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# Unauthorized Practice of Immigration Law in the Context of Supreme Court's Decision in *Sperry v. Florida*

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**UNAUTHORIZED PRACTICE OF IMMIGRATION LAW IN  
THE CONTEXT OF SUPREME COURT'S DECISION IN  
*SPERRY V. FLORIDA***

Charles H. Kuck<sup>†</sup> and Olesia Gorinshteyn<sup>††</sup>

I. INTRODUCTION..... 341  
II. BACKGROUND ..... 342  
    A. *Unauthorized Practice of Law as an Ethics Problem for*

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<i>Lawyers</i> .....	343
B. <i>Notarios Publico, Foreign Attorneys and Other     Immigration Consultants</i> .....	346
III. ANALYSIS .....	350
A. <i>Sperry v. Florida</i> .....	351
B. <i>8 C.F.R. §292.1—Who Can Practice</i> .....	352
C. <i>Immigration is Not Solely the Practice of Federal law</i> .....	354
IV. CONCLUSION .....	357

“The law in England is not only a road to riches, but to ye highest honours.”<sup>1</sup>

### I. INTRODUCTION

Unauthorized practice of immigration law has been an ongoing and growing problem for the past several decades in the United States. There are numerous commentaries and publications in the legal community regarding the unauthorized practice of law by the ill-named “*notarios publico*,”<sup>2</sup> commonly known as “*notarios*,” and other immigration consultants. The practice of immigration law by out-of-state licensed attorneys, however, has not received any substantive attention for years.

Thus the question becomes: What does it mean to be a lawyer who is admitted to practice and what constitutes the unauthorized practice of law by a licensed attorney?

The type of licensed lawyers we focus on here are those who move from the state(s) in which they are admitted, and then set up their law practice, concentrating in the field of immigration law, in another state. These lawyers believe this is acceptable, based in large part upon the Supreme Court decision of *Sperry v. Florida*,<sup>3</sup> so long as they practice “purely” federal law.<sup>4</sup> Their argument is that since they limit their practice to federal immigration law, it is not necessary to become members of the bar in the state(s) in which

1. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 192 (1966) (quoting a 1759 letter from Charles Carroll of Carrollton to his father).

2. “*Notarios publico*” is Spanish for “notary public.”

3. *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).

4. *See id.* at 401 (allowing petitioner to practice federal patent law in a state in which he was not admitted to practice law because “[t]he rights conferred by the issuance of letters patent are federal rights.”).

they have their immigration practice. To that we say: Whoa! Not so easy.

## II. BACKGROUND

Many states traditionally follow the Model Rules of the American Bar Association (ABA) to regulate the licensing and conduct of attorneys.<sup>5</sup> Every state makes it clear that not everyone can be a lawyer and practice law because the profession is reserved for those who meet the minimal requirements in order to be admitted to the bar.<sup>6</sup> Regulation of lawyers' admission and practice is based on various statutes and rules. A constitutional provision in several states also gives "the courts the exclusive jurisdiction to regulate the admissions of persons to practice law, including the power to prevent the unauthorized practice of law."<sup>7</sup> Therefore, generally an attorney who is admitted to practice in a particular jurisdiction is one who has a license from that state and is subject to the disciplinary authority of that state.<sup>8</sup>

The regulation of the unauthorized practice of law goes back to the seventeenth century.<sup>9</sup> During the twentieth century, however, it has become a focal point in the development process of the organized bar. In 1931 the ABA appointed its first committee on the unauthorized practice of law.<sup>10</sup> During this period and until 1960, the ABA, as well as state and local bar associations, developed intense programs designed to eliminate the unauthorized practice of law.<sup>11</sup>

5. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, at xi (2007) (noting that "many jurisdictions [have] amended their disciplinary rules to implement the [A.B.A.'s] recommendations.").

6. See, e.g., *Turner v. Am. Bar Ass'n*, 407 F. Supp. 451, 474 (N.D. Tex. 1975) (stating that "[a]ll States require[] that applicants to the Bar must meet some minimal standards"); *Hendron v. Lee*, 199 So. 2d 74,78 (Ala. 1967) (petition stricken because it was "not presented by an attorney authorized to represent litigants before" the Supreme Court of Alabama).

7. 7 C.J.S. *Attorney & Client* § 27 (2008).

8. *Id.*

9. See generally ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 145–63 (1953) (discussing lawyer regulation during colonial times).

