

## UNAUTHORIZED PRACTICE OF LAW AND THE POWER OF STATE COURTS: DIFFICULT PROBLEMS AND THEIR RESOLUTION

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The effectiveness of the legal order in every state is heavily dependent on the state's unauthorized practice laws. These laws impose restrictions on who may practice law and, in important respects, impose controls on the availability of legal services to those in need of such services and on the quality of the services offered. This is predominantly a field of state law. Federal unauthorized practice laws exist but affect only limited segments of the overall legal services market.<sup>1</sup> Unauthorized practice laws are highly controversial, and many powerful interest groups consider these laws unjustified monopoly protection of lawyers. Pressures exist to ease substantially existing restrictions on unauthorized law practice, and these pressures can be expected to increase in the future. However, powerful forces within the bar are opposed to easing the restrictions and favor stricter enforcement of existing legal restraints on unauthorized law practice.

The breadth and specificity of legal controls over unauthorized practice of law can vary greatly, depending on which branch of a state's government has ultimate power over what these controls shall be. State courts are quite likely to impose different restrictions from those that the legislative or executive branches would prefer. Power allocation among the branches of state government is essentially a state constitution separation-of-powers issue. As the texts of state constitutions on separation of powers and power allocation to the different branches of state government are typically very vague, interpretations of the constitutions' texts are required to determine how power has been allocated. In a majority of states the state constitution is interpreted as giving the state's courts ultimate power, and in a few states exclusive power, to determine what is and is not the unauthorized practice of law. In all states, state courts have a significant role in enforcing and clarifying unauthorized practice laws; but in a majority of states, the courts' constitutionally allocated ultimate power over these laws substantially enhances this role. It is quite apparent that in all states the state's courts will be important to the success of most any future efforts to revise or more aggressively enforce unauthorized practice laws; and in a majority of states, the state's courts will likely be the crucial and final determinants of the success of these efforts.

Although this Article focuses most particularly on the power of state courts over the unauthorized practice of law, Part I considers some important aspects of the legal services market and reviews the legal restrictions that unauthorized practice laws have imposed on that market. This background information is essential to an adequate understanding of the current importance of the judicial power issue to the unauthorized practice of law, to the legal services market and to the legal profession and other providers of legal services. Part II reviews the scope of state court constitutional power over unauthorized law practice and the variations among the states on the extent of that power. Part III considers the process generally followed in interpreting state constitutions. It also considers some of the

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1. Federal unauthorized practice laws include restrictions on who may appear before the federal courts and federal administrative agencies. See *infra* note 37 and accompanying text; Thomas J. Andersen, *The Federal Practice Exception: Limitations on State Regulation of Federal Practitioners*, 23 W. ST. U. L. REV. 281 (1996). Also, the Federal Constitution imposes some restrictions on state unauthorized practice laws as it does on most other kinds of state laws. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 827-28 (1986); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 44-96 (1981). On federal unauthorized practice of law and federal unauthorized practice restrictions, also see William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1536-58 (2001).

justifications advanced by courts and others in their interpretive conclusions as to the scope of state court power, including power over unauthorized law practice. In Part IV, some predictions are made as to where unauthorized practice laws and state court power over those laws seem headed. In conclusion, Part V stresses that past state court performance on unauthorized practice matters leaves much to be desired and considers some proposals for improving the processes the courts follow in making decisions on these matters.

The extent and effectiveness of restrictions on the unauthorized practice of law and how state courts should be involved in shaping and enforcing them are issues of tremendous importance to the future of the justice system in this country. The political and judicial leadership in every state should be more aware of the importance of these issues and more concerned about how best to solve the problems they raise. There are many options available for solving unauthorized practice and judicial power problems, as subsequent pages of this Article make clear. It is the responsibility of the political and judicial leadership in each state to select the best options for that state as to how these problems should be solved. In many states, past performance of this leadership in solving these problems has been disappointing. It is important that there be improvement in the future, especially since, as seems likely, pressure to enforce and reform unauthorized practice laws will escalate.