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# LegalZoom and Online Legal Service Providers: Is the Development and Sale of Interactive Questionnaires that Generate Legal Documents the Unauthorized Practice of Law?

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# NOTES

## LegalZoom and Online Legal Service Providers: Is the Development and Sale of Interactive Questionnaires that Generate Legal Documents the Unauthorized Practice of Law?

*Emily McClure*<sup>1</sup>

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## INTRODUCTION

Technological innovations afford individuals easier and less expensive access to goods and services. No longer does the Internet simply provide information and access to e-mail; one can now find a variety of business and professional services available, including legal services through sites such as LegalZoom.com. LegalZoom takes pride in the fact that “[o]ver 3 million customers have relied on [it] for their personal and business legal needs” over the past fifteen years, using both consultations and forms for business and personal matters alike.<sup>1</sup> While LegalZoom maintains that its attorneys are specialized to perform all services in the state of inquiry,<sup>2</sup> Kentucky attorneys and judges have expressed reservations.

In Kentucky, the practice of law includes any service “involving legal knowledge or legal advice . . . rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services” in the state.<sup>3</sup> The Kentucky Rules of Professional Conduct permit only attorneys licensed and admitted to the Kentucky Bar Association to maintain a continuous presence and practice.<sup>4</sup> LegalZoom claims to provide both “self-help” information to complete simple forms and consultation with an attorney who is knowledgeable and state law specialized.<sup>5</sup> Do leading consultations and providing “self-help” information violate the Kentucky prohibition against the unauthorized practice of law? Or is LegalZoom an asset to the legal field, assisting the public with routine legal matters?

Because LegalZoom is the most popular online legal service provider,<sup>6</sup> this Note centers on the business practices of LegalZoom. Several other notable websites provide similar services, however; therefore, this analysis can be applied to those websites, as well.

The focus of this Note regards whether the sale of interactive questionnaires, which generate particularized legal documents, constitutes the unauthorized practice of law. This Note comes to the conclusion that these questionnaires and resulting legal documents constitute unauthorized practice; therefore, Kentucky must either stop LegalZoom from offering services in the state or find a way to regulate its services. The purpose of LegalZoom, to provide legal services to as

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<sup>1</sup> LEGALZOOM, <https://www.legalzoom.com> [<https://perma.cc/72SM-G3NF>] (last visited Jan. 21, 2017).

<sup>2</sup> *Attorney Directory*, LEGALZOOM, <https://www.legalzoom.com/attorneys/attorney-directory> [<https://perma.cc/WY2J-445P>] (last visited Jan. 21, 2017).

<sup>3</sup> KY. SUP. CT. R. 3.020.

<sup>4</sup> *Id.* at 3.130(5.5)(b)(1).

<sup>5</sup> *Attorney Directory*, *supra* note 2.

<sup>6</sup> While there is no “Consumer Report” for this market, the top hit for Internet searches of “online legal services” or “online lawyers” repetitively returns LegalZoom as the first hit. Furthermore, because of the extensive advertising campaigns of LegalZoom, most people recognize that name over other similar providers.

many people as possible,<sup>7</sup> demonstrates a conflict between regulations designed to protect the public and a public need for affordable legal assistance. Regulations of legal practice do not exist to create a monopoly on the market for legal services; they were not designed as a protection of lawyers from outsiders threatening their positions. Instead, regulations of practice exist as a means of assuring customers that those providing answers to their legal questions have at least minimal competency in answering those questions. Customers who pay for inadequate forms find themselves in a worse financial and legal position than if they had simply hired a licensed attorney in the beginning. Not only did the customers pay for the legal services of creating the initial form, they have now wasted valuable time and resources by relying on such services.

Part I of this Note discusses background issues with regard to this topic. In addition, Part I will discuss the definition of “unauthorized practice of law” according to the American Bar Association and under Kentucky law, while analyzing LegalZoom’s service descriptions. Finally, Part I includes a short discussion of other notable online legal service providers and how they compare to LegalZoom. Part II will discuss whether other courts have ruled LegalZoom to be the unauthorized practice of law. Part III will discuss whether LegalZoom has indeed violated Kentucky’s restriction on the unauthorized practice of law. Finally, Part IV will discuss solutions to the tension between inadequate access to licensed attorneys and the unauthorized practice of non-lawyers.

## I. ARGUMENT & BACKGROUND

### A. *What is “Unauthorized Practice”?*

Before analyzing LegalZoom and whether the company engages in the unauthorized practice of law, it is necessary to define what is and is not the “unauthorized practice of law.” State law establishes the parameters of “the practice of law;” these definitions vary from state to state,<sup>8</sup> but generally, states require bar association admission before either an attorney or a layperson may engage in the practice of law.

The American Bar Association’s Model Rule 5.5 prohibits a person not admitted to the bar association of a particular jurisdiction from practicing law in that specific jurisdiction.<sup>9</sup> A person who is not admitted to the bar association may not represent to the public that he or she may practice law in that jurisdiction.<sup>10</sup> Model Rule 5.5 also prohibits a licensed attorney from assisting any another person

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<sup>7</sup> *About Us*, LEGALZOOM, <https://www.legalzoom.com/about-us> [<https://perma.cc/LV2Y-ZN4V>] (last visited Jan. 21, 2017).

<sup>8</sup> MODEL RULES OF PROF’L CONDUCT r. 5.5 cmt. [2] (AM. BAR ASS’N 1983); Isaac Figueras, Comment, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep’s Clothing?*, 63 CASE W. RES. L. REV. 1419, 1421 (2013).

<sup>9</sup> MODEL RULES OF PROF’L CONDUCT r. 5.5(b) (AM. BAR ASS’N 1983).

<sup>10</sup> *Id.* r. 5.5(b)(2).

in practicing law if such assistance results in a practice prohibited by the jurisdictional rules governing attorney ethics.<sup>11</sup> A person or attorney may also violate this rule by establishing a continuous and systematic presence in a jurisdiction in which he or she is not admitted to practice, even if the lawyer or person is not physically present in that jurisdiction.<sup>12</sup>

Most states have adopted Model Rule 5.5 with only a few linguistic changes or jurisdictional-specific additions.<sup>13</sup> A few jurisdictions, such as California, Mississippi, Texas, Wisconsin, and the District of Columbia, adopted the old Model Rule 5.5, which, although far simpler than the amended Rule 5.5, still prohibits the practice of law in violation of the jurisdictional requirements, or assisting another in such violations.<sup>14</sup> Other states, such as Alabama, Georgia, Hawaii, Idaho, Montana, Nevada, New Jersey, New Mexico, New York, North Dakota, and Virginia have notable differences, but such differences are not of importance to this Note because they do not indicate a deviation from the Model Rules' prohibition against the unauthorized practice of law.<sup>15</sup>

Kentucky's Rules of Professional Conduct are found under the Kentucky Supreme Court Rule 3.130. Kentucky SCR 3.130(5.5) substantively adopts Model Rule 5.5, but, unlike Model Rule 5.5, it does not require a "systematic or continuous presence" in the jurisdiction to violate the rule. Instead, in order to

<sup>11</sup> *Id.* r. 5.5 cmt. [1].

<sup>12</sup> *Id.* r. 5.5 cmt. [4].

<sup>13</sup> See AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (Oct. 18, 2016), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_5\\_aut\\_hcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_5_aut_hcheckdam.pdf) [https://perma.cc/C2TG-2CYH].

<sup>14</sup> CAL. R. PROF'L CONDUCT R. 1-300; MISS. RPC. R. 5.5; TEX. R. PROF'L CONDUCT, R. 5.05; WIS. SUP. CT. R. 20:5.5; D.C. BAR APPX. A, R. 5.5.

