently teach Legal Ethics and Professional Responsibility, Administrative Law, and Current Topics in Professional Responsibility (Seminar). My current research is focused on 1) the morality of lawyer ethics in light of role differentiation and the instrumental concerns of the Holmesian "Bad Man," and 2) efforts to shape lawyer ethics through the management of shared space.

EDUCATION:

Law School

- Harvard University Law School, LL.M. (Master of Laws) 1979 (Thesis: "Trying to Stand Up in the Supreme Court" (Unpublished))
- University of Wisconsin Law School, J.D. (*Juris* Doctor), 1973
College
- University of Missouri at Kansas City, Bachelor of Arts, 1970

COURSES TAUGHT:

- Administrative Law
- Constitutional Law (Separation of Powers)

- Legal Ethics
- Real Property Law
- Law & Public Policy Seminar
- Law, Legislation & Public Policy Seminar
- Law and Justice Seminar
- Current Developments in Professional Ethic Seminar

PROFESSIONAL EXPERIENCE:

Legal

- Miles and Ann Loadholt Professor of Law, 2004-
- Dean and Miles and Ann Loadholt Professor of Law, 2004 - 2006
- Dean and Professor of Law UMKC School of Law, 1994-2003
- Professor of Law, University of North Carolina at Chapel Hill
  Associate Dean for Academic Affairs, University of North Carolina at Chapel Hill, 1990 – 1993
- Visiting Professor of Law, Washington University in St. Louis, Summer 1990
- Professor of Law, 1988
- Associate Professor of Law, 1984
- Assistant Professor of Law, 1979
- Visiting Associate Professor of Law, University of Oregon School of Law, January 1987 - August 1987
- Graduate Law Teaching Fellow, Harvard Law School, 1977-1979
- Instructor, Northeastern University (Course: "Race, Racism and American Law," April - July 1978
- Associate Regional Counsel, Department of Housing & Urban Development, 1973-1977
- Law Clerk, Office of the County Prosecutor (Jackson County, Missouri, 1972

General

- Board of Directors, Consumers Union, publishers of *Consumer Reports* 1993- 2009

  ▶Secretary to the Board
  ▶Chair of Audit Committee
  ▶Chair, Audit Committee
  ▶Member, Conflicts of Interest Committee

- Trustee (Public Representative), University Hospital, Boston (Boston MA) 1978-79
- Summer Intern, New England Mutual Life Insurance Co., Public Affairs Department, 1971
- Director, City of Kansas City, Summer Youth Employment Program,1970
- Field Organizer, Kansas City Model Cities, 1969

- Community Assistant to City Councilman Frank E. Brennan, 1969
- Recruiter, Volunteers in Service to America, Summer 1968

SKILLS:

Years of involvement in the management of organizations of all sizes, including a decade of law school deaning, have enabled me to acquire the multifaceted set of generalist skills necessary to the successful leadership of complex organizations, including: lawyering skills at the intersection of law and policy decision-making; expertise in the analysis and implementation of administrative processes and government regulation; strategic planning skills; an understanding of not-for-profit board governance; sensitivity to working in a Sarbanes Oxley environments and the "best practices" implications such standards suggest for nonprofits; conflicts of Interest and standards of conduct scrutiny; external and internal audit oversight; fundraising; investment due diligence; speech writing; and professional ethics.

PUBLICATIONS:

