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Skirting the Ethical Line: The Quandary of Online Legal Forms

Lindzey Schindler*

“Yes, the law allows you to prepare your own Will. The law also allows you to perform surgery on yourself. However, neither process is recommended.”¹

INTRODUCTION

Technology is advancing and its progress has not left the legal profession unaffected.² Websites are one of the most effective means of reaching the public at large, so much so that it is more common for a law firm to have a website than not to have one—firms without a website are at an incredible marketing disadvantage as compared to those firms that have one.³ In recent years, however, lawyers’ use of websites has gone beyond making a firm’s presence known—their websites now allow the public to generate their own legal documents by simply filling out a standardized form online, resulting in saved expenses, but also creating the potential for future trouble.⁴

* J.D. Candidate 2013, Chapman University School of Law; B.A. 2010, Communication Studies, Loyola Marymount University. I am extremely grateful to Professor Robin W. Slocum for her guidance and insight into the field of Legal Ethics, and Professor Heidi K. Brown for encouraging me throughout my scholastic endeavors. I would also like to thank my parents, Paul and Karen Schindler, my grandparents, Mel and Eileen Schwartzburg, and Travis Casey for their never-ending love and support.

¹ See Roberts & Roberts, LLP, *Last Will and Testament*, <http://www.robertslegalfirm.com/estwills.html> (last viewed June 16, 2012).

² Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376, 376–77 (2011) (observing that software developers have started to offer online services, referred to as “Digital Estate Planning,” to assist people in their post-mortem needs by offering such varied services as notifying the deceased’s online contacts of the person’s passing and providing an online location for grieving, and offering an online storage location for the deceased’s information including passwords, account information, pictures, music and documents to better enable designated recipients of that information to effectively close out and disseminate the deceased’s online assets).

³ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 10-457 (2010) (discussing the “ethical obligations that lawyers should address in considering the content and features of their websites”).

⁴ Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 27 (2011).

One of the best-publicized websites that allows consumers the option to create their own legal documents at “affordable” rates is LegalZoom.com (“LegalZoom”).⁵ Co-founded in 2001 by Robert Shapiro,⁶ LegalZoom provides online services to all fifty states and guarantees 100% satisfaction on all of its trial-tested forms, which range from business incorporations and copyrights to divorces and wills and trusts, with much more in between.⁷ Despite the satisfaction guarantee and comprehensive legal disclaimer,⁸ LegalZoom has been named in class action lawsuits initiated by private attorneys who contend that LegalZoom’s website provides services amounting to the unauthorized practice of law.⁹

In 1999, a federal district court in Texas similarly dealt with an issue of potential unauthorized practice of law in regard to Parsons Technology, Inc.’s Quicken Family Lawyer software—software that contained over one hundred legal forms for at-home use.¹⁰ The court held that the software constituted the unauthorized practice of law despite its caution that the information provided was not individualized, and that personal judgment should be utilized in deciding whether to consult a lawyer.¹¹ However, the Texas Legislature soon overturned the court’s decision when it passed a statute declaring that as long as a website, book, or software program “clearly and conspicuously” stated that it was not a substitute for the advice of a lawyer, the product would not be included within the meaning of the “practice of law;”¹² therefore, neither its production, distribution, nor use could be said to be an unauthorized practice of law.¹³ Following this legislative enactment, the Fifth Circuit Court of Appeals vacated the district court’s injunction on the Quicken Family Lawyer software.¹⁴

Not all states agree with Texas on the definition of the practice of law,¹⁵ which is one reason LegalZoom remains susceptible to the class

⁵ See *LegalZoom About Us*, LEGALZOOM.COM, <http://www.legalzoom.com/about-us> (last visited June 16, 2012).

⁶ Robert Shapiro is an internationally renowned litigator with more than thirty years of criminal litigation practice, in which he has represented such clients as Occidental Petroleum, Wynn Resorts, and, most famously, O.J. Simpson. See *Robert Shapiro Biography*, GLASERWEIL.COM, <http://www.glaserweil.com/pdf/bio.php?url=robert-shapiro-attorney-lawyer-law-los-angeles-california> (last visited June 16, 2012).

⁷ See LEGALZOOM.COM, <http://www.legalzoom.com> (last visited June 16, 2012). This Comment will analyze only the wills and trusts services provided by LegalZoom.

⁸ See *LegalZoom Disclaimer*, LEGALZOOM.COM, <http://www.legalzoom.com/disclaimer.html> (last visited June 16, 2012).

⁹ Richard Acello, *We the Pauper*, A.B.A. J., May 1, 2010, available at http://www.abajournal.com/magazine/article/we_the_pauper/.

¹⁰ *Unauthorized Practice of Law Comm. v. Parsons Tech.*, 1999 WL 47235 *1–3 (N.D. Tex. Jan. 22, 1999), *vacated and remanded*, 179 F.3d 956 (5th Cir. 1999).

¹¹ *Id.* at *1, *6.

¹² TEX. GOV’T CODE ANN. § 81.101 (2011).

¹³ *Id.*

¹⁴ *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (5th Cir. 1999).

¹⁵ See Press Release, Washington Attorney General, *DIY Legal Forms Aren’t a Substitute for an Attorney* (Sept. 16, 2010), www.atg.wa.gov/

action lawsuits it currently faces.¹⁶ It is also possible that lawyers have tried to challenge LegalZoom based on a desire to protect the public from potentially damaging legal products.¹⁷ But, perhaps more realistically, attorneys with specialized practices—such as estate planning—may want to protect their practices against more affordable competitors, namely purveyors of online legal forms.¹⁸ This Comment addresses whether online, do-it-yourself legal services comply with today's ethical guidelines, or if today's ethical rules even have an answer to this quasi-practice of law.

Part I of this Comment summarizes the practices of online, do-it-yourself legal products—which are available to the general public—and discusses in particular the wills and trusts services offered by LegalZoom. Part II considers the recent ABA Formal Opinion 10-457 regarding the ethical use of websites, and the relevant Model Rules, as they apply to these types of online do-it-yourself legal services. Part III proposes legislation to deal with the discrepancies between the online practice of law and the concerns of laypeople and lawyers alike.

I. DO-IT-YOURSELF LEGAL DOCUMENTS: THE DEVIL IS IN THE DISCLAIMER

Despite the materialistic world we live in, when a person dies, none of their physical possessions go with them (save those with which they may be buried). In the first half of the twenty-first century alone, it is estimated that somewhere in the range of \$10–41 trillion will be inherited in the United States; thus, it is not surprising that societies ranging from ancient times to the present have developed rules and regulations for such

pressrelease.aspx?id=26466 [hereinafter Press Release]. The Washington State Attorney General investigated LegalZoom regarding the unauthorized practice of law, but to avoid trial, LegalZoom entered into an "Assurance of Discontinuance" with the state which, while not a finding of fact or admission to violation or commission of any act, constitutes prima facie evidence of a violation should the Discontinuance be breached. The agreement prohibits the company from:

1. Comparing the costs of its 'self help' products . . . with those provided by an attorney without clearly disclosing to consumers that LegalZoom is not a law firm.
2. Misrepresenting the costs, complexity and time required to complete a probate in Washington.
3. Misrepresenting the benefits or disadvantages of any estate planning document as compared to any estate distribution document in Washington.
4. Engaging in the unauthorized practice of law.
5. Failing to offer estate planning forms that conform to Washington law.
6. Failing to have a Washington licensed attorney review all self-help estate planning forms offered to Washington consumers.
7. Failing to clearly and conspicuously disclose that communications between the company and consumers are not protected by the attorney-client privilege.

Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 EST. PLAN. 27, 31–32 (2011).

¹⁶ LegalZoom is currently facing complaints from North Carolina, Alabama, and Missouri. Bill Draper, *Missouri Lawyers Challenge LegalZoom's Service*, ASSOCIATED PRESS, July 31, 2011, available at <http://www.newstribune.com/news/2011/jul/31/missouri-lawyers-challenge-legalzooms-service/>.

¹⁷ David C. Vladeck, *Hard Choices: Thoughts for New Lawyers*, 10 KAN. J.L. & PUB. POL'Y 351, 356 (2000).