<sup>15</sup> See AM. BAR ASS'N, *supra* note 13. Alabama does not adopt Model Rule 5.5(b) completely but rather changes the wording of portions of the Rule and adds sections regarding lawyers and law students not licensed in the state of Alabama. ALA. R. OF PROF'L CONDUCT R. 5.5(d), (e). Georgia has not amended their Rule 5.5 since the most recent amendments to Model Rule 5.5, which changes the wording of several portions of the Rule, and adds sections concerning "foreign lawyers." GA. COMP. R. & REGS. ST. BAR 5.5(e), (f), (g). Hawaii has a rule much shorter than Model Rule 5.5, but still bars the practice of law by persons not licensed in the state of Hawaii. HAW. R. OF PROF'L CONDUCT R. 5.5. Idaho uses Rule 5.5 as proposed by the American Bar Association Ethics Commission in 2000. IDAHO R. OF PROF'L CONDUCT R. 5.5. Montana uses different wording and sections, but still prohibits the practice of law by persons not licensed in Montana as well as assisting in the unauthorized practice of law. MONT. PROF'L CONDUCT R. 5.5. Nevada uses a rule that outlines examples of exceptions to unauthorized practice of law, none of which apply to this Note. NEV. R. OF PROF'L CONDUCT 5.5(b). New Jersey uses different language than the language of Model Rule 5.5, and does not adopt the numbering or titles of the Model Rules, though the New Jersey rule for unauthorized practice is similar to the Model Rule. N.J. CT. R., R. 1:21-1. New Mexico amended the structure of Model Rule 5.5 and changed the numbering, but the rules are substantially the same. N.M.R.A. R. 16-505. New York does not adopt Model Rule 5.5(b), (c), or (d), but prohibits a lawyer from assisting a non-lawyer in the practice of law. N.Y. JUD. LAW § 484. North Dakota utilizes a rule substantially different in language than the language used in Model Rule 5.5, and makes substantial references to North Dakota Rules of Professional Conduct, R. 3: Admission to Practice. N.D. R. OF PROF'L CONDUCT R. 5.5. Virginia uses a rule substantially different in language than the language used in Model Rule 5.5, but is substantially similar in content. VA. SUP. CT. R. PT. 6, SEC. II, 5.5.

qualify as unauthorized practice, Kentucky merely requires a person be present in the jurisdiction if he or she is not admitted to the jurisdiction.<sup>16</sup> Kentucky defines the practice of law as “any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services.”<sup>17</sup> Thus, unauthorized practice of law in Kentucky can apply to both a licensed attorney and a layperson. An attorney suspended from practice by the Kentucky Bar Association engages in the unauthorized practice of law if, during suspension, he or she collects a fee for legal services,<sup>18</sup> agrees to file documents on behalf of a client,<sup>19</sup> appears in court,<sup>20</sup> or corresponds on behalf of a client as a legal representative of the client.<sup>21</sup> These actions all fall under the “practice of law” category, and therefore, laypersons are also prohibited from engaging in these activities on behalf of another person.<sup>22</sup>

The practice of law, however, “is not confined to performing services in actions or proceedings in courts of justice, but includes giving advice and preparing wills, contracts, deeds, mortgages, and other instruments of a legal nature.”<sup>23</sup> In addition to document preparation and court appearances, the practice of law includes activities such as title examinations<sup>24</sup> and preparing real estate mortgages.<sup>25</sup> Laypersons may conduct a select few real estate transactions on behalf of another party, but may not answer legal questions or offer legal advice to other parties, as any response to questions would constitute the unauthorized practice of law.<sup>26</sup> Furthermore, a non-attorney business entity or corporation engages in the unauthorized practice of law when (1) such entity is in the business of creating, preparing, or typing legal forms and/or documentation, and (2) the entity also assists in the purchaser’s legal goals or advises the purchaser in legal matters.<sup>27</sup> A non-attorney business entity or corporation that uses the services of an attorney to provide legal services to a third party also engages in unauthorized practice.<sup>28</sup> In Kentucky, a corporation cannot practice as an attorney, nor may a corporation employ a licensed attorney for the purpose of selling legal services;<sup>29</sup> not only would

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<sup>16</sup> Compare KY. SUP. CT. R. 3.130(5.5), with MODEL RULES OF PROF’L CONDUCT r. 5.5(b) (AM. BAR ASS’N 1983).

<sup>17</sup> KY. SUP. CT. R. 3.020.

<sup>18</sup> Ky. Bar Ass’n v. Thornsberry, 399 S.W.3d 773, 775 (Ky. 2013).

<sup>19</sup> *Id.*

<sup>20</sup> Ky. Bar Ass’n v. Knapp, 845 S.W.2d 549, 549–50 (Ky. 1993).

<sup>21</sup> Ky. Bar Ass’n v. Klapheke, 122 S.W.3d 64, 65 (Ky. 2003).

<sup>22</sup> KY. SUP. CT. R. 3.130(5.5).

<sup>23</sup> Howton v. Morrow, 106 S.W.2d 81, 82 (Ky. 1937).

<sup>24</sup> Ky. State Bar Ass’n v. First Fed. Sav. & Loan Ass’n of Covington, 342 S.W.2d 397, 400 (Ky. 1960).

<sup>25</sup> Ky. State Bar Ass’n v. Tussey, 476 S.W.2d 177, 180–81 (Ky. 1972).

<sup>26</sup> See Countrywide Home Loans, Inc. v. Ky. Bar Ass’n, 113 S.W.3d 105, 122, 124 (Ky. 2003).

<sup>27</sup> Kentucky Bar Ass’n, Unauthorized Practice of Law Op. U-63, 1–4 (2006) [hereinafter Unauthorized Practice of Law Op. U-63].

<sup>28</sup> *Id.* at 1.

<sup>29</sup> See Tussey, 476 S.W.2d at 180.

the corporation be engaging in the unauthorized practice of law, but the employed attorney would also violate Rule 5.5 by assisting the corporation in the unauthorized practice of law.<sup>30</sup> In Kentucky, a lawyer may only engage in the practice of law as a sole practitioner; an employee of a private corporation (for the purposes of in-house counsel) or of a government agency or department; an instructor or professor in a Kentucky law school; a judge; an employee of a general partnership providing legal services; or an employee of or partner, shareholder, or member of a limited liability partnership (“LLP”), professional service corporation (“PSC”), or limited liability company or any other limited liability entity pursuant to a Kentucky statute.<sup>31</sup> This does not include a corporation.

According to Kentucky Bar Association Opinions, Kentucky law focuses on the advice and consultation of a professional, and the Supreme Court’s decision to classify an activity as “unauthorized practice” seems to turn on whether the lawyer (or non-lawyer) utilized his or her professional judgment. Providing blank forms or closing a business deal does not involve the “legal knowledge or legal advice” required under SCR 3.020 to rise to the classification of “practice of law,” but the assistance provided to complete such forms does rise to that classification.

### *B. What Services Does LegalZoom Provide?*

The increase in notoriety and controversy of online legal aid highlights what many lawyers already knew: the practice of law has evolved drastically in its scope and its use of tools, but it has changed less in kind than perhaps any other area of the U.S. economy.<sup>32</sup> As the economy grew through the rise of technology and manufacturing, intellect proved impossible to mechanize, and thus, such professionals who provide complex decision-making have survived despite trends of automation.<sup>33</sup> Enter LegalZoom, founded by Brian Liu, Brian Lee, and Edward Hartman,<sup>34</sup> to combine “the power of online technology with deep legal experience.”<sup>35</sup>

LegalZoom.com, Inc., a Delaware corporation with a principle place of business in California, is an internet-based company that provides forms for both business and personal needs, such as articles of incorporation, copyright documents,

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<sup>30</sup> Unauthorized Practice of Law Op. U-63, *supra* note 27, at 4; *see also* Ky. State Bar Ass’n v. First Fed. Sav. & Loan Ass’n of Covington, 342 S.W.2d 397, 398–99 (Ky. 1960).

<sup>31</sup> KY. SUP. CT. R. 3.022.

<sup>32</sup> Benjamin H. Barton, *The Lawyer’s Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3069 (2014).

<sup>33</sup> *Id.*

<sup>34</sup> Daniel Fisher, *Entrepreneurs Versus Lawyers*, FORBES (Oct. 5, 2011, 6:00 PM), <http://www.forbes.com/forbes/2011/1024/entrepreneurs-lawyers-suh-legalzoom-automate-daniel-fisher.html> [<https://perma.cc/2Y7C-KEQR>].