Books, Articles, Monographs

- Simon, Needham and Powell, LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS (4th Edition, LexisNexis 2008)
- THE NEXT STEPS: KOSOVO'S ACHIEVEMENT OF A FULL REGULATORY BAR (Report to the ABA Rule of Law Initiative in Kosovo, February 2008)
- "Pressing the NCAPA Paradigm: Too Much Form for *Ad Hoc* Adjudicatory Rulemaking, 61 N.C. L. Rev. 67-96 (1982)
- "Sitting and Standing in the Supreme Court: *Warth* Standing and the Problem of Distributive Justice, 33 DePaul L. Rev. 429-464 (1984)
- "Sinners, Supplicants, and Samaritans: Agency Advice Giving in Relation to Section 554(e) of the Administrative Procedure Act," 63 N.C. L. REV. Rev. 339-374 (1985)
- "Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act's Declaratory Order Process," 64 N.C. L. REV. Rev. 277-301 (1986)
- "Regular Appellate Review, Direct Judicial Review, and the Role of Review of the Declaratory Order: Three Roads to Judicial Review," 40 Administrative Law Review 451-503 (Fall 1988)
- "Whistling in the Dark: The Problem of Federal Protection for In-house Reporters of Corporate Wrong-doing" 68 Or. L. Rev. 569-613 (1989)
- "The Problem of the Parachuting Practitioner," 1992 Ill. L. Rev. 105-158 (1992)
- "Somewhere Farther Down the Line: MacCrate on Multiculturalism and the Information Age, 69 Wash. L.Rev 637 (1994)
- "Lawyer Professionalism as Ordinary Morality," 35 S.Tex L. Rev. 275 (1994)
- "The Sense of a Client: Confidentiality Issues in Representing the Elderly," B. Powell and R. Link, 52 Fordham L. Rev. 1197 (1994)

- "Open Doors, Open Arms, and Substantially Open Records: Consumerism Takes Hold in the Legal Profession," 28 Valparaiso L. Rev. 709 (1994)
- "Diagnosis and Prescription: Illusory Lawyer Disciplinary Reform and the Need for a Moratorium," 1 J. Inst. for Study Leg. Ethics 263 (1996)
- "Risking the Terrible Question of Religion in the Life of the Lawyer," Fordham L. Rev. 1321 (1998)
- "Informal Remarks on Professionalism," 2 Journal of the Institute for the Study of Legal Ethics, 85 (1999)
- "An Informal Discussion of Legal Ethics," 2 Journal of the Institute for the Study of Legal Ethics, 85 (1999)
- "A Reaction: Stand Up, Your Father [A Lawyer] is Passing," 97 Mich. L. Rev. 1373 (1999)
- "Flight from the Center: Is It Just or Just About the Money?" 84 Minn. L. Rev. 1439 (June 2000)
- "Looking Ahead to the Alpha Jurisdiction: Some Considerations that the First MDP Jurisdiction Will Want to Think About," 36 Wake Forest L. Rev. 101(spring 20001)
- "Legal Ethics and Professional Responsibility: What Needs Fixing?" Hofstra School of Law (September 2002)
- "The Lesson of Enron for the Future of MDPs: Out of the Shadows and into the Sunlight, 80 Wash. U. L.Q. 1291. (November 2002)
- "Back to the Future: Is the New York State of Mind Confused about MDP?" 2003 Ill. L. Rev. 1377 (2003)
- "What Clients Want and Why They Can't Have It," 52 Emory L.J. 1135-1146 (2003)
- "The Limits of Integrity or Why Cabinets Have Locks," 73 Fordham L. Rev. 311 (2003)
- Creating Space for Lawyers to Be Ethical: Driving Towards an Ethic of Transparency, 34 Hofstra L. Rev. 1093 (2006).

Manuscripts, Magazine Articles, Columns, *Etc.*

- Ethical Dilemmas in Nuisance Litigation Pay-to-Play Lawyering: Sometimes It's a Nuisance; Sometimes It's More than a Nuisance – It's Unethical," SIXTH Annual NFJE Judicial Symposium, THE LAW OF NUISANCE: Bother, Bore, or Basis for Broad Causes of Action? http://nfje.net/resources/2010%20Symposium%20-Course%20Materials.pdf) (June 2010)
- *On Cyperspace, Legal Ethics, and Hunting Wildebeest*, GPSolo, Dec. 2008 at 38;
- Current Developments in North Carolina Real Estate Law 1983-1984 (43Pp.)
- "There Are Conflicts in this Environment Too," prepared for the Environmental and Natural Resources Law Section of the North Carolina Bar Association (Continuing Legal Education, North Carolina Bar Foundation, 1988)
- "The Supreme Court Takes A Look at Drug-testing: The Search for the Reasonable 'Fox Trap'" (60 Pp.)

