

**ELECTRONIC WILLS & THE INTERNET: IS
LEGALZOOM INVOLVED IN THE
UNAUTHORIZED PRACTICE OF LAW OR IS
THEIR SUCCESS SIMPLY RUFFLING THE LEGAL
PROFESSION’S FEATHERS?**

Comment

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Over the last twenty years, the internet has revolutionized almost every aspect of our lives.¹ Increased access to information has benefited private individuals and hurt major companies.² For example, the ease of online bill paying has nearly put the post office out of business,³ and online shopping has virtually done away with the need to go to the actual store.⁴ In the legal profession, Lexis and Westlaw have done away with the need to have a paper law library.⁵ With the onset of online legal forms and services, the internet is threatening to do away with the need to go into an attorney’s office for many transactional law services.⁶

1. *See infra* Part I.

2. *See infra* Part I.

3. Oren Dorell, *Say goodbye to most one-day U.S. mail delivery*, USA TODAY (DEC. 5, 2011, 8:47 PM) available at <http://www.usatoday.com/news/washington/story/2011-12-05/postal-service-cutbacks/51649828/1>.

4. *See Amazon Faces Backlash Over Price Check Offer*, HERE & NOW (Dec. 15, 2011) <http://hereandnow.wbur.org/2011/12/15/amazon-main-street>.

5. *See Greg Lambert, Can Attorneys Practice Law Without Westlaw or LexisNexis?*, 3 GEEKS AND A LAW BLOG (Feb. 20, 2010 1:20 PM), <http://www.geeklawblog.com/2010/02/can-attorneys-practice-law-without.html>.

6. *See infra* Part I.

While computers and the internet have been welcome additions to most law practices, it was not until recently have law firms implemented computers to assist lawyers in research and document creation.⁷ In that aspect, computers have completely revolutionized the legal profession.⁸ The prominence of Lexis and Westlaw suffice to illustrate this point.⁹ However, computer technology and the internet have now taken this technology outside of the law office, and are now making it easier for non-lawyers to access legal information and legal forms.¹⁰

LegalZoom, a frontrunner of the internet lawyering phenomenon, has attracted enough attention and market share and is now facing class action lawsuits in California and Missouri.¹¹ The problem that LegalZoom faces is that they not only provide online questionnaires that are translated into legal documents, but they have a customer service department run by non-lawyers that “allegedly” answers legal questions.¹² While arguably these suits are arising from the fact that LegalZoom is making millions of dollars a year by offering these online legal services for much less than “traditional” lawyers charge.¹³ This service also creates the problem that individuals are receiving what they believe to be sound “legal” advice from individuals paid hourly wages to answer phone calls and provide “customer service.”¹⁴ Conversely, online legal services may not be taking business away from “traditional” lawyers.¹⁵ They may simply be providing legal service to individuals who would not consult a lawyer in the first place because they cannot afford the consultation.¹⁶ With the large amount of people each year who die intestate, a strong argument can be made for permitting these online services to wills or trusts.¹⁷ The legal community, however, must balance these arguments with the time-tested tradition of allowing lawyers, and only lawyers, to give legal advice for compensation.¹⁸

The online creation of wills is now a highly disputed area.¹⁹ The question presented to the legal community is when do online companies step into the area of practicing law without a license? This comment will address the relatively new field of internet lawyering, specifically focusing on online

7. See *infra* Part I.

8. See *infra* Part I.

9. See Lambert, *supra* note 5.

10. See *infra* Part I.

11. See Alfred Lee, *Firm's paper trail targeted: lawsuits challenge LegalZoom document business*, (Jun. 14, 2010), <http://allbusiness.com/legal/legal-services-litigation/14717166-1.html>.

12. See *LegalZoom Review for Will Preparation*, FREEADVICE http://law.freeadvice.com/estate_planning/wills/legal-zoom-will-review.htm (last visited Jan. 30, 2012).

13. See *infra* Part II.

14. See FREEADVICE, *supra* note 12.

15. See *infra* Part II.

16. See *infra* Part II.

17. See *infra* Part II.

18. See *infra* Part V.

19. See *infra* Parts III–V.

will creation. Part I will provide a general overview of the current online will preparation companies and the specific services they offer.²⁰ Part II will discuss the creation of LegalZoom and the attention it is getting from different state authorities.²¹ Part III will discuss the pending lawsuit against LegalZoom in California for deceptive trade practices.²² Part IV will discuss the pending lawsuit against LegalZoom in Missouri for the unauthorized practice of law and will discuss cases in Missouri pertaining to the unauthorized practice of law.²³ Part V will discuss the history and requirements of will formalities.²⁴ Part VI will discuss Nevada's electronic will statute and looks at the problems associated with implementing the statute.²⁵ Finally, Part VII draws a conclusion about where this area of the law is going.²⁶

I. ONLINE FORMS AND SELF-HELP SOFTWARE

Technology revolutionized attorney's wills, trusts, and estates practices.²⁷ The estate planning technological revolution initially started because lawyers developed software that other attorneys could use in their own practice.²⁸ This technology included document preparation software that has allowed lawyers to easily create wills, trusts, and other documents from templates contained in computer software.²⁹ The more recent shift is the creation of self-help software that allows individuals to create their own wills, trusts, and other estate planning documents using similar software.³⁰ While there is a myriad of online, self-help will preparation software, all of the software functions about the same.³¹ The programs ask users a series of questions and develop documents based on the answers.³² It is this self-help aspect of online will preparation that has introduced problems with the unauthorized practice of law.³³

20. *See infra* Part I.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See infra* Part V.

25. *See infra* Part VI.

26. *See* discussion *infra* Part VII.

27. *See generally* Gerry W. Beyer, *Estate Planning and Technology*, 2005, available at <http://www.professorbeyer.com/Articles/Technology.html> (discussing document preparation software designed to assist attorneys in preparing estate planning documents).