<sup>35</sup> LegalZoom.com, Inc., Registration Statement (Amendment No. 1 to Form S-1) (June 4, 2012), <http://www.sec.gov/Archives/edgar/data/1286139/000104746912006446/a2209713zs-1a.htm> [<https://perma.cc/8UVF-Q5ML>] (last visited Jan. 21, 2017).

wills, trusts, divorce decrees, and real estate documents.<sup>36</sup> According to LegalZoom, these forms “have been accepted by courts and government agencies in all 50 states.”<sup>37</sup> Its website advertises, “Let us help you protect all that matters easily and affordably.”<sup>38</sup>

LegalZoom is either an online provider of legal documents or an online provider of legal services; however, lawyers, courts, and even the company itself cannot decide which description is correct.<sup>39</sup> At the bottom of each page on its website, LegalZoom includes a disclaimer that reads: “We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.”<sup>40</sup> Yet, LegalZoom *does* provide advice, specifically in the utilization of interactive forms, such as one to determine which estate planning documents fit an individual’s specific legal needs based on location, marital status, and an individual’s desires.<sup>41</sup> Furthermore, LegalZoom is described as an “online service that helps people create their own legal documents.”<sup>42</sup>

To use LegalZoom, a customer selects a document he or she wishes to complete from choices which include business formation documents; business planning documents; divorce agreements; will and trust formation documents; and copyright, trademark, and patent applications.<sup>43</sup> LegalZoom then prompts a customer to begin a questionnaire using an online decision tree.<sup>44</sup> Once a customer enters his or her answer or selects a choice from a list, the automated decision tree begins adding or skipping questions based on the customer’s answer.<sup>45</sup> When creating a will, for example, the questionnaire asks the customer about his or her children, and—if the customer indicates they do not have children—the automated decision tree skips any remaining questions pertaining to children.<sup>46</sup> While this process is completely automated, information relevant to the customer’s choices sometimes appears on screen, occasionally followed by suggestions of actions taken by other similarly-situated customers.<sup>47</sup> LegalZoom then compiles a data file from the customer’s responses and an employee reviews the file for things like spelling

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<sup>36</sup> *Id.*

<sup>37</sup> *Trademark Registration*, LEGALZOOM, [http://www.legalzoom.com/trademarks/trademarks-overview\\_v1.html](http://www.legalzoom.com/trademarks/trademarks-overview_v1.html) [<https://perma.cc/R4PB-G5D7>] (last visited Jan. 21, 2017).

<sup>38</sup> LEGALZOOM, *supra* note 1.

<sup>39</sup> Figueras, *supra* note 8, at 1419–20.

<sup>40</sup> LEGALZOOM, *supra* note 1.

<sup>41</sup> *See, e.g., Estate Planning*, LEGALZOOM, <http://www.legalzoom.com/personal/estate-planning/help-me-decide.html> [<https://perma.cc/3J65-7QYY>] (last visited Jan. 21, 2017).

<sup>42</sup> Dorie Clark, *Could You Sell Your Business If You Wanted To?*, FORBES (Mar. 10, 2012, 11:17 AM), <http://www.forbes.com/sites/dorieclark/2012/03/10/could-you-sell-your-business-if-you-wanted-to/#a96f5ac61101> [<https://perma.cc/3CSQ-WFR2>].

<sup>43</sup> LEGALZOOM, *supra* note 1.

<sup>44</sup> *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1055 (W.D. Mo. 2011).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*



and grammar.<sup>48</sup> LegalZoom does not state what qualifications this employee has. In fact, LegalZoom only explains that a “document scrivener” reviews the answers customers provide.<sup>49</sup> After employee review, the LegalZoom software automatically merges the data file with the selected template, which contains standardized language, previously created by attorneys, from LegalZoom’s forms bank.<sup>50</sup> Once a customer enters information, the software does not alter the customer’s language.<sup>51</sup> An employee reviews the document to correct discrepancies in formatting and then sends the customer a copy of the unsigned document, which the customer may review, sign, execute, and use at her convenience.<sup>52</sup> The customer does not see the finalized purchased product until they receive it via email or mail.<sup>53</sup> LegalZoom claims that customer service providers receive extensive training to ensure that they do not provide legal advice or recommendations to customers, and LegalZoom maintains that disobeying such training would result in dismissal from the company.<sup>54</sup>

To speak with an attorney, LegalZoom requires a subscription to one of its designated legal plans, which are available in increments of six or twelve months for a flat rate instead of hourly fee.<sup>55</sup> Customers do not need to purchase a legal plan, however, to take advantage of LegalZoom services. Basic business plans, which do not incorporate a legal service plan, include the filing of state documents, a registered agent, and a “compliance calendar,” which checks state laws that apply to the business and provides alerts for required documents and fees.<sup>56</sup> Alternatively, customers can use the website to create their own divorce agreement, as LegalZoom provides a “step-by-step process” on how to file the settlement agreement.<sup>57</sup> LegalZoom also provides the instruments and documents needed to form and run a business, create a will or trust, and satisfy a variety of other personal legal needs.<sup>58</sup>

LegalZoom asserts that customers create such paperwork themselves, rather than that LegalZoom creates such paperwork for customers; therefore, LegalZoom resembles a legal formbook on this front, rather than a law practice.<sup>59</sup> However, other pieces of the “self-help” information cause LegalZoom to slide into the gray

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<sup>48</sup> *Id.*

<sup>49</sup> *Peace of Mind Review*, LEGALZOOM, <https://www.legalzoom.com/assets/modals/modal-legalzoom-peace-of-mind-review.html> [<https://perma.cc/56CH-JDB7>] (last visited Jan. 21, 2017).

<sup>50</sup> *Janson*, 802 F. Supp. 2d at 1055.

<sup>51</sup> *Id.* at 1056.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Business Advisory Plan*, LEGALZOOM, <http://www.legalzoom.com/attorneys/legal-plans/business.html> [<https://perma.cc/MH7X-3LWC>] (last visited Jan. 21, 2017).

<sup>56</sup> *Our Business Products*, LEGALZOOM, <https://www.legalzoom.com/business/> [<https://perma.cc/4326-WHQK>] (last visited Jan. 21, 2017).

<sup>57</sup> *Contested Divorce*, LEGALZOOM, <https://www.legalzoom.com/personal/marriage-and-divorce/weorce-overview.html> [<https://perma.cc/GH5D-X7YS>] (last visited Jan. 21, 2017).

<sup>58</sup> LEGALZOOM, *supra* note 1.

<sup>59</sup> *Figueras*, *supra* note 8, at 1426.

area of whether LegalZoom is engaging in the unauthorized practice of law. First, LegalZoom offers interactive forms to assist customers in determining which business structure is “right,”<sup>60</sup> and to determine which estate planning documents are “right.”<sup>61</sup> Also, many of LegalZoom’s documents include “lifetime customer support” and “Peace of Mind Review,”<sup>62</sup> where document scriveners personally review the answers provided to the website.<sup>63</sup> In some documents, including divorce actions, LegalZoom creates the settlement agreement for a customer, based on answers to a questionnaire.<sup>64</sup> The customization of forms and review of the product may push LegalZoom into the realm of unauthorized legal practice through document preparation,<sup>65</sup> but the instances where LegalZoom admits to creating a document suggest LegalZoom explicitly engages in the practice of law.

### C. What About Other Online Legal Service Providers?

While LegalZoom is the focus of this Note, other online legal service providers exist in a variety of capacities. These companies have been classified into two major groups: legal forms providers and legal services providers. These providers are discussed in summary below. Websites that merely deliver legal forms without legal services are outside the scope of this Note.