10. A.B.A. Commission on Nonlawyer Practice, *Nonlawyer Activity in Law-Related Situations: A Report with Recommendations* 17 (1995), [http://www.abanet.org/cpr/clientpro/Non\\_Lawyer\\_Activity.pdf](http://www.abanet.org/cpr/clientpro/Non_Lawyer_Activity.pdf).

11. STANDING COMM. ON LAWYERS' RESPONSIBILITY FOR CLIENT PROTECTION, A.B.A. 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE, at xv (1996).

Since 1960, many states have adopted statutory prohibitions against the unauthorized practice of law and other states have enacted unauthorized practice of law related rules and regulations.<sup>12</sup> Nevertheless, the definition of what constitutes the unauthorized practice of law is not always clear.<sup>13</sup> In *Fought v. Steel Engineering & Erection*,<sup>14</sup> the court noted that “[a]ttempts to define the practice of law in terms of enumerating the specific types of services that come within the phrase are fruitless because new developments in society, whether legislative, social, or scientific in nature, continually create new concepts and new legal problems.”<sup>15</sup> This approach suggests that jurisdictions employing laws affected by the unauthorized practice of law must review the particular facts of every issue involving the unauthorized practice of law.

A. *Unauthorized Practice of Law as an Ethics Problem for Lawyers*

As a general rule, nobody has a right to represent another person using practice of law “tools” unless admitted to the bar.<sup>16</sup> Admission to practice in one jurisdiction, however, does not give an automatic right to practice in another jurisdiction<sup>17</sup> because of the line between multijurisdictional practice and the unauthorized practice of law. For example, current law relating to multijurisdictional practice in nearly every state refers to violations of both ethics rules and state laws for an attorney who practices law without being licensed by the state, even on a temporary basis.<sup>18</sup> Therefore, the practice of law by a person who is not duly licensed in the state is forbidden not only for lay persons but for lawyers from other jurisdictions as well.<sup>19</sup>

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12. *Id.*

13. David A. Gerregano, Annotation, *What Constitutes "Unauthorized Practice of Law" by Out-of-State Counsel*, 83 A.L.R.5th 497 (2000).

14. *Fought & Co. v. Steel Eng'g & Erection, Inc.*, 951 P.2d 487 (Haw. 1998).

15. *Id.* at 495 (citing S. REP. NO. 700, at 661 (1955); H.R. REP. NO. 612, at 783 (1955)).

16. *Back Acres Pure Trust v. Fahnlander*, 443 N.W.2d 604, 605 (Neb. 1989).

17. Susan Poser, *Multijurisdictional Practice for a Multijurisdictional Profession*, 81 NEB. L. REV. 1379 (2003) (citing A.B.A. Center for Professional Responsibility, *Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice* 8 (Aug. 12, 2002), [http://www.abanet.org/cpr/mjp/final\\_mjp\\_rpt\\_121702.pdf](http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf)).

18. *Id.* at 1379–80.

19. 7 C.J.S. *Attorney & Client* § 27 (2008).

In *Hexter Title & Abstract Co. v. Grievance Committee*,<sup>20</sup> the Texas Supreme Court reviewed the public policy underlying the prohibition of unauthorized practice of law.

The primary purpose of the [legislation restricting the practice of law to licensed attorneys] was to protect the public by eliminating from the law profession those morally unfit to enjoy the privileges and those lacking in proper training and other qualifications necessary to perform the services required of an attorney. . . . The State has a vital interest in the regulation of the practice of law for the benefit and protection of the people as a whole, and the legislation . . . was adopted in furtherance of a wholesome public policy.<sup>21</sup>

Intuitively, the prohibition against unauthorized practice of law serves the dual missions of protecting consumers and, without a doubt, protecting the reputation of members of a given state bar. But that is only part of the story. Comments to the ABA Model Rules for Lawyer Disciplinary Enforcement state that “affording the agency an opportunity to be heard on the subject of lawyer discipline protects the right of the profession to preserve the high standards of conduct that it maintains in the public interest.”<sup>22</sup> Courts respond the same way to issues of unauthorized practice of law by continuously highlighting the protection of the private individuals against the legal representation and advice given by out-of-state lawyers.<sup>23</sup>

Consequently, barring unauthorized practice of law not only serves to protect the public but also improves professional standards.<sup>24</sup> A parallel is drawn in this law review comment:

Coexistent with the drive to prohibit unauthorized practice of law there began a revival of the professional nature of the practice of law. . . . As public service became paramount to the profession, efforts to combat the unauthorized practice of law, both within and without the bar, became imperative. . . . In attempting to cope with

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20. 179 S.W.2d 946 (Tex. 1944).