¹⁸ *Id.*

succession purposes.¹⁹ Furthermore, it has been estimated that as many as fifty percent of Americans die intestate—meaning without a will—thus subjecting the decedent's estate to probate and state intestacy laws.²⁰ Some people die without a will because they wanted to avoid thoughts regarding their own mortality or they did not want to invest in something from which they would not personally benefit.²¹ Many people, however, likely find that creating a will in consultation with an attorney is cost-prohibitive, as estate planning lawyers charge hundreds or thousands of dollars per estate, depending on the complexity of the estate.²² For young families just starting out, or families with little cash to spare, having a do-it-yourself will is better than having no will at all.²³

Since there is such a strong feeling amongst those in the estate-planning community that all people should create a will and make provisions for incompetency and death, it is not surprising that self-help legal techniques have emerged to assist people through the process.²⁴ Many bookstores and libraries carry self-help books that educate a non-attorney audience on how to create their own wills,²⁵ but scholars have

19 LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 4, 7 (2009); *see also* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. PROB. & TR. J. 27, 32–33 (2008) (providing a history of the prominence and legitimacy of holographic wills—a will that is handwritten and unwitnessed—that dates back to Julius Caesar and the barbarian kingdoms of seventh century Italy and Spain, through fifteenth and sixteenth century France and England, to the colonies of the New World).

20 MetLife Consumer Education Center, *Estate Planning: Understanding Distributions of Assets and Estate Taxes* 1 (2011), available at <https://eforms.metlife.com/wcm8/PDFFiles/15294.pdf>; *see also* Clowney, *supra* note 19, at 28 (observing that only 30% of Americans create a will).

21 Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, FORBES (Sep. 7, 2010, 9:50 AM), <http://www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finance-estate-lawyers-overcharge.html>.

22 *Id.*; *see also* Gerry W. Beyer, *Statutory Will Methodologies—Incorporated Forms vs. Fill-In Forms: Rivalry or Peaceful Coexistence?*, 94 DICK. L. REV. 231, 235–38 (1990) [hereinafter Beyer, *Statutory Will Methodologies*] (discussing reasons individuals fail to prepare wills, including unawareness of the importance of preparing a will, indifference toward creating a will, apprehension toward the cost of preparing a will, aversion to the perceived time and effort it takes to create a will, discouragement from the complexity of a will, lack of property, and desire to deny or distance oneself from thoughts of personal mortality); Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 842 (1993) [hereinafter Beyer, *Statutory Fill-in Will Forms*] (reporting from an empirical study on how individuals regarded statutory will forms and providing more reasons people say they do not have wills, including that they never thought about it, procrastinated on the matter, believed they were too young to have a will, were indifferent to how property was distributed at death, were unaware of the importance of dying with a will, or felt they lacked the knowledge required to write a will).

23 Janet Novak, *The Case For Do-It-Yourself Wills*, FORBES (Sep. 7, 2010, 1:21PM), <http://www.forbes.com/sites/janetnovack/2010/09/07/the-case-for-do-it-yourself-wills/>.

24 Beyer, *Statutory Fill-in Will Forms*, *supra* note 22, at 828.

25 *See generally* DEBORAH L. HERMAN & ROBIN L. BODIFORD, *A SIMPLIFIED GUIDE TO CREATING A PERSONAL WILL: HOW TO WRITE A WILL, TRUSTS AND LIFE ESTATES, ESTATE TAXES, HOW TO APPOINT AN EXECUTOR* *passim* (2003); EDWARD A. HAMAN, *HOW TO WRITE YOUR OWN LIVING WILL* *passim* (3d ed. 2002); IRA DISTENFIED & LINDA DISTENFIED, *WE THE PEOPLE'S GUIDE TO ESTATE PLANNING: A DO-IT-YOURSELF PLAN FOR CREATING A WILL AND LIVING TRUST* *passim* (2005); LIZA WEIMAN, *THE BUSY FAMILY'S GUIDE TO ESTATE PLANNING: 10 STEPS TO PEACE OF*

called the validity and effect of these products into question.²⁶ Similarly, critics have raised concerns that these books are not written with a particular state's laws in mind, and that the motivating factor behind publishing these tools is profit rather than concern for the public.²⁷ But as bookstores have begun to close their doors,²⁸ and as the Internet plays a more prevalent role in the lives of Americans,²⁹ it is only natural that do-it-yourself legal services would evolve and become web-based products.

Enter online legal document services. For more than a decade, websites such as LegalZoom.com, Nolo.com,³⁰ and LawDepot.com,³¹ to name only a few, have been offering inexpensive alternatives to paying for the experience, expertise, or assistance of an attorney when creating a will or trust.³² LegalZoom allows a consumer to create their own living will for as little as \$40 per person, and a living trust for roughly \$250, which is a far cry from the thousands of dollars a lawyer might charge. However, these low prices come with strings attached.

LegalZoom has a ten-paragraph disclaimer that, among other things, states that LegalZoom is not a law firm, its services are not to be substituted for the advice of an attorney, and that it does not act as the consumer's attorney.³³ The disclaimer further asserts that the website does not provide legal advice, but only self-help services at the consumer's specific direction, and that it cannot engage in the practice of law.³⁴ The disclaimer also states that while it provides general information on common legal issues, no attorney-client³⁵ relationship is established by use of the site.³⁶ However, the service does include a review of the customer's

MIND *passim* (2007) (accompanying CD-ROM included with the book); ROBERT J. LYNN & GRAYSON M.P. MCCOUCH, INTRODUCTION TO ESTATE PLANNING IN A NUTSHELL *passim* (5th ed. 2004); JOAN M. BURDA, ESTATE PLANNING FOR SAME-SEX COUPLES *passim* (2004); ZOE M. HICKS, THE WOMEN'S ESTATE PLANNING GUIDE: TECHNIQUES FOR PROTECTING YOURSELF AND YOUR FAMILY *passim* (1998); N. BRIAN CAVERLY & JORDAN S. SIMON, ESTATE PLANNING FOR DUMMIES *passim* (2003).

²⁶ Beyer, *Statutory Fill-in Will Forms*, *supra* note 22, at 782.

²⁷ *Id.* at 781–82.

²⁸ David Magee, *Borders Closing: Why the Bookstore Chain Failed*, INT'L BUS. TIMES, July 19, 2011, available at <http://www.ibtimes.com/articles/182815/20110719/borders-closing-why.htm>.

²⁹ In the month of September 2009, the average American spent sixty-eight hours online, or more than 2.25 hours of internet use per day, seven days per week. *Top U.S. Web Brands and Parent Companies for September 2009*, NIELSEN WIRE (Oct. 14, 2009), http://blog.nielsen.com/nielsenwire/online_mobile/top-u-s-web-brands-and-parent-companies-for-september-2009/.

³⁰ See NOLO.COM, <http://www.nolo.com/> (last visited June 16, 2012); *Disclaimer*, NOLO.COM, <http://www.nolo.com/disclaimer.html> (last visited June 16, 2012).

³¹ See LAWDEPOT.COM, <http://www.lawdepot.com/> (last visited June 16, 2012); *Disclaimer*, LAWDEPOT.COM, <http://www.lawdepot.com/disclaimer.php> (last visited June 16, 2012).

³² TopTenReviews, an online service that compares products for the convenience of consumers, offers a comparison of online legal form services for 2011 in which LegalZoom is ranked in the top five. *Online Legal Forms Review*, TOPTENREVIEWS, <http://online-legal-forms-review.toptenreviews.com/> (last visited June 16, 2012).

³³ See *LegalZoom Disclaimer*, *supra* note 8.

³⁴ *Id.*

³⁵ This Comment uses the terms "attorney-client" and "client-lawyer" interchangeably.