28. *See id.*

29. *See id.*

30. *See id.*

31. *Id.*

32. *Id.*

33. *See* Harry Styron, *LegalZoom.com sued in Missouri class action: maybe now we'll find out what the practice of law really is*, OZARKS LAW & ECONOMY (Feb. 21, 2011), <http://styronblog.com/2010/02/21/legalzoom-com-sued-in-missouri-class-action-maybe-now-well-find-out-what-the-practice-of-law-really-is/> [hereinafter Ozarks].

These do-it-yourself will preparation services have revolutionized the will creation process.³⁴ For example, the creation of a will used to require a several hundred dollar visit to an attorney's office.³⁵ LegalZoom now provides this service from the comfort of your home for as little as sixty-nine dollars.³⁶ Creating a will through LegalZoom requires answering a series of questions that ultimately create your will.³⁷ However, LegalZoom does not advise individuals on their responses to the questions.³⁸ Instead, LegalZoom simply provides users with the percentage of individuals who answered the question a certain way.³⁹ This does create problems. For instance, in "blended families" when appointing your wife as guardian of your child, the software could potentially produce a document that appoints your first wife as legal guardian instead of your current wife, which was your intention.⁴⁰ Another confusing question on the LegalZoom form concerns the distribution of your estate.⁴¹ The LegalZoom software only gives you two options.⁴² The first option allows you to leave everything to your spouse.⁴³ The second option allows you to distribute a percentage of your estate to a list of people; however, it is not possible to leave the majority of your estate to your spouse with specific exceptions.⁴⁴ Finally, LegalZoom does not offer a community property agreement form.⁴⁵ When there is a surviving spouse, the software usually combines the community property agreement form with a simple will to avoid probate.⁴⁶ While attorneys make mistakes too, the biggest problem with the online software is the inability to learn about family relationships and complex dynamics, like rocky marriages.⁴⁷ While LegalZoom does not provide specific legal explanations and the questions are quite rigid, LegalZoom allows the user to revise the will within thirty days of receipt and does provides customer support by phone.⁴⁸ It is this customer support department that has raised the most questions about whether LegalZoom's business model constitutes the unauthorized practice of law.

34. See FREEADVICE, *supra* note 12.

35. *Id.*

36. *Id.*

37. Gregory Luce, *Purchasing a \$69.00 Will*, PRACTICE BLAWG, (Mar. 3, 2010), <http://practiceblawg.com/2010/03/purchasing-a-69dollar-will/>.

38. *Id.*

39. *Id.*

40. *See id.*

41. *See generally* FREEADVICE, *supra* note 12.

42. *Id.*

43. *Id.*

44. *Id.*

45. Herald Staff, *Attorney General Warns Consumers About Website's Cost-Saving Claims*, TRI-CITY HERALD, Sept. 17, 2010, at B4.

46. *Id.*

47. Tara S. Bernard, *In Using Software to Write a Will, a Lawyer is Still Helpful*, N.Y. TIMES, Sept. 11, 2010, at B1.

48. *See id.*

II. THE RISE OF LEGALZOOM

Attorneys Brian Liu and Brian Lee started LegalZoom, a classic success story, in 2000.⁴⁹ Both founders worked for high-profile law firms, but decided to quit their jobs, teamed with web developer Eddie Hartman, and started the company out of Lee's condominium.⁵⁰ The founders called Robert Shapiro, the O.J. Simpson's former lawyer, and were able to bring him in as majority shareholder.⁵¹ Shapiro has since become the face of LegalZoom, starring in both television and radio commercials for the company.⁵² The founders launched the website from their condominium in 2001, and by 2003 LegalZoom moved out of a 900-square-foot office to its current headquarters on Hollywood Boulevard, employing 400 employees across five floors.⁵³

LegalZoom has since looked to move some of its corporate functions outside of California.⁵⁴ On February 19, 2010, Texas Governor Rick Perry announced the state would use the Texas Enterprise Fund (TEF) to invest one million dollars in the relocation of certain LegalZoom office functions from Los Angeles to Austin.⁵⁵ This investment is expected to create up to six hundred jobs and more than eleven million dollars in capital investment for the state of Texas.⁵⁶ The Texas office is expected to house sales, order fulfillment, customer service, and technical support representatives.⁵⁷ Ironically, in 1999, the U.S. District Court for the Northern District of Texas ruled that "Quicken Family Lawyer," software created by Parsons Technology, Inc., constituted the unauthorized practice of law.⁵⁸ On appeal, the Court of Appeals reversed the judgment against Parsons because the Texas Legislature had since amended its unauthorized practice of law statute to allow for the commercialization of legal forms and instructions, "as long as 'the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.'"⁵⁹

Laws governing how much assistance non-lawyers may provide in legal document preparation differ from state to state.⁶⁰ Generally, all states bar

49. Lee, *supra* note 11.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Gene Quinn, *Gov. Perry: LegalZoom to Move up to 600 Jobs to Austin, TX*, IP WATCHDOG (Feb. 19, 2010), <http://ipwatchdog.com/2010/02/19/legalzoom-to-move-600-jobs-to-tx/id=9176/>.

55. *Id.*

56. *Id.*

57. *Id.*

58. Hebert E. Tucker et. al., *Holographic and Nonconforming Wills: Dispensing with Formalities—Part II*, 32 COLO. LAW. 53, 56–57 (2003).