The *Entrepreneur* magazine maintains a “Business Form Template Gallery,” complete with several types of legal forms that a customer can download and fill in.<sup>66</sup> These forms are powered by a platform named SeamlessDocs, which carries its own terms of service.<sup>67</sup> Neither SeamlessDocs nor *Entrepreneur* offers a service for legal advice. Neither website contains a questionnaire or a survey to assist customers in choosing the best form for their business needs. *Entrepreneur* sorts forms according to the nature of business, but such forms are not generally legal in content.<sup>68</sup> For example, under the category “Childcare,” the website provides blank forms such as “Babysitter Request Forms,” “Childcare Emergency Contact,” or “Daycare Enrollment Form,” all of which are forms for use in the ordinary course

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<sup>60</sup> *What Business Type is Right for You?*, LEGALZOOM, [http://www.legalzoom.com/business/guide\\_intro.html](http://www.legalzoom.com/business/guide_intro.html) [<https://perma.cc/8XJU-PVF9>] (last visited Jan. 21, 2017).

<sup>61</sup> *Not Sure Which Estate Planning Documents Are Right for You?*, LEGALZOOM, <http://www.legalzoom.com/personal/estate-planning/help-me-decide.html#> [<https://perma.cc/87LM-8CKQ>] (last visited Jan. 21, 2017).

<sup>62</sup> *See, e.g., Divorce Pricing*, LEGALZOOM, <https://www.legalzoom.com/personal/marriage-and-divorce/divorce-pricing.html> [<https://perma.cc/3DLV-7D6S>] (last visited Jan. 21, 2017).

<sup>63</sup> *Peace of Mind Review*, *supra* note 49.

<sup>64</sup> *Divorce Pricing*, LEGALZOOM, *supra* note 62.

<sup>65</sup> Figueras, *supra* note 8, at 1426.

<sup>66</sup> *Business Form Template Gallery*, ENTREPRENEUR, <http://forms.entrepreneur.com/general-legal-forms> [<https://perma.cc/2AUW-7ENW>] (last visited Jan. 21, 2017).

<sup>67</sup> *Terms of Service*, SEAMLESSDOCS, <https://seamlessdocs.com/tos.html> [<https://perma.cc/G9D9-24YZ>] (last visited Jan. 21, 2017).

<sup>68</sup> *Business Form Template Gallery*, *supra* note 66.

of business rather than the legal process of creating a business.<sup>69</sup> Only forms under the category “General Legal Forms” are legal in nature, but such forms do not include helpful tips or legal advice. Instead, *Entrepreneur* operates similarly to a legal form provider rather than a legal service provider. Websites such as FindLegalForms<sup>70</sup> and LawDepot<sup>71</sup> similarly provide a library of legal forms without interactive questionnaires guiding customers on which forms they need.

Likewise, Nolo publishes “do-it-yourself legal guides” for a variety of legal matters.<sup>72</sup> Customers purchase books from Nolo, which include a discussion of legal information relevant to the topic, as well as access to downloadable forms.<sup>73</sup> These products classify Nolo as a legal form provider rather than a legal service provider. Nolo also offers Quicken WillMaker Plus, however, which may be more like a legal service because the software guides customers through the process of creating a will.<sup>74</sup>

U.S. Legal Forms claims to provide legal information, not legal advice.<sup>75</sup> U.S. Legal Forms, however, operates in much the same way as LegalZoom. U.S. Legal Forms offers “completion services” where a customer completes a questionnaire and U.S. Legal Forms completes the form.<sup>76</sup> U.S. Legal Forms does not have the interactive forms instructing customers which forms are best for the situation, but does provide “preparation services” that ensure quality and completion of each submitted form.<sup>77</sup> U.S. Legal Forms seems to operate as a legal service provider because it assists customers with filing paperwork as opposed to companies that simply provide legal forms.

Rocket Lawyer provides legal services to individuals, families, and business owners.<sup>78</sup> While much of the website is dedicated to articles containing legal information designed to assist a non-lawyer understand legal concepts, Rocket Lawyer also advertises that members may have their documents reviewed by an

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<sup>69</sup> *Childcare*, ENTREPRENEUR, <http://forms.entrepreneur.com/childcare> [https://perma.cc/4Q9X-P2GM] (last visited Jan. 21, 2017).

<sup>70</sup> FINDLEGALFORMS, <http://www.findlegalforms.com> [https://perma.cc/A8GB-UQVT] (last visited Jan. 21, 2017).

<sup>71</sup> LAWDEPOT, <http://www.lawdepot.com> [https://perma.cc/3AZ9-V62P] (last visited Jan. 21, 2017).

<sup>72</sup> *About Us*, NOLO, <http://www.nolo.com/about.html> [https://perma.cc/JZF7-MDTL] (last visited Jan. 21, 2017).

<sup>73</sup> *Legal Forms and Online Documents, Books, and Software*, NOLO, <http://www.nolo.com/products/> [https://perma.cc/3DZT-MPXW] (last visited Jan. 21, 2017).

<sup>74</sup> *Quicken WillMaker Plus 2017*, NOLO, <http://store.nolo.com/products/quicken-willmaker-plus-wqp.html?> [https://perma.cc/ZCL9-ELU2] (last visited Jan. 22, 2017).

<sup>75</sup> *Disclaimer*, U.S. LEGAL FORMS, <http://www.uslegalforms.com/help2/disclaimer/> [https://perma.cc/AZ7F-8X3Y] (last visited Jan. 21, 2017).

<sup>76</sup> U.S. LEGAL FORMS, <http://www.uslegalforms.com> [https://perma.cc/G6MK-ZYDD] (last visited Jan. 22, 2017).

<sup>77</sup> *Id.*

<sup>78</sup> *About Us*, ROCKET LAWYER, <https://www.rocketlawyer.com/about-us.r1> [https://perma.cc/JU68-PR8J] (last visited Jan. 22, 2017).

attorney at no additional cost.<sup>79</sup> Rocket Lawyer’s Terms of Service provides a disclaimer stating that Rocket Lawyer does not provide legal services or advice.<sup>80</sup> Rocket Lawyer specifies that any professional legal advice is the product of a licensed attorney with whom Rocket Lawyer connects the customer, not the product of Rocket Lawyer.<sup>81</sup> Rocket Lawyer, however, does have an interactive application recommending the best business format for a customer based on the business goals indicated by the customer.<sup>82</sup>

## II. ANALYSIS—HOW HAVE OTHER STATES RULED?

Only a few other states have recorded case law concerning the unauthorized practice of law in relation to online legal providers. In particular, South Carolina, Missouri, North Carolina, and Ohio each decided lawsuits naming LegalZoom as a party. The Supreme Court of South Carolina found LegalZoom does not engage in the unauthorized practice of law.<sup>83</sup> In contrast, the Federal District Court of Missouri ruled LegalZoom had violated Missouri state law because its services qualified as the unauthorized practice of law.<sup>84</sup> Courts in neither Ohio nor North Carolina, however, ruled one way or another. Ohio began to address the issue but then ruled the court had no standing unless the Supreme Court decided that LegalZoom engaged in the unauthorized practice of law, which has yet to occur.<sup>85</sup> North Carolina found LegalZoom violated several regulations but did not address whether such violations constituted unauthorized practice of law.<sup>86</sup>

### *A. South Carolina: LegalZoom Does Not Engage in the Unauthorized Practice of Law*

Travis Medlock sued LegalZoom in South Carolina in 2013 for the unauthorized practice of law.<sup>87</sup> LegalZoom decided to settle the case, but the

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<sup>79</sup> *What We Do*, ROCKET LAWYER, <https://www.rocketlawyer.com/what-we-do.rl> [<https://perma.cc/WP36-2U4X>] (last visited Jan. 22, 2017).

<sup>80</sup> *Terms of Service*, ROCKET LAWYER, <https://www.rocketlawyer.com/terms-and-conditions.rl> [<https://perma.cc/WG46-E7MN>] (last visited Jan. 22, 2017).

<sup>81</sup> *Document Defense Terms of Service*, ROCKET LAWYER, <https://www.rocketlawyer.com/document-defense-terms-of-service.rl> [<https://perma.cc/C5FF-JLYR>] (last visited Jan. 22, 2017).

<sup>82</sup> *Choosing a Business Structure?*, ROCKET LAWYER, <https://www.rocketlawyer.com/business-structure-comparison.rl> [<https://perma.cc/72DY-M46C>] (last visited Jan. 22, 2017).

<sup>83</sup> *Medlock v. LegalZoom.Com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362, at \*26–27 (S.C. Oct. 18, 2013).