21. *Id.* at 947–48.

22. See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, R. 6, cmt. 16 (2007).

23. Gerregano, *supra* note 13.

24. Comment, *Unauthorized Practice of Law—The Full Service Bank that Was: Bank Cashier Enjoined from Preparing Real Estate Mortgages to Secure Bank Loans*, 61 KY. L.J. 300, 303–04 (1972).

the continuing problem of the unauthorized practice of law, the bar sought to inform the public of the dangers inherent in condoning such practice and to develop coercive remedies to alleviate the problem.<sup>25</sup>

Thus, enforcing rules and regulations on the unauthorized practice of law by out-of-state attorneys serves two connected purposes: protecting the legal profession and protecting the public interest.<sup>26</sup> Both prongs have always gone hand in hand. The ABA and the individual states focus primarily on preventive measures of the unauthorized practice of law by non-attorneys. Such efforts are, at best, not coordinated and not necessarily effective.

The ABA Standing Committee on Client Protection sponsored a survey on the unlicensed practice of law in 2004.<sup>27</sup> According to the survey results, of the thirty-six jurisdictions that responded, twenty-three jurisdictions actively enforced unauthorized practice of law regulations.<sup>28</sup> Ten jurisdictions, however, stated that enforcement was inactive or non-existent.<sup>29</sup> In comparison, a similar survey conducted in 1999 revealed that, of the thirty-four jurisdictions that responded to the survey, twenty-nine jurisdictions actively enforced unauthorized practice of law policies and only five stated that enforcement is inactive or non-existent.<sup>30</sup> Also, the 1999 Survey indicated that sixteen jurisdictions were expecting changes in the coming year in their unauthorized practice of law policies through active enforcement.<sup>31</sup> In summary, the results of the 2004 Survey disclosed a regressed number of jurisdictions that were enforcing unauthorized practice of law from twenty-nine to twenty-three within a five-year period.<sup>32</sup> On its face, this conclusion reveals serious problems relating to the states' regulation of the unauthorized practice of law.

The American legal system today is fraught with the issue of unauthorized representation. Such concerns arise on both the

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25. *Id.*

26. *See id.*

27. ABA Standing Comm. on Client Prot., Am. Bar Ass'n Ctr. for Prof'l Responsibility, 2004 Survey of Unlicensed Practice of Law Committees (2004), available at <http://www.abanet.org/cpr/clientpro/2004INTRO.DOC>.

28. *Id.* at 1.

29. *Id.*

30. ABA Standing Comm. on Client Prot., Am. Bar Ass'n Ctr. for Prof'l Responsibility, 1999 Survey of Unlicensed Practice of Law Committees (1999).

31. *Id.*

32. *See supra* notes 27, 30.

federal and state level. On the state level, the problem of the unauthorized practice of law is perhaps more easily defined. Attorneys practicing federal law, however, face a set of problems that cross state boundaries and call into question the extent to which an attorney can practice federal law when it goes beyond the limits of the state(s) in which the attorney is licensed to practice.

One of the most complicated areas of federal law, bringing unmanageable and complex issues to the practice of law, is immigration law. In this field, many lawyers practice in jurisdictions other than where they are licensed, yet they do not consider such practice to be a violation of any state law. That happens for two reasons: (1) because “rules prohibiting multijurisdictional practice are not well defined and are almost entirely unenforced;”<sup>33</sup> and (2) many immigration attorneys rely on a Supreme Court case, which does not necessarily say what most think it says.

*B. Notarios Publico, Foreign Attorneys and Other Immigration Consultants*

Before delving into the issue of unauthorized practice of law as it relates to licensed attorneys, it is vitally important to note those who clearly *are* violating the law. The undisputedly unauthorized practice of law we refer to here is that which is done by the so-called *notarios* who hold themselves out to be immigration experts. They are usually foreign attorneys and other immigration consultants. Within the American legal system, they are simply non-lawyers and thus considered to be lay persons who do not have any right to provide legal assistance to any individual.<sup>34</sup> Unlicensed attorneys are typically not part of the ABA or any other professional organization or State Bar which may regulate their conduct. Therefore, their ability to harm the public within the states that do not regulate them is immeasurable.