³⁶ See *LegalZoom Disclaimer*, *supra* note 8.

answers for completeness, spelling and grammar, as well as internal consistency of names, addresses and the like.³⁷ The disclaimer makes clear that the law changes frequently, and that while efforts are made to keep the forms on the website up-to-date, they are not guaranteed to be current, or even accurate, in every jurisdiction.³⁸ Lastly, the disclaimer states that LegalZoom should be used at the consumer's risk, as "LegalZoom is not responsible for any loss, injury, claim, liability, or damage related to [the] use of [the] site."³⁹ Furthermore, before receiving their legal documents, the consumer must acknowledge that LegalZoom did not supply the consumer with any advice, explanation or representation about any legal rights.⁴⁰ However, even these attached strings do not keep consumers away, as LegalZoom's homepage boasts of over one million satisfied customers.⁴¹

Despite the impressively detailed disclaimer to which the user must agree before any sort of product is completed for the consumer by LegalZoom, some might argue that any sort of will that denotes the deceased's intent is better than no will at all.⁴² Even holographic wills—un-witnessed wills that are handwritten by the testator⁴³—are permitted in twenty-seven states despite the lack of legal guidance needed to create one.⁴⁴ However, states that do not recognize the validity of holographic wills, such as Washington,⁴⁵ Alabama,⁴⁶ and Missouri,⁴⁷ would probably

³⁷ *Id.*

³⁸ *Id.* Under the "Common Questions" section of the Last Will & Testament page, however, LegalZoom replies that they have designed their Last Wills to the specific laws and requirements of each state. *LegalZoom Last Will & Testament*, LEGALZOOM.COM, <http://www.legalzoom.com/legal-wills/wills-overview.html> (last visited June 16, 2012) [hereinafter *Last Will & Testament*].

³⁹ See *LegalZoom Disclaimer*, *supra* note 8.

⁴⁰ See Fred Bernstein, *Being of Sound Mind and a \$55 Consultation*, N.Y. TIMES, May 16, 2002, at G1, available at <http://www.nytimes.com/2002/05/16/technology/being-of-sound-mind-and-a-55-consultation.html?pagewanted=all&src=pm>.

⁴¹ See LEGALZOOM.COM, *supra* note 7.

⁴² For those who die without a will state intestacy statutes control the allocation of their assets. Typically, property passes to those most closely related to the decedent by blood and marriage in an attempt to distribute the decedent's possessions based on the presumed intent of the average person. As a result, the actual desires of any individual decedent are apt to be unaccounted. Clowney, *supra* note 19, at 53.

⁴³ BLACK'S LAW DICTIONARY 1735–36 (9th ed. 2009).

⁴⁴ See ALASKA STAT § 13.12.502 (2010); ARIZ. REV. STAT. ANN. § 14-2503 (2005 & Supp. 2007); ARK CODE ANN. § 28-25-104 (2012); CAL. PROB. CODE § 6111 (West 2009); COLO. REV. STAT. § 15-11-503 (2006); HAW. REV. STAT. ANN. § 560:2-502 (LexisNexis 2005); IDAHO CODE ANN. § 15-2-503 (2009); KY. REV. STAT. ANN. § 394-040 (West 2006); LA. CIV. CODE ANN. art. 1575 (2000 & Supp. 2012); ME. REV. STAT. ANN. tit. 18-A, § 2-503 (2012); MICH. COMP. LAWS § 700.2502 (2002 & Supp. 2007); MISS. CODE ANN. § 91-5-1 (1999); MONT. CODE ANN. § 72-2-522 (2011); NEB. REV. STAT. § 30-2328 (1995); NEV. REV. STAT. ANN. § 133.090 (LexisNexis 2009); N.J. REV. STAT. ANN. § 3B:3-3 (West 2007); N.C. GEN. STAT. § 31-3.4 (2007); N.D. CENT. CODE § 30.1-08-02 (1996); OKLA. STAT. ANN. tit. 84, § 54 (West 1990 & Supp. 2008); 20 PA. CONS. STAT. ANN. § 2502 (West 2005); S.D. CODIFIED LAWS § 29A-2-502 (2004); TENN. CODE ANN. § 32-1-105 (2007); TEX. PROB. CODE ANN. § 60 (West 2003); UTAH CODE ANN. § 75-2-503 (1993 & Supp. 2011); VA. CODE ANN. § 64.1-49 (2007); W. VA. CODE § 41-1-3 (2004 & Supp. 2007); WYO. STAT. ANN. § 2-6-113 (2011).

⁴⁵ See *In re Brown's Estate*, 172 P. 247, 247 (1918) ("[T]he Legislature has defined wills and how they shall be executed and by whom, and no provision is made for holographic wills."); Press Release, *supra* note 15.

not argue that any will is better than no will at all, and in fact have tried to curtail LegalZoom's presence in their states. Moreover, even North Carolina, a state that permits holographic wills, has issued a cease-and-desist letter to LegalZoom.⁴⁸

For example, in 2009, plaintiffs Todd Janson, Gerald T. Ardrey, Chad M. Ferrell, and C & J Remodeling LLC sued LegalZoom in Missouri.⁴⁹ They alleged that LegalZoom engaged in the unauthorized practice of law, that LegalZoom's charging of fees for alleged assistance in the preparation of legal documents violated the Missouri Merchandising Practices Act (MPA), section 407.010, et seq., of the Revised Statutes of Missouri, and they asserted a claim for money had and received with respect to fees paid to LegalZoom.⁵⁰ Furthermore, the court granted plaintiff's Motion to Certify as a Class.⁵¹ On August 2, 2011, the court denied LegalZoom's Motion for Summary Judgment (arguing that, as a matter of law, it did not engage in the unauthorized practice of law in Missouri).⁵² The court found it problematic that LegalZoom sold not only a good, but also a service, when LegalZoom said in its advertisements, "[j]ust answer a few simple online questions and LegalZoom takes over. You get a quality legal document filed for you by really helpful people."⁵³ On August 12, 2011, the parties informed the court via teleconference that they had agreed to settle the matter.⁵⁴ On September 28, 2011 a Motion for order Approving Class Action Settlement was filed on behalf of all plaintiffs,⁵⁵ as well as suggestions in support of the Motion filed on behalf of LegalZoom.⁵⁶

46 See ALA. CODE § 43-8-131 (2011) ("[E]very will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will."); *Black v. Seals*, 474 So. 2d 696, 698 (Ala. 1985) ("The rule in Alabama is that an instrument must be subscribed by at least two witnesses to be valid as a will.").

47 See MO. REV. STAT. § 474.320 (2011). The Dekalb County Bar of Alabama is suing to bar LegalZoom from selling its legal documents there. *Draper*, *supra* note 16.

48 Interestingly, North Carolina does recognize holographic wills as valid in their state, but the North Carolina State Bar has nonetheless sent a cease-and-desist letter to LegalZoom. *Id.*

49 *Janson v. LegalZoom.com, Inc.*, 271 F.R.D. 506, 506 (W.D. Mo. 2010).

50 *Id.* at 508.

51 *Id.* at 509, 513. Plaintiffs defined the Class as "All persons and other entities resident within the State of Missouri who were charged and paid fees to LegalZoom for the preparation of legal documents from December 17, 2004 to the present." *Id.* at 509.

52 Order, *Janson v. LegalZoom.com, Inc.*, 2:10-CV-04018-NKL at 17, 31 (W.D. Mo. Aug. 2, 2011) (order denying summary judgment), available at <http://www.scribd.com/doc/61564347/Janson-v-LegalZoom>.

53 *Id.* at 18.

54 Minute Sheet, *Janson v. LegalZoom.com, Inc.*, 2:10-CV-04018-NKL (W.D. Mo. Aug. 12, 2011), available at <http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/193/>.

55 Joint Motion for Preliminary Approval of Class Action Settlement Agreement, *Janson v. LegalZoom.com, Inc.*, 2:10-CV-04018-NKL (W.D. Mo. Sept. 28, 2011), available at <http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/197/>.

56 *Janson v. LegalZoom.com, Inc.*, 2:10-CV-04018-NKL (W.D. Mo. Sept. 28, 2011) (Defendant LegalZoom.com, Inc.'s Suggestions in Support of Joint Motion for Preliminary Approval of Class

While the settlement is not finalized at the time of this Comment, if the plaintiffs' suggestions are any indication of joint work toward settlement on behalf of both parties, it appears that LegalZoom has agreed to pay the class members six million dollars, and make substantial changes in its future practice within Missouri, including a free consultation with a Missouri licensed attorney for each future purchaser of a LegalZoom product.⁵⁷ But while Missouri has seemingly neared the end of its quandary with LegalZoom,⁵⁸ other states have yet to determine whether they too feel the company is engaging in an unauthorized practice of the law.