59. *Id.*

60. Lee, *supra* note 11.

non-lawyers from giving legal advice.⁶¹ However, California law allows “legal document assistants,” who are registered in their counties and have a minimum level of education or experience, to help customers prepare legal documents.⁶² These assistants can help the customer understand the form but cannot help customers fill it in, tell customers what forms they may need, or tell customers the legal effect of a filing.⁶³ Several state agencies have investigated LegalZoom over the years, and it now faces class-action lawsuits in both California and Missouri.⁶⁴ The states claim that LegalZoom’s practices constitute deceptive trade practice and the unauthorized practice of law, respectively.⁶⁵ Gillian Hadfield is a law and economics professor at University of Southern California who studies legal markets.⁶⁶ He believes that the California and Missouri suits are signs that LegalZoom is “ruffling feathers.”⁶⁷ Hadfield says, “I would not take it as an indicator that they’re doing bad stuff . . . I’d take it as an indicator that they’re challenging the status quo.”⁶⁸

For some time, the United States has scrutinized the area of e-lawyering. In 2004, a New Jersey Supreme Court committee issued a ruling limiting the services that do-it-yourself legal businesses offer.⁶⁹ The New Jersey Supreme Court committee warned that the buyers, themselves, must fill out the do-it-yourself kits.do-it-yourself legal kits and that any substantial assistance by non-lawyers in completing the forms would constitute the unauthorized practice of law.⁷⁰ According to the New Jersey Supreme Court Committee, non-lawyers may assist customers by “typing, transcribing or translating.”⁷¹ However, the committee went on to say, “the rendering of any other assistance with the preparation, review, analysis or completion of materials included in these kits in person, in writing, electronically or otherwise constitutes the unauthorized practice of law and is therefore prohibited.”⁷² The committee said its concern in the do-it-yourself business came from complaints of sitting judges.⁷³ Those judges complained that the relief requested from the court by individuals using do-it-yourself services was sometimes not available or appropriated.⁷⁴ Specifically stating that,

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Robert G. Seidenstein, *Target: Non-Lawyer Firms Do-It-Yourself Kits Better Do-It-Yourself*, 13 NEW JERSEY LAWYER 1, (2004).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

“[p]ertinent, even critical, information that should be included in the pleading or document being prepared may be omitted. A self-representing litigant may also fail to properly exclude damaging or irrelevant information.”⁷⁵

Richard S. Granat, founder and CEO of MyLawyer.com, believes the ruling of the New Jersey committee is too broad and discourages the distribution of legal information.⁷⁶ Granat points out that the law allows for this dissemination of legal information.⁷⁷ The unauthorized practice of law involves non-lawyers applying legal information to specific facts or situations of a particular person.⁷⁸ Granat argues, “[t]here is no instance where any of our paralegals apply law to an individual’s particular circumstances. We think that consumers are intelligent enough to know the difference between purchasing legal forms off the internet and entering into a lawyer/client relationship with an attorney.”⁷⁹ Many lawyers complain about these companies because they do not want to compete with companies offering divorce-related services at rates as low as \$200 to \$300.⁸⁰ While states, such as New Jersey, regulate these companies providing online forms and information, these companies are not involved in the unauthorized practice of law as long as they are not providing legal advice.⁸¹

The state of Washington recently addressed the growing industry of do-it-yourself companies by creating an agreement between the attorney general and LegalZoom, defining how LegalZoom may operate in the state of Washington.⁸² The State Attorney General’s Office got involved in order to alert consumers of LegalZoom’s cable TV ad promising people legal help to start business, patent inventions, and create wills.⁸³ Attorney General Rob McKenna said, “LegalZoom offers do-it-yourself legal documents online but can’t provide you with legal advice or tell you which forms to fill out.”⁸⁴ The attorney general’s office was concerned about applying the “one-size-fits-all” approach and wanted to alert consumers that they are not getting any legal service, advice, or representation.⁸⁵ There are concerns in Washington that applying the one-size-fits-all approach could cause problems, particularly in the area of estate planning.⁸⁶ For example, because LegalZoom does not provide a community property agreement form with a simple will in order to avoid probate when there is a surviving spouse,

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Herald Staff, *supra* note 45, at B4.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

LegalZoom may not provide a Washington client with a will that meets his or her needs.⁸⁷ The thrust of the agreement prohibits LegalZoom from “engaging in the unauthorized practice of law, selling personal information obtained from Washington customers or misrepresenting the benefits of any estate distribution document.”⁸⁸ The agreement further requires LegalZoom to clearly disclose that its services are not a substitute for a law firm if clients compare LegalZoom’s costs to an attorney’s fees.⁸⁹ Hopefully, individuals who purchase legal documents from LegalZoom understand that, most likely, an attorney will not be involved in any part of the process.⁹⁰

Connecticut is getting involved in the fight as well.⁹¹ Attorney Louis Pepe leads a Connecticut Bar Association task force that has studied a number of legal service web sites.⁹² Pepe believes the practices of these businesses consist of providing legal services in a state that they are not licensed to practice.⁹³ Additionally, Pepe thinks that consumers are receiving legal documents that are insufficient or inaccurate.⁹⁴ Pepe said, “There’s a real vulnerability on the part of the consumer, . . . [b]ut it’s hard to make this look like [lawyers] are not just protecting self-interests.”⁹⁵ Pepe further stated that challenging these companies is a difficult task because the Federal Trade Commission is reluctant to define the preparing of legal documents as the practice of law.⁹⁶ The commissioner believes that more competition is better for consumers.⁹⁷ Mark Dubois, chief disciplinary counsel for the state of Connecticut, stated that none of LegalZoom’s customers issued complaints in Connecticut, and Pepe’s task force produced no concrete evidence of LegalZoom, or similar companies, harming customers.⁹⁸ Dubois stated,

From what I see and hear, much of the commodity work [from online providers] is pretty good. A lot of lawyering is not rocket science. It is using an existing form or format. This commodity work is the easiest to ship electronically to the cheapest provider and will be the first part of traditional legal services to be lost forever by the small practitioners.⁹⁹

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Douglas S. Malan, *Picking a Fight Against Online Competition: State Bar Association Want Investigation of Web Legal Service Providers*, 35 CONNECTICUT LAW TRIBUNE 1, (2009).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