Foreign nationals who are seeking help for their immigration issues usually look for advice within their own ethnic community. Such help frequently comes from *notarios*, who put the aliens in harm’s way. Language difficulties, lack of knowledge of the U.S. legal system, fear for their unprotected status, and efforts to keep

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33. Poser, *supra* note 17, at 1381.

34. 7 C.J.S. *Attorney & Client* § 27 (2008).



costs down bring the aliens to *notarios* who engage in the unauthorized practice of immigration law. Due to *notarios'* bilingual skills and probable fame within their ethnic communities, the *notarios* are looked upon for legal assistance, especially in the area of immigration law.

In some countries with civil law systems, those labeled as “*notarios*” are actually lawyers with exceptional training and education<sup>35</sup> and, as such, the profession of notary public in the U.S. is mistakenly believed to be synonymous with the profession of a licensed U.S. attorney.<sup>36</sup> In the United States, however, a notary public only holds a witness position.<sup>37</sup> Notaries public in the U.S. do not hold a law degree nor are they admitted to practice law.<sup>38</sup>

Seeking to educate the vulnerable Hispanic community, the New Jersey Supreme Court Committee on the unauthorized practice of law clarified the role of a notary public by issuing a Spanish version<sup>39</sup> of its Opinion 41<sup>40</sup> on the notary public and unauthorized practice of law. The State Bar of Wisconsin took a similar stance by supporting a bill protecting members of the Hispanic community from unauthorized practice of law by *notarios*.<sup>41</sup> The United States Legal Society recognizes the Hispanic community as the largest unprotected group in the scope of *notario* unauthorized practice of law, but by no means are they the only unprotected group.

Another group that frequently engages in the unauthorized practice of law consists of foreign attorneys who have been trained under different legal systems, and who are not licensed to practice in the United States. Foreign attorneys interact in the field of immigration law with greater frequency than in other field of law.

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35. Tony Anderson, *State Bar of Wisconsin Supports Bill to Stem Unauthorized Practice of Law by Notaries Public*, DOLAN MEDIA NEWSWIRE (2005), available at [http://www.accessmylibrary.com/coms2/summary\\_0286-12036329\\_ITM](http://www.accessmylibrary.com/coms2/summary_0286-12036329_ITM).

36. Henry Gottlieb, *Court Panel Targets 'Notario Fraud': Investigation Discloses Notaries Public are Intruding on Practice of Law*, 178 N.J. L.J. 385 (2004).

37. *Id.*

38. *Id.*

39. Notaries Public and the Unauthorized Practice of Law, [http://www.judiciary.state.nj.us/notices/reports/Opinion41\\_SpanishVersion\\_06092005.pdf](http://www.judiciary.state.nj.us/notices/reports/Opinion41_SpanishVersion_06092005.pdf).

40. Notaries Public and the Unauthorized Practice of law, Op. 41, 13 N.J.L. 2273 (Nov. 1, 2004), available at <http://www.judiciary.state.nj.us/notices/unauthpracomm41.pdf>.

41. Anderson, *supra* note 35.

One ongoing and extremely significant case in New Jersey against a Brazilian lawyer, Norka Schell, exemplifies the problem of foreign attorneys engaging in the unauthorized practice of immigration law.<sup>42</sup> The case also highlights the legal system's failure to regulate the unauthorized practice of law.<sup>43</sup> Ms. Schell is a credentialed foreign legal consultant, and allowed to represent clients in New Jersey solely by giving legal advice on Brazilian law, the country where she is licensed.<sup>44</sup> Law enforcement officials, however, have learned that Ms. Schell has been engaging in the unauthorized practice of law for more than ten years.<sup>45</sup> On her website, Ms. Schell indicates that she offers services related to U.S. immigration law which officials claim goes beyond what she is authorized to practice.<sup>46</sup> To date, no charges of unauthorized practice have been filed against Ms. Schell, and she has not been barred from providing immigration related services.<sup>47</sup>

A third group of lay practitioners who engage in the unauthorized practice of law includes "immigration consultants" or *notarios*. Typically, these are people, who are either paralegals or are simply familiar with basic immigration law, render legal services to the public.