- "Retribution or Rehabilitation?" Family Advocate Magazine (Summer 1991) 51
- "Bar Response to Mass Tort Disasters: Discipline View The Professional Lawyer (February 1992) 1
- "'Truce' or Consequences: The Rationale for Affirmative Action in Law Schools," 2 Kansas Journal of Law and Public Policy 123 (Summer 1992)
- "Experiencing the 'Velvet Revolution," The Professional Lawyer (November 1993) 2
- "Professionalism in Practice," ABA Journal 48 (August 1998)
- "Practice Debate Heats Up," ABA Journal 14 (August 1999)
- "Missourians Need ABA Evaluations," *BURNELE POWELL - Special to The Star* Date: 05/06/01 22:00

Reports

- "An Overview of the Use and Non-use of the Federal Administrative Procedure Act's Declaratory Order process" (52 Pp.)
- "Judicial Review and Declaratory Judgment Review: Why, then do we need the Declaratory Order?" (45 Pp.)
- "Section 554(e) Declaratory Orders: What is a Declaratory Order?" (October 12, 1985) (12 Pp.)
- ABA Model Rules for Lawyer Disciplinary Enforcement (1989), as Chair of the ABA Standing Committee on Disciplinary Enforcement
- ABA Model Rules for Judicial Discipline (1994), as Chair of the ABA Standing Committee on Disciplinary Enforcement"
- ABA Commission on Multidisciplinary Practice Report to the House of Delegates (August 1999)
- Missouri Bar Committee on Forum Nonconvenience, Final Report
- ABA Commission on Multidisciplinary Practice Report to the House of Delegates (July 2000)
- ABA Commission on Public Financing of Judicial Campaigns (August 2001)

PROFESSIONAL AFFILIATIONS, ACTIVITIES, AND MEMBERSHIPS:

Bar Admissions

- State Bar of Wisconsin, 1973
- Massachusetts State Bar, 1979
- Certified Teacher of Secondary Education, Missouri

Special Activities

- Wisconsin Supreme Court appearance, Special Session on Reform of Lawyer Disciplinary Enforcement, September 14, 1999
- New Jersey Supreme Court appearance, Special Session on Reform of Lawyer Disciplinary Enforcement, March 7, 1994

- Special ABA Consultant to Louisiana Supreme Court Hearing on Reform of Louisiana Lawyer Disciplinary Enforcement, December 15, 1990

Memberships

- American Law Institute: Member, 1991
- American Bar Foundation: Life Member
- ABA Center for Professional Responsibility, Charter Member
- ABA Commission on Access to Lawyers, Chair 2002 – August 2003
- ABA Consortium on the Delivery of Legal Services, Chair—2002 - Present
- ABA Center for Professional Responsibility Coordinating Council: Chair 1998 – August 2002
- ABA Seminar for New Law School Deans Planning Committee: Member, 1998 – 2001
- Association of American Law Schools: Presidential Nominating Committee for 2000
- ABA Commission on Public Financing of Judicial Campaigns: Member, 2000 – 2001
- ABA Center for Professional Responsibility/ Fordham Law School
- Symposium on Multijurisdictional Practice of Law: Moderator, March 1999
- Missouri Bar, Symposium on Diversity in the Legal Profession: Moderator, 2000
- Missouri Bar Diversity Committee: Chair, 2001-2002
- Missouri Institute of Justice, Inc., 2000-2003
- Missouri Bar Association Special Commission on *Forum non conveniens*, Chair, 1998-99;
- ABA Commission on Multidisciplinary Practice, Member (1998 – 2000)
- American Bar Association, Center for Professional Responsibility Coordinating Council, Chair - 1997- August 2002
- American Bar Association, National Conference on Professional Responsibility Planning Committee, 1997 – 2002 (*ex officio*)
- American Bar Association, Section of Administrative Law and Regulatory Practice
- American Bar Association Committee on High Profile Trials (Professional Ethics perspective) – 1997-1999
- American Bar Association Committee on the Futures – 1997-1998
- American Bar Association Standing Committee on Professionalism – 1996-1998
- American Bar Association, Standing Committee on Professional Discipline (1988-1994); Chair 1990-1994
- American Bar Association Joint-Subcommittee on Implementation of Lawyer Disciplinary Enforcement, Chair 1990-1995
- Association of American Law Schools, Committee on Curriculum and Research (1991- 1993); Chair 1993