II. "WITHOUT 'ETHICAL CULTURE' THERE IS NO SALVATION FOR HUMANITY"⁵⁹

Despite claiming at least one million success stories and offering a 100% satisfaction guarantee, LegalZoom probably has not provided every user of the company's services with a product best suited for their individual needs.⁶⁰ David Hiersekorn, an estate planning lawyer at Red Hill Law Group, PC in Santa Ana, California, took it upon himself to log onto LegalZoom.com as a customer to ascertain what sort of results he would get if he used the services offered by the company to create his will.⁶¹ He described his life as fairly basic; at the time he used the product he was a 39-year-old married man with a home, a Subchapter "S" corporation, and an individual retirement account.⁶² His wife had a 401(k) through her work, and together they had two children and a dog, as well as one son from his prior marriage.⁶³ Hiersekorn's end product was less than satisfactory for his needs—he was told he did not have the option to place his S-Corp stock in a living trust, (which he explained was incorrect), he was told he could put his and his wife's retirement accounts into a trust and name the trust as a beneficiary of the retirement account, (which he explained was true but that the tax consequences were severe if not done properly), and the trust had the effect of virtually guaranteeing that his son

Action Settlement), available at <http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/199/>.

⁵⁷ Plaintiff's Suggestions in Support of Preliminary Approval of Class Action Settlement Agreement, *Janson v. LegalZoom.com, Inc.*, 2:10-CV-04018-NKL at 2–3, 5 (W.D. Mo. Sept. 28, 2011), available at <http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/198/>.

⁵⁸ Preliminary Approval Order, *Janson v. LegalZoom.com, Inc.*, 2:10-CV-04018-NKL at 1, 3 (W.D. Mo. Nov. 14, 2011) (The Court preliminarily approved the settlement as proposed and set a final hearing for the proposed settlement for April 13, 2012), available at <http://docs.justia.com/cases/federal/district-courts/missouri/mowdce/2:2010cv04018/93510/200/>.

⁵⁹ ALBERT EINSTEIN, *IDEAS AND OPINIONS* 54 (1982).

⁶⁰ See LEGALZOOM.COM, *supra* note 7.

⁶¹ David A. Hiersekorn, *So, What's So Bad About LegalZoom, Anyway?*, available at <http://www.kctrustlaw.com/files/Download/Legalzoom.pdf>.

⁶² *Id.* at 3.

⁶³ *Id.*

from his previous marriage would be disinherited should he die before his wife (an undesired outcome), amongst other issues.⁶⁴ Hiersekorn determined that using LegalZoom would have cost him “tens of thousands in probate fees and potentially hundreds of thousands in taxes.”⁶⁵ The question remains if under current ethical rules, a service with the potential for such missteps and mishaps is, or should be, allowed to continue selling its services.

To answer the question of whether it is ethical for an organization like LegalZoom to provide services that can have such potentially harmful results as demonstrated in the Hiersekorn example above, one should first evaluate the ethical rules and principles that govern lawyers’ actions.⁶⁶ In order to assist those practicing or, perhaps controversially, *not practicing* in the field of law, the American Bar Association (ABA) has adopted the Model Rules of Professional Conduct (“Rules”) to guide lawyers as it strives to define ethical conduct to protect the public.⁶⁷ Forty-nine of the fifty states have adopted the Rules,⁶⁸ while California is the only state to adopt its own rules of professional conduct.⁶⁹ The Preamble to the 2011 Rules established that, as lawyers play an essential role in the preservation of society, every lawyer is responsible for observing the rules, the rules do not exhaust the morals and ethics a lawyer should consider in their work, and failure to comply with the rules gives basis for discipline.⁷⁰ It also established that a lawyer’s conduct should conform to the requirements of the law, and that a lawyer should be competent, diligent, and maintain relevant communication with clients in regard to the matter of representation.⁷¹ The ABA’s Standing Committee on Ethics and Professional Responsibility also issues formal written opinions to construe the Model Rules of Professional Responsibility, which, while not binding on any court, are considered to be highly persuasive authority on ethical matters that arise in the legal profession.⁷²

⁶⁴ *Id.* at 3–4.

⁶⁵ *Id.* at 4.

⁶⁶ See *Preface to MODEL RULES OF PROF’L CONDUCT*, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble.html (last visited June 16, 2012) (providing a brief history of the American Bar Association’s role in legal ethics beginning with the adoption of the original Canons of Professional Ethics in 1908).

⁶⁷ See J. MICHAEL GOODSON LAW LIBRARY, DUKE UNIV. SCH. OF LAW, RESEARCH GUIDES: LEGAL ETHICS 1 (2011), available at <http://www.law.duke.edu/lib/researchguides/pdf/legalethics.pdf>.

⁶⁸ *Alphabetical List of States Adopting Model Rules*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited June 16, 2012).

⁶⁹ *Rules of Professional Conduct*, THE STATE BAR OF CAL., <http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct.aspx> (last visited June 16, 2012).

⁷⁰ THOMAS D. MORGAN & RONALD D. ROTUNDA, 2011 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY: INCLUDING CALIFORNIA AND NEW YORK RULES 3–5 (2011).

⁷¹ *Id.* at 3.

⁷² Source Information: ABA Formal Ethics Opinions, LEXISNEXIS, available at <http://w3.nexis.com/sources/scripts/info.pl?138582>; see also Phila. Eth. Op. 00-10, 2000 WL 33173001.

The Rules govern the ethical considerations of the practice of law when dealing with clients, for the protection of clients.⁷³ But in LegalZoom's disclaimer, the company states that it does not practice law, but rather provides information, and that it does not form client relationships with the consumers who use its services.⁷⁴ It is uncertain whether any law-related service can or should be allowed to disclaim such accountability, but a closer look into ABA Formal Opinion 10-457, sections of the Rules, and the Restatement of the Law Governing Lawyers should help to provide a clearer answer that the services currently offered by LegalZoom are not entirely ethical under lawyer standards of ethics.

A. Has an Attorney-Client Relationship Formed?

Attorneys owe certain ethical duties to their clients, which are set forth in the Rules, and it is therefore imperative to establish whether LegalZoom has formed an attorney-client relationship with the users of its website in order to determine whether the company should be held to the ethical guidelines established in the Rules.⁷⁵ To determine whether LegalZoom *has* created an attorney-client relationship with those using its services, it is important to review Model Rule 1.18—the rule governing a lawyer's duties to prospective clients—with a narrow scope of interpretation, while still acknowledging its broad policy purpose.⁷⁶ Comment 2 of the rule explains that “[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client’ within the meaning” of the rule.⁷⁷ However, a lawyer cannot avoid the obligations of Rule 1.18 simply by making a blanket statement that there is no lawyer-client relationship until both the lawyer and the client consent to create such an agreement.⁷⁸ Despite engaging in what could arguably be labeled as more of a bilateral than a unilateral exchange of

(2000) (explaining that the ABA Committee's Formal Opinion is not binding on the Supreme Court of Pennsylvania, or any other court); Cal. Eth. Op. 1983-71, 1983 WL 31672 (1983) (elucidating that the ABA's Model Code of Professional Responsibility has no direct effect on California lawyers practicing in California courts, but that while not binding, can be looked to as a collateral source to California rules and statutes).

⁷³ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011) (describing the requirements of competence in representing a client as being knowledge of the law, skill, and preparation for the required representation).

⁷⁴ See *LegalZoom Disclaimer*, *supra* note 8.

⁷⁵ MODEL RULES OF PROF'L CONDUCT R. 1.18 (2011).

⁷⁶ *Id.*

⁷⁷ MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. 2 (2011); see also *DeVaux v. Am. Home Assur. Co.*, 444 N.E.2d 355 (1983) (holding that a jury might reasonably find that the client had reasonably believed that the firm had formed an attorney-client relationship with a client who had only ever spoken to the firm's secretary, when the secretary answered the client's call, told the client to write a letter to the firm requesting legal services, arranged a medical examination for the client, but then misfiled the client's letter requesting services so that no lawyer in the firm ever saw it until after the statute of limitations had run).

⁷⁸ JOHN DZIENKOWSKI & RONALD ROTUNDA, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* 640 (2007–2008 ed.).

information (because document assistants at LegalZoom review the user's submitted information for spelling, grammar, and consistency before providing the finished product), users of LegalZoom do not likely form a reasonable expectation that an attorney-client relationship exists with the company, because the disclaimer that such a relationship will not exist must be agreed upon by the user before the requested document can be purchased.⁷⁹ Still, Comment 9 of Rule 1.18 tells lawyers that the duty of competency applies when assistance is given to a prospective client on the merits of a matter, set forth in Model Rule 1.1.⁸⁰ As the very first substantive rule of the Model Rules of Professional Conduct, Rule 1.1 directs a lawyer to provide competent representation to a client, which requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation at hand.⁸¹ A person could reasonably believe that LegalZoom is assisting them on the merits of their needs, since it provides necessary forms, checks the forms for consistency, and provides future assistance on those same forms should the need arise, thus necessitating at least the required competency set forth in Rule 1.1.