In certain parts of the United States, such as states with vast numbers of immigrants, individuals seeking legal help with immigration issues are at greater risk of being taken advantage of by non-lawyers. Some areas with the largest populations of

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42. Mary Pat Gallagher, *Fee Litigation Puts Spotlight on Foreign Lawyer's Unlicensed Work*, 188 N.J. L.J. 65 (2007).

43. *Id.*

44. *Id.* Ms. Schell gained her status as a foreign legal consultant under Rule 1:21-9 which allows a consultant to represent clients in New Jersey for the purpose of giving advice on the laws of the country in which the consultant is licensed. Rule 1:21-9 specifically bars consultants from representing individuals before a court, judicial officer, or administrative agency. It also bars consultants from signing pleadings and other papers in the capacity of a lawyer or legal advisor. Consultants are prohibited from giving legal advice on the law of New Jersey, or any country in which they are not licensed, except when based on advice given from someone licensed in that jurisdiction. *Id.* (citing N.J. STAT. ANN. § 1:21-9 (2008)).

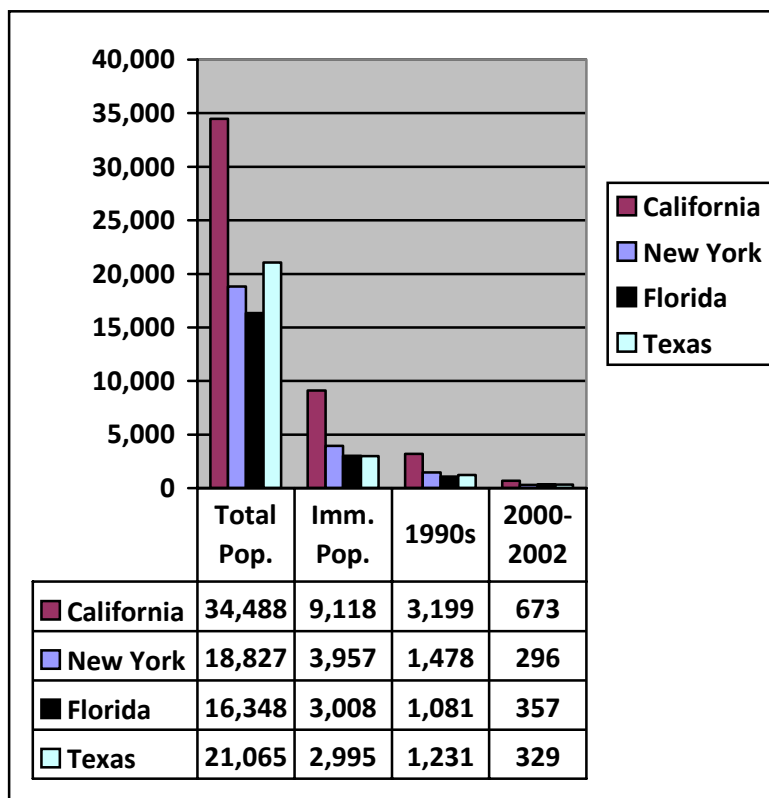
45. Gallagher, *supra* note 42, at 65.

46. *Id.*

47. *Id.* Several cases have been filed by Ms. Schell's former clients all claiming that she stated she was a licensed attorney, when in fact she was not. None of these cases, however, ever resulted in a verdict against Schell. At the time of this writing, the Unauthorized Practice Committee was conducting an ongoing investigation of Schell's activity.

immigrants, and consequently a greater risk of non-lawyers taking advantage of immigrants seeking legal assistance, include California, New York, Florida, and Texas. Twenty-eight percent of the nation's total immigrant population lives in California, followed by New York with twelve percent, and Florida and Texas with nine percent each.<sup>48</sup>

Table 1. Rank of States by Number of Immigrants (thousands).<sup>49</sup>



The large number of immigrants in California created an enormous number of potential victims in the area of immigration

48. Steven A. Camarota, *Immigrants in the United States—2002, A Snapshot of America's Foreign-Born Population*, CENTER FOR IMMIGR. STUD. at 7 (2002), available at <http://www.cis.org/articles/2002/back1302.pdf>.