- Association of American Law Schools Special Committee on the MacCrate Report: Member 1993
- Association of American Law Schools, Workshop on Professional Responsibility ("From Kaye Scholer to the Legal Services Office") (1993)
- North Carolina State Bar Association, Ethics Committee (1990-1992)
- Association of American Law Schools, Special Committee on Indicia of Institutional Quality (1990)
- Association of American Law Schools, Long-Range Planning Committee (1988)
- Association of American Law Schools, Special Committee on the Recruitment of Minorities (1987)
- Association of American Law Schools, Committee on the 1988 Annual Meeting Program
- UMKC/American Judicature Society Symposium on Preserving the Independence of the Judiciary (UMKC, 1999)
- ABA Conference on Development (Santa Fe, New Mexico 1999)
- Administrative Conference of the United States, Consultant (1983-86)
- Missouri Bar Association, member 1995-2003
- Missouri Bar Association, Venue Commission, Chair 1997 - 1999
- Missouri Bar Association, Foresight Committee, member 1997 - 1998
- Kansas City Metropolitan Bar Association, 1995-2003

Community Service

- Board of Directors of the South Carolina Death Penalty Resource and Defense Center – since 2009
- DeLasalle Education Center, Board of Directors, 1996 - 2004
- American Lung Association, Western District of Missouri, Board of Directors 1997- 2003
- Midwest Bioethics Center, Board of Trustees, member 1995 - 2004
- Planned Parenthood of Orange and Durham Counties, Board of Governors,1992 - 1995
- UNC Chapter of the American Association of University Professors, President,1990 - 1991
- Village West Homeowners' Association, Board of Directors 1980-1986 (President, 1984-1986)
- Inter-Church Council Housing Corporation (Chapel Hill), Board of Directors 1980- 1986 (Vice President, 1985-1986)
- Chapel Hill Housing Authority Grievance Committee, 1983-1986 (Chair)

UNIVERSITY and LAW SCHOOL SERVICE ACTIVITIES:

Available Upon Request.

SELECTED ADDRESSES:

- "Standing to Sue in Court and Distributive Justice," (Nags Head Conference Center: Conference on Justice, and Law, Nags Head, N.C., June 1983)
- "Will the Federal Agencies Come to Order: The Non-use of Section 554(e) of the APA," (Faculty Colloquium, March 1985)
- "Current Developments in North Carolina Real Estate Law," (Speaker, Annual Spring Real Property Section Seminar, Pinehurst, N.C., April 13, 1985)
- "Agency Use of Administrative Declaratory Orders: If You Don't Swing, You Can't Hit!" (Speaker, Thirty-second Plenary Session of the Administrative Conference of the United States, Washington, D.C., June 20, 1986)
- "There Are 'Conflicts' in this Environment Too" (Panelist, NCBA Environmental and Natural Resources Law Section Annual Meeting, Pinehurst, N.C. June 3, 1988)
- Seventh Annual North Carolina Evidence Seminar, (Panelist, June 4,1988) National Institute for Trial Advocacy, Deposition Program (Instructor, June 17, 1988)
- "The Supreme Court Takes A Look at Drug-Testing," U.N.C. School of Law Faculty Colloquium (October 1988)
- "The Supreme Court Takes A Look at Drug-Testing," University of Colorado School of Law Faculty Colloquium (December 1988)
- "The Future of Lawyer Disciplinary Enforcement: The Meaning of Morals in a Multivalent Context," U.N.C. Law School Perspectives Lecture (September 1990)
- Judicial Conference of the Louisiana Supreme Court, "Judicial Responses to Lawyer Misconduct (New Orleans, October 1990)
- ABA 17th National Conference on Professional Responsibility (Scottsdale, Arizona May 1991) Federalist Society Debate: "Resolve that Judge Clarence Thomas Should Be Confirmed as a Supreme Court Justice [Opposing]" (Chapel Hill, September 9, 1991)
- John Turner Professionalism Lecture, South Texas College of Law (March 10, 1993): "Lawyer Professionalism as Ordinary Morality"
- Conference on Judicial and Legal Ethics in China and the United States:
- The Lawyer Disciplinary Process," (Fudan Law School, Peking University, May 27, 2000)
- 2002-2003 Howard Lichtenstein Distinguished Legal Ethics Lecture: The Limits of Morality: Why the Cabinets Need Locks," Hofstra School of Law, November 2002.
- "Can the Public University Survive?" Unitarian Forum: All Souls Unitarian Church, May 10, 2003.
- The Limits of Integrity: Lawyers and Ethical Responsibility, address to Sinkler & Boyd P A (Annual Firm Retreat) (Winter 2004)
- Creating Space to Be Ethical, Kosmos Club, Columbia, South Carolina (Winter 2006)