Furthermore, the Restatement of the Law Governing Lawyers lends additional support to the idea that an attorney-client relationship has been formed between LegalZoom and its users based on the user's reasonable belief of the nature of the services provided. Section 14 of the Restatement provides that a relationship of client and lawyer arises when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person and . . . the lawyer manifests to the person consent to do so,"⁸² an arrangement that LegalZoom could be said to be engaged in (i.e. offering documents that hold up in courts of law at the request of paying clients). While Section 19 of the Restatement imparts that "a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances,"⁸³ it could be argued that the terms of limitation are not entirely reasonable in the circumstance of people looking for affordable solutions for their legal needs since they are giving up their complete right to file a malpractice suit against the company.⁸⁴ Model Rule 1.2, Comment 7 clarifies that while this limitation on duties is allowed—provided the requisite reasonableness and consent exist—the agreement for limited representation does not exempt a lawyer from the duty to provide competent representation.⁸⁵ As

⁷⁹ Bernstein, *supra* note 40; *see also* DZIENKOWSKI & ROTUNDA, *supra* note 78, at 639 (explaining that a website that encourages prospective clients to contact the law firm may change expectations of whether a prospective client could reasonably expect the formation of an attorney-client relationship, particularly if the website gives no cautionary instruction).

⁸⁰ MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. 9 (2011).

⁸¹ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

⁸² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000).

⁸³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (2000).

⁸⁴ *See LegalZoom Disclaimer*, *supra* note 8.

⁸⁵ MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2011).

demonstrated in David Hiersekorn's trial run of the service offered by LegalZoom for his own needs, it is clear that at least in *his* case, competent service would not have been provided.⁸⁶

B. Lawyer Websites Can Create Attorney-Client Relationships

LegalZoom's website seems to offer more than just legal information, but rather legal advice; that fine line which, when crossed, establishes an attorney-client relationship.⁸⁷ The ABA Formal Opinion 10-457 on Lawyer Websites is the Standing Committee on Ethics and Professional Responsibility's most recent view on "some of the ethical obligations that lawyers should address in considering the content and features of their websites."⁸⁸ The opinion speaks about lawyers using their websites to give information about the law, it addresses when website visitors inquire about legal advice or representation, and it discusses when lawyers disclaim obligations to website visitors.⁸⁹ Formal Opinion 10-457 can be read to show that despite the disclaimer agreed to by the user of LegalZoom, an attorney-client relationship has been formed between the company and the user based on the interactive relationship the company engages in with its users.

The opinion acknowledges that lawyer websites are an incredibly useful tool to assist the public in understanding matters of law and to inform the public on how to obtain legal counsel for various issues in their lives.⁹⁰ However, the opinion warns that no precise line distinguishes legal information from legal advice.⁹¹ For instance, a lawyer "who answers fact-specific legal questions may be characterized as offering personal legal advice," but "[a] lawyer who poses and answers hypothetical questions usually will not be characterized as offering legal advice."⁹² In order to avoid misunderstanding, the opinion advises that it would be prudent for lawyers to warn visitors not to rely on the legal information provided as legal advice, but rather that the advice is general in nature.⁹³

In its next section, the opinion explains that "inquiries from a website visitor about legal advice or representation may raise an issue concerning the application of Rule 1.18 (Duties to Prospective Clients)."⁹⁴ Rule 1.18(a) defines a prospective client as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect

⁸⁶ See *supra* notes 61–65 and accompanying text.

⁸⁷ See *infra* note 107 and accompanying text.

⁸⁸ ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 10-457 (2010).

⁸⁹ *Id.*

⁹⁰ *Id.*; see also MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2011) (acknowledging the "public's need to know about legal services [which] can be fulfilled in part through advertising").

⁹¹ ABA Comm. on Ethics & Prof'l. Responsibility, Formal Op. 10-457 (2010).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

to a matter.”⁹⁵ Either the lawyer or the potential prospective client can initiate this initial communication.⁹⁶ Without any cautionary language, a lawyer’s website that provides an electronic form encouraging visitors to submit a personal inquiry about a proposed representation invites submission of confidential information, and might indicate that a lawyer has agreed to discuss a possible attorney-client relationship.⁹⁷

In its last section, the opinion discusses warnings or cautionary statements intended to limit, condition, or disclaim a lawyer’s duties to its website visitors.⁹⁸ It states that limitations, conditions, or disclaimers of lawyer obligations will be effective only if reasonably understandable, properly placed, and not misleading.⁹⁹ Furthermore, these warnings may be used to avoid a misunderstanding by the website visitor that an attorney-client relationship has been formed, that the visitor’s information will be kept confidential, or that legal advice has been given.¹⁰⁰ The information must be conspicuously placed to assure that the visitor is likely to see it before proceeding.¹⁰¹ However, the Committee boldly makes its final declaration in the last line of the opinion by stating that a limitation, condition, waiver, or disclaimer may be undercut if the lawyer acts or communicates contrary to the warning on its website.¹⁰²

This opinion is consistent with the Model Rules’ policy to protect lawyers from unwittingly forming relationships with prospective clients, but more importantly, to protect the public from unethical legal practices.¹⁰³ With this policy in mind, it can be argued that an attorney-client relationship has been created between those who use the services offered by LegalZoom’s website and the company itself, despite the disclaimer that is prominently featured on the website in various locations (and to which the user must agree before completion of the legal document transaction).¹⁰⁴ After a website visitor has filled out the legal questionnaire for the service of their choice, LegalZoom’s document assistants review the answers for spelling, grammar, and consistency before compiling the final

⁹⁵ MODEL RULES OF PROF’L CONDUCT R. 1.18 (2011).

⁹⁶ ABA Comm. on Ethics & Prof’l. Responsibility, Formal Op. 10-457 (2010).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ A lawyer should aid the legal profession in pursuing the objectives of seeking to improve the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession, and should help the bar regulate itself in the public interest. Neglect of the responsibilities to assure its regulations are conceived in the public interest and not in furtherance of self-interested concerns of the bar compromise the independence of the profession and the public interest that it serves. THOMAS D. MORGAN & RONALD D. ROTUNDA, 2011 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY: INCLUDING CALIFORNIA AND NEW YORK RULES 4–5 (2011).

¹⁰⁴ See *Creating LegalZoom Living Trusts in 3 Simple Steps*, LEGALZOOM.COM, <http://www.legalzoom.com/living-trusts/living-trusts-3-step-process.html> (last visited June 16, 2012).

document.¹⁰⁵ Furthermore, with the optional purchase of “Legal Advantage Plus,” the LegalZoom website visitor receives the added features of attorney support, annual legal checkup with an attorney, unlimited revisions to the trust through LegalZoom, secure storage and delivery of the trust, and 25% savings on additional attorney services.¹⁰⁶ Whether narrowly reading into the definition of “advice” to mean giving information, or broadly defining the term to mean taking care of a person’s legal needs, it appears that LegalZoom does more than simply provide information to those who purchase and reasonably rely on the services it provides.¹⁰⁷

C. Law-Related Services Are Subject to Ethical Guidelines

Model Rule 5.7 should also be examined in determining whether an attorney-client relationship has been established between LegalZoom and its users, as the rule describes a lawyer’s ethical responsibilities regarding law-related services—an area that LegalZoom seems to be dabbling in.¹⁰⁸ Paragraph (a) of the rule states that a “lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services . . . if the law-related services provided” display either of two characteristics.¹⁰⁹ The Rules will apply: (1) if the law-related services are

¹⁰⁵ See *Living Trust Documents Pricing*, LEGALZOOM.COM, <http://www.legalzoom.com/living-trusts/living-trusts-pricing.html> (last visited June 16, 2012).

¹⁰⁶ See *id.* The Legal Advantage Plus package comes with its own thirteen page legal disclaimer that, among other things, states:

Please note that LegalZoom does not provide legal services. Attorneys made available through Legal Plans are third-party independent contractors who agree to provide legal services directly to you, not through LegalZoom, via a separate retention agreement between you and the attorney. Their contact information is provided as advertising. The attorneys have agreed to provide complimentary, thirty-minute consultations related to subject matters about which they represent that they are qualified in jurisdictions where they are admitted to practice. A conflict check will apply. They may require you to meet at their office or another location convenient to them or may require a telephonic consultation. LegalZoom will not select an attorney for you. LegalZoom makes no guarantees as to the substance of the attorney's advice.