49. *Id.*

law.<sup>50</sup> This prompted the creation of the Immigration Consultants provision in California state law that prohibits legal assistance by non-attorneys.<sup>51</sup> Immigration consultants are defined as “persons who provide non-legal assistance or advice in an immigration matter.”<sup>52</sup> Additionally, the California Legislature specified the requisite conditions for immigration consultants:

[E]ach person shall file with the Secretary of State a bond of fifty thousand dollars (\$50,000) . . . [which] shall be in favor of, and payable to, the people of the State of California and shall be for the benefit of any person damaged by any fraud, misstatement, misrepresentation, unlawful act or omission, or failure to provide the services of the immigration consultant or the agents, representatives, or employees of the immigration consultant while acting<sup>53</sup> within the scope of that employment or agency.

Moreover, any violation of the Act “carries criminal sanctions, civil penalties, and civil action.”<sup>54</sup>

Clearly, the problem of unauthorized practice of law in the immigration field exists throughout the country. And while not every state pays great attention to the issues arising out of unauthorized practice of law either by U.S. licensed attorneys or lay persons, some states have taken steps to stamp out unlawful practice in order to protect aliens from the devastating results of improper filing, fraud, and the unaccountability of such individuals.

### III. ANALYSIS

The issues surrounding the unauthorized practice of law discussed above raise questions about states’ ethical rules. The rationale used by immigration lawyers who are licensed in one state

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50. Alexandra M. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO. J. LEGAL ETHICS 237, 254 (1991).

51. Professions and Occupations; Immigration Consultants; Bribery and Corruption, 2004 Cal. Legis. Serv. 3477–84.

52. *Id.* at 3477.

53. Bond Requirements; Disclosure Forms; Fees; Deposit in lieu of Bond; Payment of Claims; Exempt Persons, 2006 Cal. Legis. Serv. 3816.

54. Alan R. Diamante, *Avoid Being Engaged in Immigration Consultant Fraud*, 30-SEP L.A. LAW. 10 (2007).

but then proceed to physically live and practice law in another state—whereby they are unlicensed and practicing without the assistance of a licensed attorney in that state—arises from the U.S. Supreme Court decision *Sperry v. Florida*.<sup>55</sup>

A. *Sperry v. Florida*.<sup>56</sup>

The controversy over the unauthorized practice of law was the emphasis of this 1963 Supreme Court decision.<sup>57</sup> Mr. Alexander T. Sperry (Sperry), a non-attorney, practiced patent law in Tampa, Florida without admission to the Florida Bar or any other state bar.<sup>58</sup> Sperry, however, was licensed to practice before the U.S. Patent and Trademark Office (USPTO).<sup>59</sup> The Florida Bar sought to enjoin Sperry's conduct on the ground that it constituted the unauthorized practice of law.<sup>60</sup> The Court did not question the determination that, under Florida law, preparing and prosecuting patent applications for others constituted practicing law.<sup>61</sup> In the decision delivered by Chief Justice Warren, however, the Court stated that although Florida has a substantial interest in regulating the practice of law within the State, it could not validly prohibit this "practice" because Congress provided "that the Commissioner of Patents 'may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the patent office.'"<sup>62</sup> Thus, state law must "yield" when it is incompatible with federal law.<sup>63</sup>

The Court's decision in *Sperry* provides an important explanation regarding the prohibition of unauthorized practice of law.<sup>64</sup> *Sperry* suggests that a State's unauthorized practice of law rules and regulations cannot obstruct an individual's right to practice if such practice is authorized by federal law.<sup>65</sup> Thus, by virtue of the Supremacy Clause of the U.S. Constitution, the federal

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55. 373 U.S. 379 (1963).

56. *Id.*

57. *Id.*

58. *Id.* at 381.

59. *Id.*

60. *Id.*

61. *Id.* at 383.

62. *Id.* at 384.

63. *Id.* at 383–84.

64. *Id.*

65. *See id.*

law that authorized practice before the USPTO was superior to Florida's unauthorized practice of law statute and therefore the Florida state law had no right to hinder or interfere with the federal statute at stake.<sup>66</sup>

The *Sperry* decision influenced various groups of people who sought to practice before federal agencies. Some of these groups have argued that the *Sperry* decision means that an out-of-state, licensed attorney can practice federal law if his or her federal practice is clearly covered by authorizing language similar to the federal patent office statutes discussed in *Sperry*.<sup>67</sup> The *Sperry* "federal practice exception" to the unauthorized practice rules, however, has been limited to the facts of that case and applies only where there is a federal statute specifically authorizing such practice.<sup>68</sup> Therefore, in order to demonstrate the effect of *Sperry*'s decision on the area of immigration law we must examine the federal statute that governs who can practice immigration law.