Fred Ury, another member of the Connecticut task force, believes that “commoditized law is going the way of the buggy whip.”¹⁰⁰ Ury reported that a tenet in his office building showed him the documents he received by incorporating his business for a couple of hundred dollars through LegalZoom.¹⁰¹ Ury said everything was done correctly; “[h]e got a great value,” Ury concluded.¹⁰² Ury believes lawyers who wish to make money using the traditional business model will simply have to be more creative to compete with online companies such as LegalZoom.¹⁰³ Pepe disagrees, he believes these online companies owe a duty to other Connecticut Bar Association members who endure law school and put in the time and effort to develop their practices.¹⁰⁴ The Connecticut Bar Association is also proposing a bill to the General Assembly’s Judiciary Committee that would make the unauthorized practice of law a felony instead of a misdemeanor. The committee believes this will encourage the Chief State Attorney’s Office to devote more time to investigating alleged misconduct.¹⁰⁵

One argument against the LegalZoom business model is that the company employs deceptive trade practices.¹⁰⁶ The argument arises from LegalZoom comparing its prices to attorneys’ fees and claiming it will save its customers hundreds or thousands of dollars in legal fees.¹⁰⁷ The settled law allows non-lawyers to sell legal information and documents; however, they may not advise customers on which forms to use or offer any legal advice.¹⁰⁸ Many argue that there is a comparison of two completely different services when LegalZoom compares their services to traditional attorney costs.¹⁰⁹ While LegalZoom has soundly proven that access to “legal information” may be all some consumers need in order to get the same result as hiring an attorney, many argue that LegalZoom should not be able to suggest in their advertising that they will provide the same result as hiring an attorney.¹¹⁰

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *LegalZoom Sued for Unlawful Practice of Law in Missouri*, LAWVIBE, <http://lawvibe.com/legalzoom-sued-for-unlawful-practice-of-law-in-missouri/> (last visited Jan. 30, 2012) [hereinafter LAWVIBE].

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

III. LEGALZOOM SUED IN CALIFORNIA

California is currently suing LegalZoom for engaging in deceptive trade practices.¹¹¹ Filed May 27, 2010, the Los Angeles Superior Court lawsuit alleges that by advertising its services as “attorney-quality,” it misleads customers.¹¹² San Francisco resident Katherine Webster filed the lawsuit after purchasing a living trust on behalf of her uncle that turned out to cause so many problems that she had to hire an attorney to fix it.¹¹³ Webster claims that customers get a false sense of security because LegalZoom’s website and advertising claims that “‘virtually anyone’ can create a valid legal document through the site, and that the ‘customized’ documents made by nonlawyers would be reviewed for ‘accuracy and reliability.’”¹¹⁴ Webster is claiming that LegalZoom capitalizes on Shapiro’s fame in its television commercials, which have Shapiro saying, “I’m Robert Shapiro and I created LegalZoom.”¹¹⁵ Webster further argues that LegalZoom contradicts most of its claims through disclaimers in secondary pages of its website.¹¹⁶ For example, Webster argues that LegalZoom claims “virtually anyone” can use its product; however, a disclaimer states, “the law is a personal matter and no general information or legal tool like the kind LegalZoom provides can fit every circumstance.”¹¹⁷

The plaintiffs are seeking registration of the suit as a class action.¹¹⁸ This may cause some problems as Webster will have to “show a common link with multiple other plaintiffs who would benefit” from the lawsuit.¹¹⁹ The problem is that Webster’s suit alleges that LegalZoom misrepresented its services and by doing so caused Webster to purchase a bad living trust.¹²⁰ However, Webster is suing on behalf of anyone who purchased a living trust or will in California, regardless of whether that person was misled by LegalZoom’s advertising.¹²¹ This may result in a class action lawsuit “where the majority of class members may not have a claim.”¹²²

111. Lee, *supra* note 11.

112. *Id.*

113. Dan McCue, *Class Claims LegalZoom is Unfair & Misleading*, COURTHOUSE NEWS SERVICE (June 1, 2010, 12:11 PM), <http://www.courthousenews.com/2010/06/01/27694.htm>.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Lee, *supra* note 11.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

IV. LEGALZOOM SUED IN MISSOURI

A suit accusing LegalZoom of the unauthorized practice of law was filed December 2009 in Missouri.¹²³ The plaintiffs claim that LegalZoom is involved in the unauthorized practice of law and is violating the Missouri Merchandising Practices Act (MPA) by charging fees for allegedly assisting in document preparation.¹²⁴ They are seeking an injunction against continued violations.¹²⁵ The plaintiffs are also seeking damages of three times the money collected by LegalZoom in Missouri, as allowed by Missouri statute.¹²⁶ The suit is being brought by Todd Janson, Gerald Ardrey, and Chad Ferrell.¹²⁷ Janson paid \$121.95 for a will and Ardrey and Ferrell paid \$249 for the preparation of articles of organization.¹²⁸ The court has since certified the class action suit, and it is pending trial.¹²⁹

Missouri defines the practice of law as follows:

The “practice of the law” is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.¹³⁰

Missouri further defines law business as follows:

The “law business” is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever.¹³¹

LegalZoom claims to have served over 14,000 Missouri residents over the past five years, generating over five million dollars in sales.¹³² With Missouri being a relatively small state, this suit suggests, “the legal

123. Ozarks, *supra* note 33.

124. Janson v. LegalZoom.com, Inc., 271 F.R.D. 506, 508 (W.D. Mo. 2010).

125. Ozarks, *supra* note 33.

126. *Id.*

127. Janson, 271 F.R.D. at 508.

128. *Id.* at 509.

129. *Id.* at 513.