Legal Plan Contract, LEGALZOOM.COM, <http://www.legalzoom.com/legal-plans-contract.html> (last visited June 16, 2012).

¹⁰⁷ If a lawyer gives legal advice or provides legal services to a person seeking advice or services from a lawyer, that person may become a client. LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 267 (2d ed. 2008); see *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980) (holding that in a legal malpractice action, evidence was sufficient to establish existence of attorney-client relationship arising when the alleged client went to an attorney for legal advice, was told there was not a case against husband's doctor for medical malpractice, and relied upon advice in failing to pursue claim for medical malpractice, and the attorney allegedly did not qualify legal opinion by urging client to seek advice from another attorney and did not inform alleged client that he lacked expertise in medical malpractice area).

¹⁰⁸ MODEL RULES OF PROF'L CONDUCT R. 5.7 (2011).

¹⁰⁹ *Id.* Law-related services are services that are reasonably performed in conjunction with, and are related to, legal services, but these services would not constitute the unauthorized practice of law if a nonlawyer performed them. DZIENKOWSKI & ROTUNDA, *supra* note 78, at 992–93. Comment 9 to Rule 5.7 defines law-related services to include “title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation, and patent, medical or environmental consulting.” MODEL RULES OF

provided “by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients,” or (2) if the law-related services are provided in “other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.”¹¹⁰

Once again, it appears LegalZoom has instituted measures to properly disclaim that its services create an attorney-client relationship. However, a closer reading of the Rules’ comments and tangential rules makes it clear that LegalZoom has ethical obligations to its users under either section (a)(1) or (a)(2) of Rule 5.7. First, under paragraph (a)(1) of the rule, it could be argued that since LegalZoom claims that it only offers the website’s users information rather than advice, it is engaging in a law-related practice not distinct from the lawyer’s provision of legal services to its clients who are not purchasing products through its website.¹¹¹ If true, LegalZoom should therefore be subject to the Rules of Professional Conduct because the users of LegalZoom would necessarily be receiving legal services not distinct from the legal services the company’s owners offer to their non-website clients.¹¹² Second, Rule 5.7, Comment 8 elucidates that the requirement of disclosure imposed by section (a)(2) of Rule 5.7 sometimes cannot be met when legal and law-related services are closely entwined.¹¹³ In such a case, “a lawyer will be responsible for assuring that both the lawyer’s conduct and . . . that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.”¹¹⁴ Since LegalZoom offers services that minimally can be described as law-related, LegalZoom should be responsible for making sure that its employees and company policies comply with the Rules, including, but certainly not limited to, Rule

PROF’L CONDUCT R. 5.7 cmt. 9 (2011).

¹¹⁰ MODEL RULES OF PROF’L CONDUCT R. 5.7 (2011).

¹¹¹ The Co-Founders, Senior Management Team, and Directors at LegalZoom.com includes top attorneys such as General Counsel Chas Rampenthal, a graduate of the University of Southern California, a founding partner of Belanger and Rampenthal LLC, an associate at Testa, Hurwitz & Thibault, LLP of Boston, Massachusetts and at the Los Angeles office of Thelen Reid & Priest LLP; Chairman and Co-Founder Brian Liu, a graduate of UCLA School of Law and a former corporate attorney with Sullivan & Cromwell; Chief Strategy Officer and President, Attorney Services Eddie Hartman, a member of the California Bar; Co-Founder Robert Shapiro, currently a partner of Glaser, Weil, Fink, Jacobs, Howard & Shapiro, LLP, a full-service law firm with approximately 120 attorneys (no relationship with LegalZoom); and Co-Founder Brian S. Lee, a graduate of UCLA School of Law and a former attorney with Skadden, Arps, Slate, Meagher & Flom, LLP and a former Manager at Deloitte & Touche, LLP. *Management Team, About Us*, LEGALZOOM.COM, <http://www.legalzoom.com/about-us/management-team> (last visited June 16, 2012). Any of these lawyers could be said to be engaging in a law-related practice not distinct from their provision of legal services to their previous or current clients not purchasing products through LegalZoom’s website.

¹¹² MODEL RULES OF PROF’L CONDUCT R. 5.7 (2011).

¹¹³ MODEL RULES OF PROF’L CONDUCT R. 5.7 cmt. 8 (2011).

¹¹⁴ *Id.*

1.8(h)(1).¹¹⁵ Rule 1.8(h)(1) states, “A lawyer shall not: make an agreement limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.”¹¹⁶ Despite the company stating in its disclaimer that LegalZoom “is not responsible for any loss, injury, claim, liability, or damage related to [the users] use of this site,” it does not require, or even advise users to obtain independent representation before agreeing to the terms in the disclaimer as is required in Rule 1.8(h)(1).¹¹⁷ This violation of Rule 1.8(h) should not be taken lightly because, as stated above, the rules are in place to protect clients. Therefore, LegalZoom, with its law-related services, should not be exempt from the requirements of the Rules.¹¹⁸

D. What Constitutes the Practice of Law?

Assuming that LegalZoom has established an attorney-client relationship with its website users,¹¹⁹ and considering LegalZoom has been named in class action lawsuits initiated by private attorneys who contend that the website provides services amounting to the unauthorized practice of law, it would be prudent to discuss where the boundaries of the practice of law lie to determine whether LegalZoom should be allowed to continue offering its services.¹²⁰ Legally, only licensed professionals can practice law in the United States, and what constitutes the unauthorized practice of law is a matter of state law.¹²¹ Model Rule 5.5 incorporates the definitions provided by the various states and in paragraph (b) notes that “a lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law” or otherwise represent that the lawyer is admitted to practice law.¹²²

¹¹⁵ MODEL RULES OF PROF’L CONDUCT R. 1.8 (2011).

¹¹⁶ *Id.*

¹¹⁷ See *LegalZoom Disclaimer*, *supra* note 8.

¹¹⁸ See *supra* note 75.

¹¹⁹ See *supra* Part II.A–C.

¹²⁰ Acello, *supra* note 9, at 24.

¹²¹ DZIENKOWSKI & ROTUNDA, *supra* note 78, at 950–51. A 1994 ABA survey found that thirteen jurisdictions had adopted no definition of “the practice of law,” eight jurisdictions reported that their enforcement mechanism was inactive or non-existent, and of the thirty-five jurisdictions that reported they had a definition, only twenty-eight could support it with case law. *Id.* at 951–52.

¹²² MODEL RULES OF PROF’L CONDUCT R. 5.5 (2011); see also Letter from Federal Trade Commission to Task Force on the Model Definition of the Practice of Law, American Bar Association (Dec. 20, 2002), available at <http://www.justice.gov/atr/public/comments/200604.htm> (discussing the ABA Task Force on the Model Definition of the Practice of Law, Draft Definition (Sept. 18, 2002), which, if adopted, would have included “[s]electing, drafting, or completing legal documents or agreements that affect the legal rights of a person” within the definition of the practice of law). Instead, the ABA House of Delegates adopted the Report and Recommendation of the Task Force on the Model Definition of the Practice of Law in 2003. *Task Force on the Model Definition of the Practice of Law*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html (last visited June 16, 2012).

The Guidelines for the Adoption of a Definition of the Practice of Law recommend that every jurisdiction and territory adopt a definition of the practice of law that includes the basic premise that the practice of law is the application of legal principles and judgment to

Furthermore, the Model Code of Professional Responsibility, Ethical Considerations 3-5 states that the

essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment,¹²³

once again emphasizing the important policy goal of protecting clients' interests in matters of law.¹²⁴

Regardless of the aforementioned policy considerations, publishers have a First Amendment right to create and sell do-it-yourself legal kits, but they can only do so if they are not engaging in the unauthorized practice of law, which is accomplished by refraining from personal contact with customers regarding the use of the kits.¹²⁵ However LegalZoom, with its practice of reviewing documents for spelling, grammar, and consistency, arguably creates sufficient personal contact to prevent it from relying upon

the circumstances or objectives of another person or entity and that each state and territory should determine who may engage in the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability.