#### B. 8 C.F.R. Section 292.1—Who Can Practice

The Code of Federal Regulations (CFR) was created as a set of practical and procedural rules for those appearing before the federal agencies. The CFR outlines a wide range of representatives who may appear before the Department of Homeland Security and U.S. Citizenship and Immigration Services (USCIS) as well as before the Department of Justice, the U.S. Customs and Border Patrol (CBP) and U.S. Immigration Customs Enforcement (ICE).<sup>69</sup> The allowed representation includes the following: (1) attorneys licensed to practice law in one of the states of the United States;<sup>70</sup> (2) law students and law graduates;<sup>71</sup> (3) reputable individuals;<sup>72</sup> (4)

66. George A. Riemer, *Is There a "Federal Law Only" Exception to the Oregon Bar Examination?*, 61 OR. ST. B. BULL. 25, 27 (2001).

67. *Id.* at 27–28.

68. Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J.L. & COM. 301, 320 (1998).

69. See generally The National Archives, *About the CFR*, <http://www.archives.gov/federal-register/cfr/about.html> (last visited Dec. 13, 2008).

70. 8 C.F.R. § 292.1(a)(1) (2008). An "attorney" for purposes of the CFR is "[a]ny person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbaring, or otherwise restricting him in the practice of law." *Id.* § 1.1(f).

71. *Id.* § 292.1(a)(2).

72. *Id.* § 292.1(a)(3).

accredited representatives;<sup>73</sup> (5) accredited officials;<sup>74</sup> and (6) foreign attorneys.<sup>75</sup>

The CFR, however, sets certain restrictions for non-attorneys as to the establishment of the immigration practice and remuneration for such representation.<sup>76</sup> There remains, however, 8 C.F.R. section 292.1(a)(1), which allows any attorney licensed by a state in the United States to practice immigration law.<sup>77</sup> The language implies that, as long as a U.S. licensed attorney restricts her practice to federal immigration law, her practice is permissible in any state and will withstand any state level unauthorized practice of law rules. In *Sperry* there was a federal statute authorizing the USPTO to set licensing requirements for patent attorneys and agents.<sup>78</sup> Requirements include an examination administered by the USPTO.<sup>79</sup> In contrast, representation before USCIS, ICE, CBP, or the Executive Office for Immigration Review (EOIR) does not require special registration or licensing.<sup>80</sup>

Taking *Sperry* as a starting point, the Department of Justice “promulgat[ed] disciplinary regulations on a nationwide basis governing the privilege of appearing as an attorney or representative before the [Board of Immigration Appeals (BIA)], the Immigration Courts, and the [USCIS].”<sup>81</sup> The national disciplinary scheme was criticized from different standpoints. Many commentators argued that the unilateral national disciplinary scheme of the federal agencies is inappropriate; states should have sole jurisdiction over the disciplinary rules because a unilateral scheme would cause confusion and uncertainty with the states’ rules.<sup>82</sup> Furthermore, critics objected to a dual disciplinary system that punishes practitioners twice for the same conduct.<sup>83</sup>

73. *Id.* § 292.1(a)(4) (defining accredited representatives as persons accredited by the Board of Immigration Appeals who represent a non-profit religious, charitable, social service, or similar organization).

74. *Id.* § 292.1(a)(5) (meaning accredited official “of the government to which the alien owes allegiance.”).

75. *Id.* § 292.1(a)(6).

76. *See generally id.* § 292.1.

77. *Id.* § 292.1(a)(1).

78. *See Sperry*, 373 U.S. 379, 384 (1963).

79. *Id.* at 395–96.

80. *See* 8 U.S.C. § 292.1 (2008).

81. Professional Conduct for Practitioners, 65 Fed. Reg. 39513, 39524 (June 27, 2000) (to be codified at 8 C.F.R. pts. 3 & 292).