<sup>84</sup> *See Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1065 (W.D. Mo. 2011).

<sup>85</sup> *Lowry v. LegalZoom.Com, Inc.*, No. 4:11CV02259, 2012 U.S. Dist. LEXIS 100155, at \*4, 6–8 (N.D. Ohio July 19, 2012) (noting that the Supreme Court has the sole power to determine that a person has engaged in the unauthorized practice of law).

<sup>86</sup> *LegalZoom.Com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2015 NCBC 96, at \*3 (N.C. Oct. 22, 2015).

<sup>87</sup> *Medlock*, 2013 S.C. LEXIS 362, at \*2–3.

Supreme Court of South Carolina designated a special referee to determine whether or not LegalZoom engaged in the unauthorized practice.<sup>88</sup> South Carolina permits non-lawyers to sell blank legal forms or books or computer software simply containing blank forms.<sup>89</sup> Preparing legal documents for others, however, “constitutes the practice of law when such preparation involves the giving of advice, consultation, explanation, or recommendations on matters of law.”<sup>90</sup> A special referee for the Supreme Court of South Carolina found LegalZoom did not offer legal advice to anyone based on the terms of use provided by LegalZoom.<sup>91</sup> These terms of service state:

The LegalZoom Services also include a review of your answers for completeness, spelling, and for internal consistency of names, addresses and the like. At no time do we review your answers for legal sufficiency, draw legal conclusions, provide legal advice, opinions or recommendations about your legal rights, remedies, defenses, options, selection of forms, or strategies, or apply the law to the facts of your particular situation. LegalZoom is not a law firm and may not perform services performed by an attorney. LegalZoom, its Services, and its forms or templates are not a substitute for the advice or services of an attorney.<sup>92</sup>

Instead, the appointed referee recommended to the Supreme Court of South Carolina to find that LegalZoom constituted a mere “scrivener” who does not engage in the unauthorized practice of law simply by preparing legal documents.<sup>93</sup> The court compared the practices of LegalZoom to the practices in *Franklin v. Chavis*.<sup>94</sup> In *Franklin*, Chavis used Quicken Lawyer Disk to prepare a will for Weiss and later supervised the will’s execution, even though Chavis was not a licensed attorney.<sup>95</sup> No evidence existed to prove Chavis simply recorded Weiss’s instructions and transferred the information to a form.<sup>96</sup> Thus, under South Carolina law, Chavis participated in the unauthorized practice of law by providing legal assistance to Weiss, not by his use of Quicken software.<sup>97</sup> In contrast to

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<sup>88</sup> *Id.* at \*3. In legal situations, a “special referee” acts as a judge, but only as to matters of fact, not law. S.C. CODE ANN. § 14-3-340 (West 2016). Typically, a special referee is appointed when the statutes or law is completely clear, but depends on undetermined matters of fact. *Id.*

<sup>89</sup> South Carolina v. Despain, 460 S.E.2d 576, 578 n.2 (S.C. 1995).

<sup>90</sup> *Id.* at 578.

<sup>91</sup> *Medlock*, 2013 S.C. LEXIS 362, at \*26–27.

<sup>92</sup> *Terms of Use*, LEGALZOOM, <https://www.legalzoom.com/legal/general-terms/terms-of-use> [<https://perma.cc/V3BN-X48D>] (last updated Oct. 16, 2015).

<sup>93</sup> *Medlock*, 2013 S.C. LEXIS 362, at \*17–18. This decision seems inconsistent with LegalZoom’s Estate Planning Filter. If LegalZoom provides a questionnaire to assist customers’ choice of legal forms, LegalZoom appears not exist as a mere “scrivener,” but rather provides legal assistance.

<sup>94</sup> *Id.* at \*17–23.

<sup>95</sup> *Franklin v. Chavis*, 640 S.E.2d 873, 875 (S.C. 2007).

<sup>96</sup> *Id.* at 875, 877.

<sup>97</sup> *Id.* at 876–77; see also *Medlock*, 2013 S.C. LEXIS 362, at \*23.

*Franklin*, the Supreme Court of South Carolina found that LegalZoom’s business practices did not constitute the practice of law.<sup>98</sup>

*B. Missouri: LegalZoom is Engaged in the Unauthorized Practice of Law*

In 2010, Todd Janson and a certified class of plaintiffs filed suit alleging that LegalZoom engaged in the unauthorized practice of law in violation of Missouri law.<sup>99</sup> Missouri prohibits the practice of law by any person not licensed in Missouri.<sup>100</sup> Missouri defines the practice of law as:

[T]he 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.<sup>101</sup>

In its opinion, the District Court compared the practices of LegalZoom to the practices in two other Missouri cases: one involving a “do-it-yourself” divorce kit<sup>102</sup> and another involving a real estate agent who prepared legal documents for others.<sup>103</sup> The divorce kit is lawful, providing an acceptable means of assistance in legal matters,<sup>104</sup> while the preparation of documents is the unauthorized practice of law.<sup>105</sup> The court found that LegalZoom’s services extend “beyond mere general instruction;” the sale of its services is predicated on the notion that LegalZoom would complete the documents for the customer.<sup>106</sup> The court determined that a business may sell legal goods to aid customers in their own preparations, including blank documents and general information, but cannot charge fees for a legal document preparation service.<sup>107</sup> Because the employees intervened at numerous stages of the so-called “self-help” services, the court concluded that LegalZoom goes “beyond the role of a notary or public stenographer.”<sup>108</sup>

The District Court, however, explicitly stated that LegalZoom’s sale of forms did not violate Missouri law because that itself did not constitute the unauthorized

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<sup>98</sup> *Medlock*, 2013 S.C. LEXIS 362, at \*26–27.

<sup>99</sup> *Janson v. LegalZoom.com, Inc.*, 271 F.R.D. 506, 508 (W.D. Mo. 2010).

<sup>100</sup> MO. ANN. STAT. § 484.020 (West 2016).

<sup>101</sup> MO. ANN. STAT. § 484.010 (West 2016).

<sup>102</sup> *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1059–60, 1063–65 (W.D. Mo. 2011) (citing *In re Thompson*, 574 S.W.2d 365 (Mo. 1978)).

<sup>103</sup> *Id.* at 1059, 1064–65 (citing *Hulse v. Criger*, 247 S.W.2d 855 (Mo. 1952)).

<sup>104</sup> *Id.* at 1053, 1059–60, 1063–65 (citing *In re Thompson*, 574 S.W.2d 365 (Mo. 1978)).

<sup>105</sup> *Id.* at 1059, 1064–65 (citing *Hulse v. Criger*, 247 S.W.2d 855 (Mo. 1952)).

<sup>106</sup> *Id.* at 1063.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1064.

practice of law, and that the delivery of the forms via Internet did not matter in the determination, but only mattered for the multiple levels of guidance necessary to create the finalized product.<sup>109</sup> But the District Court found significance in how a LegalZoom employee drafted the online questionnaire and decision tree using his or her knowledge of Missouri law.<sup>110</sup> The means of communication matter little to the practice of law: “There is little or no difference between [the online decision tree] and a lawyer in Missouri asking a client a series of questions and then preparing a legal document based on the answers provided and applicable Missouri law.”<sup>111</sup> LegalZoom charges a fee for its services. Because the customer provides information and LegalZoom completes the rest, in Missouri LegalZoom has engaged in the unauthorized practice of law.<sup>112</sup>

### *C. Ohio: Declined to Rule on LegalZoom*

In 2012, Christopher Lowry, a private plaintiff, sued LegalZoom for engaging in the unauthorized practice of law.<sup>113</sup> Ohio law prohibits anyone not licensed in Ohio from practicing law or representing to the public that he or she is authorized to practice law in Ohio.<sup>114</sup> Ohio allows a private plaintiff to pursue a claim for the unauthorized practice of law, but only after the Supreme Court of Ohio makes a finding that the other party engaged in unauthorized practice.<sup>115</sup> The District Court for the Northern District of Ohio granted LegalZoom’s motion to dismiss only because the Supreme Court of Ohio had not yet made a decision on whether LegalZoom’s activities constituted the unauthorized practice of law, and therefore the District Court did not have jurisdiction over Lowry’s claim.<sup>116</sup> The Supreme Court of Ohio still has not determined whether LegalZoom’s practices rise to the level of the unauthorized practice of law.