AMERICAN BAR ASSOCIATION TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW STANDING COMMITTEE ON CLIENT PROTECTION WASHINGTON STATE BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION (Aug. 11, 2003), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.authcheckdam.pdf>. The adoption of state definitions was recommended in order to protect the public from unqualified service providers and provide certainty for those providing services in law-related areas. *A History of the Client Protection Rules*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/history.html (last visited June 16, 2012); see Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2582–85 (1999) (providing a detailed account of the history of the regulation regarding the unauthorized practice of law in the United States).

¹²³ MODEL CODE OF PROF'L RESPONSIBILITY Canon 3-5 (1980).

¹²⁴ While it is true that the law allows people to act *pro se*, or represent themselves in court, the unauthorized practice of law rules are still important because the practice involves a person helping another with legal matters. THOMAS D. MORGAN, RONALD D. ROTUNDA, & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 634 (11th ed. 2011). "The condemnation of the unauthorized practice of law is designed to protect the public from legal services by persons unskilled in the law. The prohibition of lay intermediaries is intended to insure the loyalty of the lawyer to the client unimpaired by intervening and possibly conflicting interests." Elliott E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438, 439 (1965); see also Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581–94 (1999) (discussing the Ethical Considerations' dominant justifications for prohibiting the unauthorized practice of law and restricting the practice of law to members of the bar. Reasons include:

- (1) protecting the public against harmful incompetence and unscrupulous conduct; (2) protecting the administration of justice from incompetent or unscrupulous nonlawyers; (3) supplying a system of discipline to regulate lawyers; and (4) rewarding lawyers with an economic advantage over their potential and actual competitors in exchange for their submitting to regulation.

¹²⁵ *Id.* at 2591 (citing *In re Thompson*, 574 S.W.2d 365, 369 (Mo. 1978); *New York County Lawyers' Ass'n. v. Dacey*, 234 N.E.2d 459, 459 (N.Y. 1967); *Or. State Bar v. Gilchrist*, 538 P.2d 913, 919 (Or. 1975)).

a First Amendment shield for publishers.¹²⁶ LegalZoom's services are unlike self-help books, do-it-yourself kits, and self-help legal software, because unlike the one-time purchase of such products, LegalZoom reviews and edits its users' documents and more aptly engages in an interactive transaction with its customers.¹²⁷ When there is just a one-time purchase of a do-it-yourself legal kit, it is not hard to imagine that the buyer has accepted responsibility for the consequences of the personal use of that kit. But when a do-it-yourself kit allows the user interaction with the selling company beyond the one-time purchase of the product, it is reasonable for the user to place greater responsibility for the final outcome of the product on the provider of the kit.

Operating under the assumption that LegalZoom does not violate prohibitions of the unauthorized practice of law, since as of yet there is no definitive authoritative position on the matter, there are consequent Model Rules, including Rules 1.1, 1.4, and 5.3, by which LegalZoom and all those legally practicing law must abide.¹²⁸ Model Rule 1.1 establishes the duty of competency that a lawyer must provide to represented clients, including competent legal knowledge, skill, thoroughness, and preparation reasonably necessary for the requisite representation.¹²⁹ A lawyer and client may agree to limit the scope of representation for which the lawyer is responsible, but the duty to provide competent representation may not be limited.¹³⁰ The case *In re Sledge* demonstrates this rule well.¹³¹ Sledge, a high-volume solo practitioner, ran his office by largely leaving his cases in the hands of his clerks and other nonlawyers, who were left to put the lawyer's name on pleadings, discovery responses, and correspondences using a rubber stamp.¹³² Sometimes Sledge was not present in the office for months as he attended religious retreats and wrote a novel, leaving his staff of nonlawyers to sign-up clients, write letters and pleadings, and negotiate settlements.¹³³ The Louisiana Supreme Court held that disbarment was the appropriate sanction for Sledge for the neglect of his

¹²⁶ See *supra* note 124.

¹²⁷ See Steve French, Note, *When Public Policies Collide . . . Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 101–02 (2001) (discussing that most courts opine that mere information and forms enabling individuals to self-prepare legal forms and documents do not violate prohibitions of the unauthorized practice of law because no personal relationship exists between the provider and the recipient, while a minority of courts hold that kits containing legal forms and instructions as to their completion do constitute an unauthorized practice of law since personal contact is not a prerequisite to finding that an activity or product constitutes the practice of law).

¹²⁸ See Draper, *supra* note 16; see also MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2011) ("This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.").

¹²⁹ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011).

¹³⁰ MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2011); see also MODEL RULES OF PROF'L CONDUCT R. 1.2 (2011); MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2011).

¹³¹ *In re Sledge*, 859 So.2d 671 (La. 2003).

¹³² *Id.* at 674.

¹³³ *Id.* at 674–75.

law practice and failure to supervise his nonlawyer assistants.¹³⁴ Even though LegalZoom's main disclaimer states that at no time does the company review users' answers for legal sufficiency, draw legal conclusions, or provide legal advice or apply the law to particular user situations,¹³⁵ the site does proclaim to users that they will get a "personalized legal document" with specific language for their state and "peace of mind" knowing their family is protected, implying that a user can safely rely on the legal document created for them by LegalZoom.¹³⁶ It is hard to imagine that a user would get a legal document sufficient to protect their families if the document they received was not checked for legal sufficiency, and without someone to be liable, or accountable, for potential insufficiency down the road.

Similarly, Model Rule 1.4 states that a lawyer shall keep the client reasonably informed about the status of their legal matter,¹³⁷ and Rule 1.3 requires a lawyer to act with reasonable diligence and promptness when representing a client.¹³⁸ LegalZoom's disclaimer makes clear that the law changes frequently, and that while efforts are made to keep the forms on the website up-to-date, they are not guaranteed to be current, or even accurate, in every jurisdiction.¹³⁹ It is hard to reconcile this part of the disclaimer with the requirements of the Rules on this count, because as Rule 1.3, Comment 4 makes clear, unless the attorney-client relationship is terminated, a lawyer should carry through to conclusion all matters undertaken for a client.¹⁴⁰ When a client retains an attorney to draw up a will, the attorney-client relationship is not terminated upon the lawyer's completion and delivery of the will. The attorney has the responsibility to keep the client up-to-date on any changes in the law that might affect that client's will and is liable for malpractice to beneficiaries should the will be drafted in a way that the client did not request.¹⁴¹

Lastly, Rule 5.3 sets forth a lawyer's responsibilities regarding nonlawyer assistants.¹⁴² The rule states that,

With respect to a nonlawyer employed or retained by or associated with a lawyer . . . (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of

¹³⁴ *Id.* at 686.

¹³⁵ See *LegalZoom Disclaimer*, *supra* note 8.

¹³⁶ See *Last Will & Testament*, *supra* note 38.

¹³⁷ MODEL RULES OF PROF'L CONDUCT R. 1.4 (2011).

¹³⁸ MODEL RULES OF PROF'L CONDUCT R. 1.3 (2011).

¹³⁹ See *LegalZoom Disclaimer*, *supra* note 8; *Last Will & Testament*, *supra* note 38. Under the "Common Questions" section of the Last Will & Testament page, however, LegalZoom replies that they have designed their Last Wills to the specific laws and requirements of each state. See *id.*

¹⁴⁰ MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 4 (2011).

¹⁴¹ See *Leavenworth v. Mathes*, 661 A.2d 632, 634-35 (Conn. App. Ct. 1995).

¹⁴² MODEL RULES OF PROF'L CONDUCT R. 5.3 (2011).

Professional Conduct if engaged in by a lawyer if (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.¹⁴³

There is at least one instance per document where LegalZoom retains nonlawyer assistants to aide in the completion of the documents prior to releasing them to the purchaser. The “peace-of-mind review” is included in all LegalZoom wills, trusts, and power of attorney documents.¹⁴⁴ The peace-of-mind review is described as follows:

Unlike simple do-it-yourself forms, LegalZoom services include a personal review of your work after you create your document through the LegalZip® system. Along with hundreds of automated checks, our document scriveners review the answers you provide for the following:

Complete information. We’ll contact you by phone and email regarding any missing information.

Spelling, grammar and punctuation. We do not rely solely on software spell checkers.

Correct capitalization and lowercasing where required.

Proper pagination and blank space elimination.

Complete words. We spell out abbreviations or symbols in English.