- "Ethical Dilemmas in Nuisance Litigation: Pay-to-Play Lawyering: Sometimes It's a Nuisance; Sometimes It's More than a Nuisance – It's Unethical," 2010 Annual Judicial Symposium for the National Foundation for Judicial Excellence: Symposium on Ethical Dilemmas in Nuisance Litigation

AWARDS, GRANTS AND HONORS:

UMKC Law Foundation, President's Award 2002
UMKC School of Education, Alumni of the Year, 2001
Missouri Bar President's Award 2000
Missouri Bar President's Award 1999
Honored for Service by Association for the Study of Afro-American Life & History Kansas City Chapter) 1999
University of North Carolina Law Center Grant for 1983
R. J. Reynolds Industries--Junior Faculty Development Award for 1983
University of North Carolina Law Center Grant for 1980
University of North Carolina Law Center Grant for 1990
Outstanding Service Awards, various from Federal Department of Housing and Urban Development

REFERENCES:

Available upon request

EXHIBIT 2

Cases in Which I Have Testified at Trial or By Deposition in the Previous Four Years

Foxland, Inc. v. The Stolar Partnership, LLP, et al. (May 2007)

Children's Wish Foundation v. Mayer Hoffman McCann, P.C. (December 2008)

EXHIBIT 3

Materials Reviewed and/or Relied On

Pleadings in *Janson v. LegalZoom*

Documents produced by the parties in *Janson v. LegalZoom*

Deposition of Edward R. Hartman

Deposition of Todd Janson

Deposition of Chad Ferrell

Deposition of Gerald T. Ardrey

Expert Report of Richard F. Waigand, CPA

Website of LegalZoom.com

Divorce Kit from *In re Thompson*, 574 S.W.2d 365 (Mo. banc 1978)

JOHN WELLS, EVERY MAN HIS OWN LAWYER (1866)

NORMAN F. DACEY, HOW TO AVOID PROBATE! (1965)

CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986)

ABA Commission on NonLawyer Practice, *NonLawyer Activity in Law-Related Situations* (August 1995)

ABA Standing Committee on the Delivery of Legal Services, *Improving the Delivery of Affordable Legal Services Through the Internet: A Blueprint for the Shift to a Digital Paradigm* (June 10, 2009)

American Bar Association Consortium on Legal Services and the Public, *Legal Needs and Civil Justice, A Survey of Americans, Major Findings from the Comprehensive Legal Needs Study* (1994)

Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors--or Even Good Sense?*, 1980 Am. B. Found. Res. J. 159 (1980)

Bart T. Thomas, *Unauthorized Practice and Computer Aided Legal Analysis Systems*, 20 Jurimetrics J. 41 (1979)