130. MO. ANN. STAT. § 484.010(1) (West 2010).

131. MO. ANN. STAT. § 484.010(2) (West 2010).

132. LAWVIBE, *supra* note 106.

profession is getting nervous and starting to pay attention to this disruptive player in the legal industry.”¹³³ In its defense, LegalZoom claims to be:

a company whose principal business consists of providing an online platform for customers to prepare their own legal documents. Customers choose a product or service suitable to their needs and input data into a questionnaire. Where applicable, the LegalZoom platform then generates a document using the product and data provided by the customer.¹³⁴

Some states, including California and Florida, allow non-lawyers called “legal technicians” to prepare legal documents, as long as they do not give legal advice.¹³⁵ The major question is exactly what does the LegalZoom platform do; does LegalZoom actually provide legal advice?¹³⁶ The pending suit is focusing on LegalZoom’s services for wills and other court filings and does not seem to concern LegalZoom’s services relating to patents, copyrights, and trademarks.¹³⁷ The complaint filed against LegalZoom refers to an investigation by the North Carolina State Bar’s Unauthorized Practice Committee that found:

Among the documents LegalZoom prepares or offers to prepare are articles of incorporation, wills, trusts, divorce pleadings, and deeds. LegalZoom represents that it prepares the articles of incorporation and ‘customized bylaws and resolutions’ for its business formation customers. The legal documents are prepared through LegalZoom’s website where, once the customer purchases the service, the customer is presented a questionnaire that the customer completes online. LegalZoom transcribes the responses onto a form template that LegalZoom has determined appropriate for the customer’s legal document and in a form or manner determined by LegalZoom or through software developed by or on behalf of LegalZoom. **The customer is presented with a finished document that is represented to be legally sufficient for the customer’s needs without review or edit and has not been approved by an attorney.**¹³⁸

This final sentence tends to suggest that North Carolina finds LegalZoom’s representation of its services to be misleading.¹³⁹ LegalZoom has responded to the suit by claiming that it is involved in nothing more than the distribution

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Gene Quinn, *LegalZoom Sued in Class Action for Unauthorized Law Practice*, IPWATCHDOG, Feb. 9, 2010, available at <http://ipwatchdog.com/2010/02/09/legalzoom-sued-in-class-action-for-unauthorized-law-practice/id=8816/>.

138. *Id.* (emphasis added).

139. *Id.*

of legal forms and information, which does not constitute the unauthorized practice of law.¹⁴⁰

The question of whether LegalZoom is involved in the unauthorized practice of law turns on exactly how LegalZoom's customer service department operates.¹⁴¹ LegalZoom provides customer service representatives who will answer client's questions and in doing so are allegedly providing legal advice.¹⁴² Gene Quinn, the founder of IPWatchdog, says that when he asked LegalZoom's customer service center if he could start selling a product before filing a patent application, the representative informed him that filing a patent application first had no bearing on the decision to sell.¹⁴³ While that seems very much like legal advice, it is also incorrect, and following that advice would cause you to lose the ability to obtain a patent outside the United States.¹⁴⁴ With all of the complex legal terminology involved in the creation of a will, it would seem that LegalZoom, by providing a customer service department run by non-lawyers, may be treading on the grounds of the unauthorized practice of law. Looking at the definition of "law business" in the Missouri Statute, the customer service department seems to be involved in "the advising or counseling for a valuable consideration" of individuals in preparing their wills.¹⁴⁵ LegalZoom claims that its licensed attorneys create the templates for legal documents, and LegalZoom's non-lawyers only "review the data file [resulting from the client questionnaire] only for completeness, spelling, and grammar errors, and consistency of names, addresses and other factual information."¹⁴⁶ LegalZoom further stated, "it is a firing offense to come even close" to answering customer phone calls with legal advice.¹⁴⁷

A. Hulse v. Criger

In a 1952 case, the Supreme Court of Missouri found that a licensed real estate broker had engaged in the unlawful practice of law by preparing instruments relating to and affecting real estate.¹⁴⁸ The real estate broker had either himself or through his employees prepared deeds, promissory notes, and contracts of sale.¹⁴⁹ The real estate broker or his employees had in each circumstance met personally with the involved parties.¹⁵⁰ The real estate

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. MO. ANN. STAT. § 484.010 (2) (West 2010).

146. *Janson v. LegalZoom.com, Inc.*, 271 F.R.D. 506, 509 (W.D. Mo. 2010).

147. *Id.*

148. *Hulse v. Criger*, 247 S.W.2d 855, 856 (Mo. 1952).

149. *Id.*

150. *Id.* at 856-57.

broker claimed that the completion of these documents was vital to his practice as a real estate broker.¹⁵¹ The Supreme Court of Missouri found that because the real estate broker was many times creating documents for individuals whom he was not selling property and charging his own customers additional fees for completing the documents, he was involved in the unauthorized practice of law.¹⁵²

The attorney in *Hulse v. Criger* was found to be practicing law because he was, many times, involved in preparing legal documents for other realtors, thereby holding himself out to be an attorney.¹⁵³ This seems similar to LegalZoom's customer service department, should they actually be providing legal advice. While courts have found simply providing forms to be acceptable practice, LegalZoom's customer service department may be stepping into the arena of practicing law by answering clients' legal questions.¹⁵⁴

B. *In re Mid-America Living Trust Associates, Inc.*

This case involved a trust-marketing corporation that prepared trusts, pour-over wills, and powers of attorneys for individuals.¹⁵⁵ The company would send "trust associates," usually individuals involved in financial planning, insurance, or stock brokerage, to obtain clients.¹⁵⁶ The "trust associate" would recommend and sell a living trust and gather personal and financial information by having customers complete a workbook provided by the company.¹⁵⁷ Paralegals would then review the workbook and decide which forms to use and draft initial documents from blank prototypes.¹⁵⁸ The trust documents and workbook were then mailed to an attorney.¹⁵⁹ The court found that the counseling by "trust associates" as to which trusts or wills were appropriate and the drafting of these documents by non-lawyers constituted the unlawful practice of law.¹⁶⁰ The court additionally ruled that non-lawyer agents could not assist in the preparation of trusts or wills without the supervision of an independent licensed attorney.¹⁶¹

The workbook provided in the above case seems very similar to the questionnaire that individuals answer when purchasing a LegalZoom will. While the agents for Mid-America were looking at the workbooks and then

151. *Id.* at 856.

152. *Id.*

153. *Id.*

154. Quinn, *supra* note 137.

155. *In re Mid-America Living Trust Associates, Inc.*, 927 S.W.2d 855, 856 (Mo. 1996).