Correct residency information. Indicating the proper state is critical to ensure the document conforms to your state’s requirements.

Full names. We verify that full names are given (first and last) and that all names appear consistently throughout the document.

Correct shipping addresses and email addresses to ensure timely delivery.¹⁴⁵

The document scriveners retained by LegalZoom who provide the useful and beneficial checks listed above should be subject to the Model Rules since, should they do their job incorrectly, they would violate the Model Rule requiring competency, thus seemingly exposing the lawyer who hired the document scrivener and authorized their work to liability for the mistake.¹⁴⁶

¹⁴³ *Id.*

¹⁴⁴ See *Last Will & Testament*, *supra* note 38; *LegalZoom Living Trusts*, LEGALZOOM.COM, <http://www.legalzoom.com/living-trusts/living-trusts-pricing.html> (last visited June 16, 2012); *LegalZoom Living Wills*, LEGALZOOM.COM, <http://www.legalzoom.com/living-wills/living-wills-overview.html> (last visited June 16, 2012); *Pricing, LegalZoom Powers of Attorney*, LEGALZOOM.COM, <http://www.legalzoom.com/power-of-attorney/power-of-attorney-pricing.html> (last visited June 16, 2012).

¹⁴⁵ See *Pricing, LegalZoom Last Will and Testament*, LEGALZOOM.COM, <http://www.legalzoom.com/legal-wills/wills-pricing.html>, (follow “Peace-of-mind review”); *LegalZoom Living Trusts*, *supra* note 144 (follow “Peace-of-mind review”); *Living Wills*, *supra* note 144 (follow “Peace-of-mind review”); *LegalZoom Powers of Attorney*, *supra* note 144 (follow “Peace-of-mind review”).

¹⁴⁶ See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2011).

III. IF IT AIN'T BROKE, YOU STILL MIGHT WANT TO FIX IT

LegalZoom does an excellent job of giving notice that it has disclaimed liability from its users.¹⁴⁷ While every user may not actually read the ten and thirteen page disclaimers and terms of use documents that they “click” and thereby acknowledge they have read and agreed to, they at least have notice that terms and conditions apply to the legal document they create with LegalZoom. Then again, in other areas of life, providing a disclaimer is not always enough to disclaim liability—New York and Ohio both have statutes that void liability disclaimers for parking garages whose employees act negligently in handling patrons’ cars.¹⁴⁸ While valuable, cars are likely less valuable than the sum of the estate a person leaves in their will, the handling of which deserves care above a level of potential negligence. At least three possible actions can be taken—either by LegalZoom, the states, or the ABA—to ensure that people who have little money to spend on a will or trust receive the protections their legal documents should provide, while still holding someone accountable should something go wrong down the road.

¹⁴⁷ See discussion *supra* Part I.

¹⁴⁸ N.Y. GEN. OBLIG. LAW § 5-325 (McKinney 2001); 51 OHIO JUR. 3d *Garages, Etc.* § 23 (West 2011); see also Cal. State Auto. Ass’n. Inter-Ins. Bureau v. Barrett Garages, Inc., 64 Cal. Rptr. 699, 704 (1967) (“hold[ing] that the delivery of a claim check to the respective bailors . . . did not create a contract embodying the matter printed thereon as a [m]atter of law”); Cascade Auto Co. v. Petter, 212 P. 823, 824 (Colo. 1923) (holding that posting a sign in a parking garage, limiting liability for theft, cannot actually limit the garage keeper’s liability for theft); Malone v. Santora, 64 A.2d 51, 53–54 (Conn. 1949) (stating that the operator’s failure to exercise reasonable care in the bailment of the plaintiff’s car was not relieved simply because the operator had given the plaintiff a claim ticket and stating he assumed no responsibility for damages or theft of the car); Davidson v. Ramsby, 210 S.E.2d 245, 247 (Ga. Ct. App. 1974) (holding that “a mere disclaimer of responsibility on a receipt is insufficient to absolve one of responsibility where negligence is alleged in the handling of [bailor’s] automobile while defendants had it in their possession so as to allow the keys to be used in removing it”); U.S. Fid. & Guar. Co. v. Dixie Parking Serv., Inc., 262 So.2d 365, 365–67 (La. 1972) (holding that a man who delivered his car with personal belongings in it, and who specifically asked the parking attendant if the personal belongings would be safe in the car, was entitled to believe that the personal belongings would be safe despite a sign stating the garage denied responsibility for personal items); Sandler v. Commonwealth Station Co., 30 N.E.2d 389, 391 (Mass. 1940) (stating that it could be a “reasonable assumption by the plaintiff that the stub that was given him was a receipt for his automobile, or a means of identifying him when he should return to get his automobile, rather than a contract freeing an apparent bailee from all responsibility”); Miller’s Mut. Fire Ins. Ass’n. of Alton, Ill. v. Parker, 65 S.E.2d 341, 344 (N.C. 1951) (holding that it would go against public interest to exculpate the defendant parking lot owner from his own negligence, despite the defendant erecting signs and telling the parking lot user that he would not be responsible for loss by fire or theft); Wendt v. Sley Sys. Garages, 188 A. 624, 625 (Pa. 1936) (holding that “the bailee was relieved of liability as an insurer, but not for loss due to its negligence”); Savoy Hotel Corp. v. Sparks, 421 S.W.2d 98, 104 (Tenn. Ct. App. 1967) (denying that “the exculpatory language printed upon the claim check delivered to plaintiff formed a part of the contract of bailment”); Allright, Inc. v. Schroeder, 551 S.W.2d 745, 747 (Tex. Civ. App. 1977) (stating that “[t]he fact that the closing time of the lot was posted on signs and was printed on the claim ticket does not exempt the operator of the lot from the exercise of ordinary care with respect to the safety of the property”); Althoff v. System Garages, Inc., 371 P.2d 48, 50 (Wash. 1963) (adopting the rule that “a professional bailee cannot contract away responsibility for his own negligence or fraud”).

One option is to make the “Legal Advantage Plus” package a required item of purchase for all legal products sold through LegalZoom.¹⁴⁹ The package gives the user the added features of attorney support, annual legal checkup with an attorney, unlimited revisions to the trust through LegalZoom, and secure storage and delivery of the trust.¹⁵⁰ These added measures of review would likely have the effect of increasing the accuracy of the document created for the user.

A second option is for all states to enter into Assurance of Discontinuance agreements with LegalZoom, much like the one the state of Washington has entered into with the company.¹⁵¹ Provisions stating that LegalZoom cannot misrepresent the benefits or disadvantages of any estate-planning document as compared to any estate distribution document in the state, or fail to offer estate-planning forms that conform to the state’s law, would help assure that users of LegalZoom receive a product that better protects and satisfies the user’s needs.¹⁵² Furthermore, the provision should state that LegalZoom cannot fail to have a state licensed attorney review all self-help estate-planning forms offered to the state’s consumers, or fail to clearly and conspicuously disclose that communications between the company and consumers are not protected by the attorney-client privilege, which would further assure protection and satisfaction of the user’s needs.¹⁵³

A third option is the creation and adoption of a new Model Rule that makes it unethical for a provider of legal forms, who has an interactive relationship with the user of those forms, to disclaim complete liability from harm that may come from using those forms. By disallowing the disclaimers, users would have no doubt of their right to sue the provider for malpractice should a form end up being harmful to, or misrepresent, the user’s needs.¹⁵⁴

CONCLUSION

No one is likely to argue that preparing a will is an unwise decision, and, in fact, having a will is highly recommended.¹⁵⁵ LegalZoom was created with noble intentions: it sought to allow people to create essential legal documents without encountering inconvenience or high fees.¹⁵⁶ But disclaiming all liability to users of legal services, whether online or not—

¹⁴⁹ See *Legal Plan Contract*, *supra* note 106.

¹⁵⁰ *Id.*

¹⁵¹ See Press Release, *supra* note 15.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ “In the Restatement of this Subject, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. It does not include conduct recklessly disregarding of an interest of others.” RESTATEMENT (SECOND) OF TORTS § 282 (1965).

¹⁵⁵ See discussion *supra* Part I.

¹⁵⁶ *Legal Zoom About Us*, *supra* note 5.

especially without the users conferring with a separate attorney—skirts a line of ethical responsibility that should not be allowed in light of the underlying policy of protecting the public from potentially harmful legal practices.