Ohio has determined, however, that when a nonattorney selects the appropriate form for a customer to complete, that person has engaged in the unauthorized practice of law.<sup>117</sup> Furthermore, the Ohio Board on the Unauthorized Practice of Law (“the Ohio Board”) issued an advisory opinion in 2008, stating, “Legal document preparation by nonattorneys in Ohio is limited by application of existing

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1065.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Lowry v. LegalZoom.Com, Inc.*, No. 4:11CV02259, 2012 U.S. Dist. LEXIS 100155, at \*1 (N.D. Ohio July 19, 2012).

<sup>114</sup> OHIO REV. CODE ANN. § 4705.07(A) (LexisNexis 2016).

<sup>115</sup> *Lowry*, 2012 U.S. Dist. LEXIS 100155, at \*6–7.

<sup>116</sup> *Id.* at \*8–10.

<sup>117</sup> *Cleveland Bar Ass’n v. McKissic*, 832 N.E.2d 49, 50–51 (Ohio 2005).

case law to the traditional and permissible activities of a scrivener.”<sup>118</sup> The Ohio Board listed “additional aids” of online providers such as: (a) customer representatives that answer questions about how to fill out forms via telephone or online chat; (b) assistance in reviewing customers’ documents; (c) assistance in filing documents; and (d) assistance via advice, consultation, recommendations, or explanations of forms.<sup>119</sup> According to the Ohio Board, the presence of these “additional aids” may support a conclusion that an online form preparation service is in fact engaged in the unauthorized practice of law.<sup>120</sup> Thus, while the Ohio Supreme Court has not ruled on LegalZoom’s practices specifically, the Ohio Board has outlined services that would be considered the unauthorized practice of law, each of which LegalZoom provides.

#### *D. North Carolina: Declined to Rule on LegalZoom*

North Carolina perhaps has the lengthiest history of conflict between its state bar association and LegalZoom. In 2003, the North Carolina State Bar began its first inquiry into LegalZoom’s practices but later terminated the inquiry when the evidence was insufficient to support a finding of the unauthorized practice of law.<sup>121</sup> In 2007, the North Carolina State Bar began a second inquiry, which, by early 2008, resulted in a cease and desist letter prohibiting LegalZoom from offering services to North Carolina residents.<sup>122</sup> LegalZoom disregarded the letter and continued to provide services in North Carolina.<sup>123</sup> In 2010, LegalZoom attempted to register its prepaid legal plans with the North Carolina State Bar, but the State Bar refused to register the plans.<sup>124</sup> LegalZoom then sued the North Carolina State Bar, claiming the State Bar exceeded its statutory power by refusing to register LegalZoom’s service plans.<sup>125</sup> In its 2014 decision, the North Carolina Superior Court ruled that the State Bar had authority to determine whether LegalZoom’s legal services plan conformed to the statutory requirements.<sup>126</sup> In 2015 the parties entered a consent judgment, thereby agreeing upon which practices LegalZoom may participate in without engaging in the practice of law.<sup>127</sup> The court order

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<sup>118</sup> Bd. on the Unauthorized Practice of Law of the Superior Court of Ohio, Advisory Op. UPL 2008-03, at 1 (2008), [http://www.supremecourt.ohio.gov/Boards/UPL/advisory\\_opinions/UPLAdvOp\\_08\\_03.pdf](http://www.supremecourt.ohio.gov/Boards/UPL/advisory_opinions/UPLAdvOp_08_03.pdf) [<https://perma.cc/7NY8-2CYU>].

<sup>119</sup> *Id.* at 2–3.

<sup>120</sup> *Id.* at 3.

<sup>121</sup> *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2012 NCBC 47, at \*13 (N.C. Aug. 27, 2012).

<sup>122</sup> *Id.* at \*14–16.

<sup>123</sup> *Id.* at \*19.

<sup>124</sup> *Id.* at \*20–21.

<sup>125</sup> *Id.* at \*7.

<sup>126</sup> *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2014 NCBC 9, at \*22 (N.C. Mar. 24, 2014).

<sup>127</sup> *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111, 2015 NCBC 96, at \*2 (N.C. Oct. 22, 2015).



outlined changes LegalZoom must make in its service plans in North Carolina, but the court did not rule on whether LegalZoom's service plans constituted the unauthorized practice of law.<sup>128</sup> Furthermore, nothing in the order constitutes LegalZoom's admission of unauthorized practice.<sup>129</sup>

*E. Other Notable Advisory Opinions: Pennsylvania and Connecticut*

The Connecticut Unauthorized Practice of Law Committee ("the Connecticut Committee") reviewed the activities of legal document providers, namely LegalZoom and We the People.<sup>130</sup> Both providers claimed attorneys or experts supervised the work and production of legal documents.<sup>131</sup> After review, the Connecticut Committee found both providers to be engaged in the unauthorized practice of law.<sup>132</sup> The supervision of attorneys or experts would be an unnecessary expense if the company only provided a scrivener service, adding value only if the company was indeed purporting to give legal advice.<sup>133</sup> Because both websites provided more than mere forms and documents for a customer to complete, the Connecticut Committee determined both entities engaged in the unauthorized practice of law.<sup>134</sup>

The Pennsylvania Bar Association Unauthorized Practice of Law Committee ("the Pennsylvania Committee") reviewed the activities of legal document preparation services, provided both in-person and online.<sup>135</sup> Relying on the opinions and decisions of several other states,<sup>136</sup> the Pennsylvania Committee determined, "[T]he offering or providing [in Pennsylvania] of legal document preparation services . . . (beyond the supply of preprinted forms selected by the consumer not the legal document preparation service), either online or at a site in Pennsylvania is the unauthorized practice of law."<sup>137</sup> In the opinion, the Pennsylvania Committee addressed LegalZoom's assertion of "reliable" legal documents specifically: "The term 'reliable' is obviously intended to convey the meaning that the document is enforceable under governing law."<sup>138</sup> For the

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<sup>128</sup> *Id.* at \*1-2.

<sup>129</sup> *Id.* at \*3.

<sup>130</sup> Conn. Unauthorized Practice of Law Comm., Informal Op. 2008-01, at 1 (2008), [http://c.ybcdn.com/sites/www.ctbar.org/resource/group/776a1a25-71dc-4190-95d2-4793e945208a/Unauthorized\\_Practice\\_of\\_Law\\_Committee/08-01.pdf](http://c.ybcdn.com/sites/www.ctbar.org/resource/group/776a1a25-71dc-4190-95d2-4793e945208a/Unauthorized_Practice_of_Law_Committee/08-01.pdf) [<https://perma.cc/JS8V-YJ46>].

<sup>131</sup> *Id.* at 3.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *See generally* Pa. Bar Ass'n Unauthorized Practice of Law Comm., Formal Op. 2010-01 (2010).

<sup>136</sup> In the opinion, the Pennsylvania Committee analyzed the Connecticut Unauthorized Practice of Law Committee's Informal Opinion 2008-01, the Supreme Court of Ohio Advisory Opinion on Unauthorized Practice of Law 2008-03, and *LegalZoom.Com, Inc. v. North Carolina State Bar*. *See generally id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at n.9.

Pennsylvania Committee, nonattorneys who perform more than simple clerical duties of form completion engage in the unauthorized practice of law.

### III: ANALYSIS—HOW SHOULD KENTUCKY RULE?

The issues regarding LegalZoom and other online providers that have been presented in other state courts have yet to reach Kentucky, but with the recent litigation in Missouri and North Carolina, the issue may arise within the state in the near future. In order to determine how Kentucky should rule, Kentucky courts must first consider the ever-elusive definition of “practice of law,” and whether LegalZoom actually participates in the practice. If LegalZoom does not engage in the practice of law, no conflict exists and LegalZoom may continue operations on the same scale. If LegalZoom does engage in the practice of law, however, Kentucky must decide whether to continue allowing LegalZoom to offer legal services, and if so, in what capacity. Each challenge to the validity of LegalZoom’s services has turned on the state’s definition of the practice of law.