Catherine J. Lanctot, *Regulating Legal Advice in Cyberspace (Symposium)*, 16 St. John's J. Legal Comment. 569 (2002)

Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 Hofstra L. Rev. 811 (2002)

Cynthia L. Fountaine, *When Is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. Cin. L. Rev. 147 (2002)

Darryl R. Mountain, *Disrupting Conventional Law Firm Business Models Using Document Assembly*, 15 Int'l J.L. & Info. Tech. 170 (2007)

Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369 (2004):

Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1 (1981)

Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. Rev. L. & Soc. Change 701 (1996)

Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 Geo. J. Legal Ethics 2009 (1991)

Deborah L. Rhode, *Whatever Happened to Access to Justice? (Symposium)*, 42 Loy. L.A. L. Rev. 869 (2009)

Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 Fordham L. Rev. 2581 (1999)

Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 Cap. U. L. Rev. 483 (1997)

Julee C. Fischer, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 Ind. L. Rev. 121 (2000)

Legal Services Corporation, *Overview on Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (2005)

Marc Lauritsen, *Ethics, UPL, and Online Document Automation, Informal Session Notes for the 2006 Equal Justice Conference* (2006)

Melissa Blades, *Virtual Ethics for a New Age: The Internet and the Ethical Lawyer*, 17 Geo. J. Legal Ethics 637 (2004)

Michael S. Knowles, *Keep Your Friends Close and the Laymen Closer: State Bar Associations Can Combat the Problems Associated with Nonlawyers Engaging in the Unauthorized Practice of Estate Planning Through a Certification System*, 43 Creighton L. Rev. 855 (2010)

Oregon Ethics Opinion 1994-137 (Or. State Bar Ass'n Bd. of Gov. 1994)

Oregon Formal Ethics Opinion 2005-137 (Or. State Bar Ass'n Bd. of Gov. 2005)

Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, Winter 2003 Court Review 2003 (2003)

Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 Willamette L. Rev. 795 (2003)

Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 Loy. L.A. L. Rev. 1117 (2009)

Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 Utah L. Rev. 87 (2007)

Steve French, *When Public Policies Collide: Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 Rutgers Computer & Tech. L.J. 93 (2001)

Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 St. Mary's L.J. 891 (2009)

William A. Scott, *Filling in the Blanks: How Computerized Forms Are Affecting the Legal Profession*, 13 Alb. L.J. Sci. & Tech. 835 (2003)

William H. Brown, *Comment: Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 Cal. W. L. Rev. 157 (1999)

Letter from Federal Trade Commission to American Bar Association Task Force on the Model Definition of the Practice of Law, December 20, 2002

Letter from Federal Trade Commission to Rules Committee of the Superior Court of Connecticut, May 17, 2007

Letter of Federal Trade Commission to Hawaii State Bar Association, Comments on Proposed Definition of the Practice of Law, January 25, 2008

California Business and Professions Code §§ 6400-6401.6

www.sos.mo.gov/forms/corp/llc1.pdf

www.courts.mo.gov

https://lawhelpinteractive.org/about

http://www.findlegalforms.com/xcart/customer/help.php?section=about

http://www.u-s-history.com/pages/eras.html

www.calda.org

www.incorporate.com

www.mycorporation.com

www.bizfilings.com

www.legaldocs.com

www.directlawconnect.com

www.nolo.com

www.findlegalforms.com

www.lawhelpinteractive.org

www.uslegalforms.com

Mort Rieber, "300 Years of Self-help Law Books" (Retrieved from 2000 Website of Nolo Press *via* Internet Archive, http://www.archive.org/web/web.php.)

EXHIBIT 4

Exhibits That Will Be Used to Summarize or Support My Opinions

Pages from Website of LegalZoom.com

Divorce Kit from *In re Thompson*, 574 S.W.2d 365 (Mo. banc 1978)

JOHN WELLS, EVERY MAN HIS OWN LAWYER (1866)

NORMAN F. DACEY, HOW TO AVOID PROBATE! (1965)

Timeline