156. *Id.*

157. *Id.* at 857.

158. *Id.*

159. *Id.*

160. *Id.* at 870.

161. *Id.* at 871.

deciding which trust or will would be most appropriate, this case suggests that LegalZoom's questionnaire does more than fill in the blanks of a will.¹⁶² It actually allows non-lawyers to review documents and make legal determinations.¹⁶³ Additionally, by finding that the "trust associates" by making recommendations to clients were involved in the unauthorized practice of law, the court very well may find that LegalZoom's customer service department is doing exactly the same thing by they answering questions concerning legal terminology.¹⁶⁴

C. *In re Thompson*

It is well settled in Missouri law that the distribution of legal forms does not constitute the unauthorized practice of law.¹⁶⁵ In 1978, The Missouri Bar Administration requested injunctive relief against the sale of "Divorce Kits."¹⁶⁶ The "Divorce Kits" were packets of forms and instructions "pertaining to an action for an uncontested dissolution of marriage."¹⁶⁷ They included sample forms that contained blanks and instructions for completing each form.¹⁶⁸ Additionally, the kits contained procedural instructions about which "forms to file, in what order, and where . . ."¹⁶⁹ Restating their ruling from *Hulse v. Criger*, the court explained that the regulation of the unauthorized practice of law

. . . is not to protect the Bar from competition but to protect the public from being advised or represented in legal matters by incompetent or unreliable persons. Our purpose must be to make sure 'that legal services required by the public, and essential to the administration of justice, will be rendered by those who have been found by investigation to be properly prepared to do so by conforming to strict educational standards, and who demonstrate that they have the character to conform to higher standards of ethical conduct than are ordinarily considered necessary in business relations which do not involve the same fiduciary and confidential relationships.'¹⁷⁰

The court decided that the advertisement and sale of divorce kits did not constitute the unauthorized practice of law.¹⁷¹ However, the court warned that the individuals involved in the sale of divorce kits must not give personal

162. *See id.*

163. *See id.*

164. *See id.*

165. *See In re Thompson*, 574 S.W.2d 365, 365 (Mo. 1978).

166. *Id.* at 366.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 367.

171. *Id.* at 369.

advice concerning legal remedies or their consequences, as that would constitute the unauthorized practice of law.¹⁷²

The outcome of the Missouri class-action suit will depend on the discovery evidence that surfaces concerning LegalZoom's customer service and transcription departments.¹⁷³ *In re Mid-America Living Trust Associates, Inc.*, has made it settled law in Missouri that non-lawyer agents cannot assist in the creation of a will or trust without the supervision of a licensed attorney.¹⁷⁴ It will be interesting to see if the Missouri court interprets the transcription of a questionnaire onto a standardized legal form as assisting in the creation of a will and, if they do, whether LegalZoom has a supervising licensed attorney that oversees this work. This case has the potential to create waves in this relatively new area of the law, as the ruling will be crucial in defining exactly where to draw the line concerning online self-help legal document creation and the unauthorized practice of law.

V. WILL FORMALITIES

The law has been evolving over the years to include and, in many instances, embrace technology.¹⁷⁵ Today most courts accept, or in some cases require, some form of electronic filing and other electronic methods for legal transactions.¹⁷⁶ However, probate law is one area that has not shown welcomed acceptance of technology, as many states will not allow the e-filing of wills.¹⁷⁷ This is largely due to the ritualism and formality associated with the creation and execution of a will.¹⁷⁸ In fact, laws such as the Electronic Signatures in Global and National Commerce Act of 2000 (E-SIGN) and the Uniform Electronic Transactions Act (UTEA), which have made many electronic transactions the equivalent of "traditional 'paper'" transactions, generally exclude wills.¹⁷⁹

Originating from the English Statute of Frauds of 1677, the law of wills is regarded as "one of the oldest and most archaic areas of modern law."¹⁸⁰ Most jurisdictions can trace "the requirements and formalities to execute a valid will . . . back to feudal laws and codifications. For over three hundred years, wills have been defined by their formal qualities. The details have

172. *Id.*

173. *See In re Mid-American Living Trust Assocs., Inc.*, 927 S.W.2d 855, 856 (Mo. 1996) (en banc).

174. *See id.*

175. *See* Mary Wahne Baker, Comment, *Where There's A Will, There's A Way: The Practicalities and Pitfalls of Instituting Electronic Filing for Probate Procedures in Texas*, 39 TEX. TECH L. REV. 423, 424 (2007).

176. *See* FED. R. CIV. P. 5(d)(3).

177. Baker, *supra* note 175, at 426.

178. Joseph M. Mentrek, *Estate Planning in a Digital World*, 19 OHIO PROB. L.J. 195 (2009).

179. *Id.* at 196.

180. Joseph K. Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 116 (2008).

varied, but the essential formal requirements—writing, signature, and attestation—have remained constant and inviolate.”¹⁸¹

In most jurisdictions, the testator must satisfy four requirements in order to create a valid will.¹⁸² These requirements include “(1) legal capacity; (2) testamentary capacity; (3) testamentary intent; and (4) the statutory formalities required in the jurisdiction.”¹⁸³ To fulfill legal capacity, the testator must be eighteen years or older.¹⁸⁴ Showing that the testator was of sound mind fulfills the testamentary capacity requirement.¹⁸⁵ Testamentary intent requires showing that the testator intended, following his death, “for the will to be the final disposition of the testator’s . . . property.”¹⁸⁶

While will statutes differ from state to state, the Uniform Probate Code sets out the formalities required for a will to be legally valid.¹⁸⁷ The Uniform Probate Code requires that for a will to be valid, it must fulfill the following formalities: (1) be in writing; (2) signed by the testator or by someone else in the testator’s name and at the testator’s direction or in the testator’s conscience presence; and (3) signed by two witnesses who within a reasonable time witnessed the signing of the will or the testator’s acknowledgement of the will or the signature.¹⁸⁸ Virtually all jurisdictions require these three formalities.¹⁸⁹

Most states require strict compliance with the above-mentioned statutory requirements.¹⁹⁰ Failure to comply with these statutory requirements results in an invalid will in most states.¹⁹¹ However, several states “have adopted the substantial compliance doctrine . . . [of section] 2-503 of the Uniform Probate Code.”¹⁹² The substantial compliance doctrine creates a “harmless error standard” that allows probate courts to excuse will deficiencies when clear and convincing evidence shows that the testator intended the instrument to be his or her will.¹⁹³ Some view the formalities as a hierarchy.¹⁹⁴ While courts consider the signature and attestation requirements more liberally, the writing requirement is indispensable.¹⁹⁵

181. *Id.* at 116–17.