The Supreme Court of Kentucky has the exclusive authority to declare and enforce rules governing the practice of law in Kentucky.<sup>139</sup> The practice of law includes any service rendered involving legal knowledge or advice, whether through representation, counsel, or advocacy.<sup>140</sup> In South Carolina, where the practices of LegalZoom are not barred as “unauthorized practice,” the meaning of “practice of law” is not defined, but rather is determined based on the facts of the case.<sup>141</sup> According to case law, however, legal document preparation is considered the practice of law when the preparation of such documents involves consultation, recommendations, advice, and experience of the attorney as to relevant matters of law.<sup>142</sup> In Missouri, where the services of LegalZoom are considered “unauthorized practice,” the court defines the practice of law as the appearance of a representative 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.”<sup>143</sup> Missouri finds that document preparation (“the drawing of papers”) automatically qualifies as being the practice of law, whereas South Carolina requires advice and consultation by the attorney before the services are considered practice. Thus, at first blush, Kentucky’s definition appears similar to the definition provided by South Carolina: document preparation does not rise to the level of “practice of law” unless advice, consultation, and professional opinion are required to prepare the documents.

Missouri case law shows a much narrower definition and establishes a sliding scale between the sale of blank forms, however, which require very little expertise,

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<sup>139</sup> *Turner v. Ky. Bar Ass’n*, 980 S.W.2d 560, 562–63 (Ky. 1998).

<sup>140</sup> KY. SUP. CT. R. 3.020.

<sup>141</sup> *In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar*, 422 S.E.2d 123, 124 (S.C. 1992).

<sup>142</sup> *South Carolina v. Despain*, 460 S.E.2d 576, 578 (S.C. 1995).

<sup>143</sup> MO. ANN. STAT. § 484.010 (West 2016).

and full attorney consultations.<sup>144</sup> While the statute does seem different from the statutes in South Carolina and Kentucky, the application appears the same. Missouri found LegalZoom in violation of the prohibition against unauthorized practice because of the continuing aid LegalZoom provides its customers throughout the process.<sup>145</sup>

Thus, Kentucky should find LegalZoom to be engaged in the practice of law. LegalZoom does not simply provide blank forms with instructions, but, rather, attempts to guide the customer throughout the entire process. Even if the assistance is elemental and basic, the employees must maintain a working knowledge of the law so as to better design the website. The program is interactive and the questions are the same as those asked by an attorney. The Supreme Court of South Carolina erred: the LegalZoom documents do require the experience of a licensed attorney. A licensed South Carolina attorney helped design the questions and designed the interactive decision tree such that the program would design the proper forms. Furthermore, some level of expertise is needed to review the documents, even for simply completeness.<sup>146</sup> Some level of legal knowledge, specific to a customer's needs, is necessary to determine which parts of the document can be left blank and which parts must be completed entirely. Simply hiding behind the Internet does not alleviate these problems; no difference exists when a customer submits the document to LegalZoom for review or when a person takes the document to a non-lawyer who generally knows how to complete the form. A customer does not need someone to review the document for spelling and grammar; the customer can complete that task individually. The customer relies on LegalZoom to review the document for legal correctness; otherwise, the customer would simply download the form for free. If customers did not expect legal expertise from LegalZoom, why would they pay for those services? If LegalZoom did not provide such expertise, why do they continue to attract customers and receive high reviews? Despite the disclaimers, the services LegalZoom offers cross the line from "document provider" to "legal service provider." Thus, LegalZoom *necessarily* engages in the practice of law as defined in Kentucky.

To practice law in Kentucky, one must first meet the educational and character requirements, and, second, one must be admitted to the Bar Association, subject to the Kentucky Rules of Professional Conduct and subject to discipline by the Kentucky Bar Association—unless, if, and only if, a layperson is representing himself or herself.<sup>147</sup> In Kentucky, no corporation is allowed to practice law as defined by Kentucky SCR 3.020.<sup>148</sup> LegalZoom is a corporation and thus cannot practice law. Therefore, if LegalZoom has engaged in the practice of law at all, it is necessarily in violation of Kentucky rules. Furthermore, LegalZoom is not admitted to the Kentucky Bar Association, and therefore cannot represent another

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<sup>144</sup> See generally *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053 (W.D. Mo. 2011).

<sup>145</sup> *Id.* at 1064.

<sup>146</sup> See *id.* at 1065.

<sup>147</sup> *May v. Coleman*, 945 S.W.2d 426, 428 (Ky. 1997).

<sup>148</sup> *Carter v. Trevathan*, 309 S.W.2d 746, 748 (Ky. 1956).

person. “A person is guilty of the unlawful practice of law when, without a license issued by the Supreme Court of Kentucky, he or she engages in the practice of law, as defined in SCR 3.020.”<sup>149</sup> Because LegalZoom does engage in the practice of law without admission to the bar and does exist as a corporation, LegalZoom is guilty of the unauthorized and unlawful practice of law in Kentucky. So, what to do with LegalZoom?

#### IV. OFFERED SOLUTIONS

##### *A. Option One: Bar LegalZoom From Kentucky*

Allowing LegalZoom to continue unauthorized practice creates a risk of an inadequate or even harmful outcome to consumers; attorney regulations aim to prevent the delivery of inadequate services and to provide sufficient remedies for inadequate representation when attorneys provide services.<sup>150</sup> “With minimal or no consequences resulting from sub-par legal instruments and services, LegalZoom has no incentives to ensure accuracy or quality.”<sup>151</sup> While LegalZoom limits its liability from inadequate forms,<sup>152</sup> licensed attorneys cannot enter into agreements limiting their liability unless another attorney independently represents the client.<sup>153</sup> The purpose of regulating the unauthorized practice of law is not to insulate lawyers from competition, but, instead, to protect the public from incompetent or unreliable persons offering legal advice.<sup>154</sup> Opting for cheaper alternatives or “do-it-yourself” kits may save money on the front end, but often result in other problems arising later, resulting in far more expensive legal costs than would an initial attorney consultation.<sup>155</sup> Public approval of these less expensive alternatives, evidenced by five-star ratings of LegalZoom’s services and a customer base of over three million, seems to indicate general satisfaction with LegalZoom.<sup>156</sup> But could this mean only that customers are unaware of the inadequacies? Customers who rate their experience immediately after completing a form likely have not considered and are ignorant of future risks or future consequences of using LegalZoom.

As one article states, the answer to a flawed legal system is not to allow non-lawyers to conduct legal activities requiring professional expertise:

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<sup>149</sup> *In re Lyvers*, 179 B.R. 837, 840 (Bankr. W.D. Ky. 1995).

<sup>150</sup> Cody Blades, *Crying Over Spilt Milk: Why the Legal Community is Ethically Obligated to Ensure LegalZoom’s Survival in the Legal Services Marketplace*, 38 *HAMLIN L. REV.* 31, 39–40 (2015).

<sup>151</sup> *Id.* at 40.

<sup>152</sup> *Terms of Use*, LEGALZOOM, *supra* note 92.

<sup>153</sup> KY. SUP. CT. R. 3.130(1.8)(h)(1).

<sup>154</sup> *Hulse v. Criger*, 247 S.W.2d 855, 857–58 (Mo. 1952).

<sup>155</sup> Pierce G. Hunter, Note, *Unauthorized Practice of Law: Driving Legal Business Without a License, LegalZoom, Inc., and Campbell v. Asbury Automotive, Inc.*, 2011 *Ark. 157*, 381 S.W.3d 21, 36 U. ARK. LITTLE ROCK L. REV. 201, 210 (2014).

<sup>156</sup> LEGALZOOM, *supra* note 138.

One of the most indispensable responsibilities of a licensed attorney is to recognize a case's potential complexity, especially when it hides beneath deceptive clarity. Being unable to decipher those problems—either through self-help or unlicensed help—can present such severe consequences that they have served as the justification for the heavily proscribed regulation of the legal profession.<sup>157</sup>

Allowing non-lawyers to perform legal services allows non-lawyers to operate outside of the established and necessary regulations and roles of an attorney and his or her relationship with the client.