182. *Id.* at 119.

183. *Id.*; Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994).

184. *See supra* note 180, at 119.

185. *Id.*

186. *Id.*

187. *See id.* at 118–23.

188. *Id.* at 120.

189. *Id.*

190. *Id.*

191. *Id.* at 120–21.

192. *Id.* at 121.

193. *See* UNIF. PROBATE CODE § 2-503 (2006).

194. Mann, *supra* note 183, at 1040–41.

195. *Id.*

Will formalities serve four public policy concerns: evidentiary, cautionary, protective, and channeling functions.¹⁹⁶ Will formalities, as described by Professor Langbein, serve the evidentiary function by “provid[ing] the court with reliable evidence of testamentary intent and the terms of the will.”¹⁹⁷ Writing and signature requirements serve the cautionary function and ensure that the testator made his or her “decisions with measured forethought and awareness.”¹⁹⁸ Witnesses serve the protective function and ensure that the testator exercised his or her own free will in creating the document.¹⁹⁹ These public policy concerns have shaped and continue to influence will-creation statutes in this country and abroad.²⁰⁰ When one considers these policy concerns in light of the indispensable nature of the writing requirement and the deeply rooted ritualistic history of the law of wills, it is not surprising that probate law has been reluctant to embrace electronic records.

VI. NEVADA’S ELECTRONIC WILL STATUTE

A comparison of how probate law and the law of evidence each have reacted to electronic records illustrates the aversion of probate law to jump on the technological bandwagon.²⁰¹ The law of wills, unlike the law of evidence, does not recognize audio or video wills as a “writing.”²⁰² For example, the law of evidence clearly acknowledges audiotape recordings as writing, reasoning, “that a tape recording may be more reliable and accurate than the testimony of a witness.”²⁰³ In contrast, courts do not recognize audio recordings as sufficing the writing requirement for a will.²⁰⁴ In *Estate of Reed*, the Wyoming Supreme Court refused to enter an audio recording purporting to be a will into probate.²⁰⁵ That case featured a tape recording found in a sealed envelope, with the handwritten words: “Robert Reed To be played in the event of my death only!” also accompanied by Reed’s signature.²⁰⁶ The Wyoming court refused to acknowledge a tape recording as a sufficient writing as required by Wyoming statute.²⁰⁷

196. Grant, *supra* note 180, at 121.

197. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975).

198. Grant, *supra* note 180, at 121.

199. *Id.* at 122.

200. *Id.*

201. Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 881 (2007).

202. *Id.*

203. *Id.*

204. *Id.* at 882.

205. *Estate of Reed*, 672 P.2d 829, 834 (Wyo. 1983).

206. *Id.* at 830.

207. *Id.* at 829.

Neither probate law nor the law of evidence allow videotapes to qualify as a writing; however, both have allowed video tapes as a form of evidence.²⁰⁸ In 1985, Indiana passed legislation authorizing the use of a videotape of a will execution ceremony to satisfy all the necessary requirements.²⁰⁹ Under that statute, a videotape can provide evidence of the will's proper execution and authenticity, the testator's intentions and mental capacity, or any other matter the court decides is relevant to the probate of the will.²¹⁰ However, while the Indiana statute allows the use of videotapes as evidence in many probate proceedings, courts do not consider a videotape to constitute a writing as required by wills statutes.²¹¹ The law of evidence views videotapes as a form of "photograph" and not a writing.²¹² While videotapes are becoming more commonplace in providing evidence in probate cases, few states have followed Indiana's lead in formalizing the acceptance of evidentiary videotapes in probate cases.²¹³ The Uniform Probate Code explicitly states that an audiotape is not a writing; however, the Code is silent concerning videotapes.²¹⁴ Some have argued that many could interpret the Code can be as allowing a videotaped will to satisfy the writing requirement.²¹⁵ It can suffice to say that states have been wary to codify electronic media as satisfying the deeply rooted formalities involved in the creation and execution of wills.

In 2007, Nevada attempted to change this landscape by becoming the first (and remaining the only) state to pass a statute allowing an electronically created and stored will to pass the writing requirement and qualify as a valid will.²¹⁶ The Nevada statute defines an electronic will as follows:

1. An electronic will is a will of a testator that:
 - a. Is written, created and stored in an electronic record;
 - b. Contains the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator; and
 - c. Is created and stored in such a manner that:
 - (1) Only one authoritative copy exists;
 - (2) The authoritative copy is maintained and controlled by the testator or a custodian designated by the testator in the electronic will;

208. See Beyer, *supra* note 201, at 883–84.

209. See IND. CODE ANN. § 29-1-5-3(c) (LexisNexis 2000) (amended 2003, to be re-codified at § 29-1-5-3.2).

210. *Id.*

211. Beyer, *supra* note 201, at 885.

212. FED. R. EVID. 1001(2).

213. See Beyer, *supra* note 201, at 884.

214. UNIF. PROB. CODE § 2-502 & cmt. (a) (amended 2008).

215. James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1022 (1992).

216. Beyer, *supra* note 201, at 887.

- (3) Any attempted alteration of the authoritative copy is readily identifiable; and
- (4) Each copy of the authoritative copy is readily identifiable as a copy that is not the authoritative copy.²¹⁷

Created to serve tech-oriented California clients, the Nevada statute was a result of Nevada's desire to be a leader in electronically executed legal transactions.²¹⁸ The statute requires an electronic signature, biometric authentication, and only one authoritative copy in order to produce a legally valid electronic will.²¹⁹

To fulfill the electronic signature requirement the statute requires “the date and the electronic signature of the testator.”²²⁰ “Electronic Signature” as defined in the Uniform Electronic Transactions Act is “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”²²¹ A facsimile signature, typing your name at the end of an e-mail, or using a personal identification number could satisfy this requirement.²²²

The Nevada statute further requires the electronic will include “at least one authentication characteristic of the testator.”²²³ This is the biometric authentication requirement mentioned earlier.²²⁴ The statute defines an authentication characteristic as one that is unique to a person and can be measured and recognized in an electronic record as “a biological aspect of or a physical act performed by that person.”²²⁵ Therefore, a digitized signature, voice recognition, facial recognition, a retinal scan, a fingerprint, or other similar authentication would satisfy this requirement.²²⁶

Finally, the statute requires that the electronic will be stored in a manner so that only one “Authoritative Copy” exists.²²⁷ An Authoritative Copy is defined as being “original, unique, identifiable and unalterable.”²²⁸ This Authoritative Copy must be stored so that the testator or someone designated to act for him maintains and controls the electronic will.²²⁹ This Authoritative Copy must be stored in a manner that makes attempted alterations readily

217. NEV. REV. STAT. ANN. § 133.085 (West 2011).

218. Beyer, *supra* note 201, at 890.

219. *Id.*

220. NEV. REV. STAT. ANN. § 133.085(1)(b).

221. UNIF. ELECTRONIC TRANSACTIONS ACT § 2(8) (Final Text & Draft Commentary, July 23–30, 1999).

222. Beyer, *supra* note 201, at 888.

223. NEV. REV. STAT. ANN. § 133.085(1)(b) (West 2010).

224. *See supra* Part VI, pp. 32.

225. NEV. REV. STAT. ANN. § 133.085(1)(b).

226. *See Beyer, supra* note 201, at 888.

227. NEV. REV. STAT. ANN. § 133.085(1)(c)(1).

228. *Id.* § 133.085(6)(b).

229. *Id.* § 133.085(1)(c)(2).

identifiable.²³⁰ The Authoritative Copy must be stored so that each copy of the Authoritative Copy is readily identifiable as a copy.²³¹ The requirements for the Authoritative Copy make compliance with the Nevada Electronic Wills Statute impossible because there is no software able to meet these requirements.²³²

Failure to implement the Nevada Electronic Will Statute is due to the lack of software able to fulfill this Authoritative Copy requirement.²³³ Computers are the perfect copying machines; therefore, it is very hard to prove which version of a file is the original because electronic documents are easily changed.²³⁴ The Nevada Legislature anticipated that computer software would have evolved by now to meet the statutory requirements, but that simply is not the case.²³⁵ The constant change of computer technology creates additional problems.²³⁶ Because an electronically stored file requires the proper software and hardware to read the file, keeping up with software updates can create a problem for electronic wills, as many of these documents are stored for many years before they are used.²³⁷ Finally, due to the loss of electronic media when computers crash, backup systems must also be created to limit the possibility of a mainframe crash destroying an electronic will.²³⁸

Some attorneys argue that the costs associated with creating and implementing technology that can fulfill the Authoritative Copy requirement simply outweigh the convenience factor offered by electronic wills.²³⁹ Computer technology has the tendency to degrade and become outdated, but paper will last for hundreds of years.²⁴⁰ Additionally, Nevada is the only state to create this type of legislation; therefore, no market really exists for creating software to support electronic wills.²⁴¹ Pending widespread acceptance of electronic wills, companies such as LegalZoom would experience widespread success; however, currently there does not seem to be any large advantage in creating an electronic will over a “traditional” paper will.

VII. CONCLUSION

One thing is certain: technology is here to stay, and as technology progresses it will continue to affect and change the landscape of the legal

230. *Id.* § 133.085(1)(c)(3).

231. *Id.* § 133.085(1)(c)(4).

232. *See* Beyer, *supra* note 201, at 890.

233. *See id.*

234. *See id.*

235. *Id.*

236. *Id.* at 893.

237. *Id.*

238. *Id.* at 895.

239. Mentrek, *supra* note 178.

240. *Id.*

241. *Id.*; *see supra* note 217.

profession. With the fight concerning the distribution of legal forms and information already won, LegalZoom's business model was the next logical step in utilizing the internet to not only streamline areas of commodity law, but also increase market share. It is no surprise that LegalZoom has put the legal controversy concerning online document preparation in the news, as they are beginning to cut into traditional law practices. The outcome of the Missouri suit²⁴² could have far-reaching effects on these online document preparation companies.

It is a good thing states are starting to pay attention to companies such as LegalZoom. The widespread use of companies, such as LegalZoom, to create wills runs the risk that probate courts will be flooded with invalid and insufficient wills in the years follow. If state action, such as that shown by Washington,²⁴³ does nothing more than inform customers utilizing these companies that they are not receiving the services of an attorney, then they have done their job.

The widespread acceptance of electronic wills may also have very positive effects on companies such as LegalZoom. Should an electronically created and stored will become commonplace in the United States, it will do nothing more than bolster the LegalZoom business model. Additionally, the acceptance of electronic wills will also create a new market for companies that can develop the software and maintain the databases to fulfill the Authoritative Copy requirement.²⁴⁴ This is a very progressive and volatile area of the law that our generation of lawyers will confront for our entire professional career, and cases such as *Janson v. LegalZoom.com, Inc.*,²⁴⁵ will be important in shaping and regulating the law and technology.

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

243. Herald Staff, *supra* note 45, at B4.

244. Mentrek, *supra* note 178.

245. See *Janson*, 271 F.R.D. 506 (W.D. Mo. 2010).