Literature also suggests that courts may subpoena information from non-lawyers concerning their clients,<sup>158</sup> though the attorney-client privilege protects such disclosure of confidential information shared between an attorney and a client.<sup>159</sup> Without legal representation, consumers of LegalZoom's services may not understand the true risk, and may be deemed to have waived such protections without realizing the gravity of their decision. Furthermore, the well-established tradition of attorney-client privilege may create false security for consumers who believe LegalZoom protects their information. The very procedure needed to find and weigh this risk, searching through case law and statutes and applying that research to individual scenarios, requires a professional, legal opinion; and LegalZoom customers may believe LegalZoom employees have already weighed that risk. But LegalZoom has no duty of loyalty to the customer and does not avoid conflicts among customers, as required by ethical rules.<sup>160</sup> Therefore, it is the duty of the Kentucky Bar Association to protect the unsuspecting public by regulating the practice of law, and this necessarily means banning LegalZoom from operating in Kentucky. Executing such a prohibition, however, comes with other pitfalls.

### *B. Option Two: Allow LegalZoom to Continue Operations*

Despite the glaring inadequacies, LegalZoom provides inexpensive access to legal tools for individuals who want to start a business or resolve personal legal issues.<sup>161</sup> This helps satisfy a serious market need since almost eighty percent of the need for civil legal services in the eligible population is not met.<sup>162</sup> LegalZoom closes the justice gap and allows a greater number of people access to important services, such as creating wills and trusts. Thus, given the general reception of

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<sup>157</sup> Hunter, *supra* note 155, at 209 (internal footnotes omitted).

<sup>158</sup> *E.g.*, Cristina L. Underwood, Comment, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 441 (2004).

<sup>159</sup> KY. SUP. CT. R. 3.130(1.6).

<sup>160</sup> KY. SUP. CT. R. 3.130(1.7).

<sup>161</sup> *See generally* Blades, *supra* note 150, at 33.

<sup>162</sup> *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <http://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> [<https://perma.cc/VZ3Z-6AGD>] (last visited Jan. 22, 2017).

LegalZoom among communities, efforts to abolish LegalZoom would result in negative attention for the attorneys attempting to enforce regulations.<sup>163</sup> Many laypersons believe lawyers forbid and regulate the unauthorized practice of law merely as a means for lawyers to guard their market against “barbarians at the gate.”<sup>164</sup> Allowing LegalZoom to continue operations would avoid this possible outcry.

Additionally, LegalZoom has Constitutional First Amendment rights, just the same as any other entity, and such concerns are a high priority when any bar association attempts to suppress speech concerning the law.<sup>165</sup> Almost fifty years ago, Norman Dacey, a New York estate planner, wrote a book on how to avoid probate, prompting the New York County Lawyer’s Association to file an action to enjoin the book’s sale and distribution.<sup>166</sup> The New York Court of Appeals ruled in favor of Dacey, finding that the First Amendment protected his publication.<sup>167</sup> The opinion distinguished between a book discussing the law which is protected by the First Amendment, and the representation and advice given to a particular person based on his or her situation, which the court labeled the practice of law.<sup>168</sup>

A book is inherently different than services on the Internet. The Internet creates an interactive gray zone between a book protected by the First Amendment and an attorney consultation. Some websites provide mere information, while others, such as LegalZoom, are interactive. The court in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.* identified three types of websites: (1) a passive website, where a user can simply post information for others to access, (2) an interactive website, where a user can exchange information with the website, and (3) an active website, where a user can exchange files and conduct business using the website.<sup>169</sup> While *Zippo* considered websites for the purposes of personal jurisdiction, the same classifications are useful here. Passive websites are the technological equivalent of books; a website outlining how to avoid probate would be the counterpart of Dacey’s book and would thus be protected by the First Amendment. *Entrepreneur*, as discussed in Part I, exists similarly to a book because it merely provides the forms a customer might need; it does not suggest forms or outline which forms are necessary for the customer’s business. *Entrepreneur* customers must pick and choose their own forms without help from the website. But an interactive or active website does more than simply provide information. By

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<sup>163</sup> Benjamin H. Barton, *The Lawyer’s Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3082–83 (2014).

<sup>164</sup> Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 255 (2011).

<sup>165</sup> *Id.* at 269.

<sup>166</sup> N.Y. Cty. Lawyers’ Ass’n v. Dacey, 282 N.Y.S.2d 985, 986 (N.Y. Sup. Ct. 1967); Lanctot, *supra* note 164, at 266–67.

<sup>167</sup> N.Y. Cty. Lawyers’ Ass’n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967); Lanctot, *supra* note 164, at 268.

<sup>168</sup> *Dacey*, 234 N.E.2d at 459; Lanctot, *supra* note 164, at 268.

<sup>169</sup> *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

facilitating communication between the website host and the consumer, the website becomes more like an attorney consultation. Because *Dacey* explicitly distinguished a book discussing the law from legal advice, the protections of the First Amendment do not extend to interactive or active websites. Based upon LegalZoom's own description of its services, it is providing representation to a particular person rather than providing mere information on the controlling law of certain situations.

If the Bar Association chooses this option and abolishes LegalZoom in Kentucky, the risks of consumer outcry must be weighed against the risks of not regulating LegalZoom. "The moral certainty many lawyers possess that these companies are practicing law without a license is not a sufficient basis for triggering litigation against them that could boomerang."<sup>170</sup>

### *C. Option Three: A Compromise*

Clearly, neither allowing LegalZoom to continue operations nor prohibiting LegalZoom from operating will satisfy all current issues with the Kentucky legal system. Allowing prolonged operation will allow continued unauthorized practice, but forbidding operation will decrease legal access in an already underrepresented area. LegalZoom is clearly inadequate; allowing its continued operation fuels the fire since faulty documents can lead to further litigation and unwanted results. But banishing LegalZoom from Kentucky has its own share of unwanted consequences.

Instead, the Kentucky Bar Association should regulate the services LegalZoom can offer. For example, LegalZoom could continue offering blank forms and instructions on form completion without providing guidance.<sup>171</sup> The litigation concerning Norman Dacey suggests non-lawyers may distribute legal information with First Amendment protections, so long as the information is general and does not attempt to provide personalized legal advice.<sup>172</sup> Therefore, the Kentucky Bar Association could set limits on what information LegalZoom would be permitted to provide. LegalZoom should be required to discontinue its practice of reviewing documents. However, LegalZoom could sell "checklists" or general instructions on how to complete the forms. LegalZoom should be required to discontinue the interactive forms that recommend actions for the customer, and stop suggesting forms needed for a particular action. Instead, LegalZoom could create a summary of different options, and perhaps the pros and cons of such options, and offer such summaries to the public. Regardless, LegalZoom should not be permitted to provide any type of "document review" or interactive questionnaires in order to continue operating within Kentucky law and regulations. LegalZoom should also be mandated to provide more disclosures. The disclosures and disclaimers on the

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<sup>170</sup> Lancot, *supra* note 164, at 295-96.

<sup>171</sup> Figueras, *supra* note 8, at 1440.

<sup>172</sup> *Dacey v. N.Y. Cty. Lawyers' Ass'n*, 423 F.2d 188, 193 (2d Cir. 1969); Lancot, *supra* note 164, at 279.

website today are hidden behind multiple hyperlinks and fine print. LegalZoom should provide more information to their customers on their product, and should require complete informed consent before purchasing products from LegalZoom.

#### CONCLUSION

Kentucky should follow Missouri and find LegalZoom in violation of the prohibition against the unauthorized practice of law. LegalZoom clearly offers more than just blank forms through its review services and interactive questionnaires. Using LegalZoom is not a means of independently completing the required documentation, but rather a means of assistance, relied upon by many customers who believe it includes professional legal judgment. But instead of condemning the practice, and thus eliminating an incredible resource that allows broader access to the system, Kentucky should simply hold LegalZoom accountable for the quality of their product by regulating the services LegalZoom provides and the manner in which it provides them.