82. *Id.*

83. *Id.*

Finally, it was called an “unnecessary and impermissible intrusion” into the state law licensure process; “to bar a lawyer from practice before an agency is unheard of.”<sup>84</sup> The ABA acquiesced and suggested that EOIR and USCIS establish a system where attorneys’ misconduct is reported to the state disciplinary authority, who would then notify the agencies about sanctioned lawyers.<sup>85</sup> This National disciplinary scheme, however, involves only USCIS and EOIR, excluding other federal and state agencies involved in immigration law practice.<sup>86</sup>

*C. Immigration is Not Solely the Practice of Federal Law*

Nonetheless, many states bar federal immigration law practice by out-of-state licensed attorneys for the stated reason of protecting public interests, increasing professionalism, and punishing violators.<sup>87</sup> A state’s disciplinary rules only bind state-licensed attorneys, so an attorney licensed outside of that state would not be bound by those rules.<sup>88</sup> The issue of fairness arises, as the rules are not the same for all attorneys practicing in that state. State-licensed attorneys are subject to higher standards set by the state bar while corresponding federal standards are very low or virtually non-existent.

Additionally, states cannot be silent when the practice of an out-of-state licensed attorney involves state law. Clearly, immigration law cannot be called “pure” federal law as long as practice questions involve a wide range of state laws. In 2002, a New York licensed lawyer who had established an immigration law

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84. *Id.*

85. *Id.*

86. ROBERT C. DIVINE & BLAKE CHISAM, IMMIGRATION PRACTICE §§ 2-1-3-1 (2006-07). In the very complex area of immigration law, practitioners engage in practice before the Federal Bureau of Investigation, Department of State, American consuls abroad, Office of Diplomatic Security, U.S. Passport Office, Department of Labor, Department of Agriculture, Center for Disease Control, Department of Health and Human Services, U.S. Coast Guard, Bureau of Immigration and Customs Enforcement, Offices of the Governors of the several states, Boards of Pardons and Paroles, and other federal agencies, as well as concurrent state law.

87. *See, e.g.*, CAL. BUS. & PROF. CODE § 6125 (2008); COLO. REV. STAT. ANN. § 12-5-101 (2008).

88. *See* *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (denying fee recovery to out-of-state lawyers but not disciplining them under the unauthorized practice statute).



practice in Houston was sued by the Texas Bar's Unauthorized Practice of Law Committee.<sup>89</sup> The Committee alleged that the attorney, Ms. Senanayake, violated the Texas Unauthorized Practice of Law Statute by practicing law in Texas without a license.<sup>90</sup> The Committee was concerned about the effect of Texas family and criminal law on Ms. Senanayake's clients' immigration cases.<sup>91</sup> Furthermore, the Committee raised the issue that Ms. Senanayake could not be controlled by either the Texas bar or by federal agencies.<sup>92</sup> The case was ultimately dropped by the Committee.<sup>93</sup>

In comparison, an article authored by the Deputy Director and General Counsel<sup>94</sup> of the Oregon State Bar concluded that there is no clear answer to the question of whether an out-of-state attorney can establish a federal practice in Oregon without taking and passing the Oregon bar exam. After careful review of relevant case law,<sup>95</sup> the Director observed that the "cases are a strong basis for concluding that an out-of-state lawyer cannot set up a bankruptcy practice in a state he is not licensed in even if the lawyer is admitted to the bar of the federal court in that state."<sup>96</sup> The Director strongly encouraged attorneys seeking to practice in Oregon to take the bar exam so as to avoid unauthorized practice of law issues.<sup>97</sup>

Even more striking, the Maryland Court of Appeals held that the unauthorized practice of law is "not limited to practice utilizing the common law and statutes of Maryland."<sup>98</sup> Rather, the court held that the unauthorized practice of law includes any advice to

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89. Cyrus D. Mehta, *Emerging Issues in Dual Representation and Unauthorized Practice of Law*, 1659 PLI/CORP 237 (2008), available at: [http://www.pli.edu/emktg/all\\_star/Dual\\_Rep22.doc](http://www.pli.edu/emktg/all_star/Dual_Rep22.doc).

90. John Council, *Out of Bounds: Lawyer Without Texas Bar Card Fights for Right to Practice*, 18 TEX. LAW. 24 (2002).

91. *Id.*

92. *Id.*

93. Mehta, *supra* note 89.

94. George A. Riemer is Deputy Director and General Counsel of the Oregon State Bar.

95. Riemer, *supra* note 66, at 32 (examining *In re Desilets*, 247 B.R. 660 (Bankr. W.D. Mich. 2000), *aff'd*, *Rittenhouse v. Delta Home Improvement, Inc.*, 255 B.R. 294 (W.D. Mich. 2000)).

96. Riemer, *supra* note 66, at 32.

97. Riemer, *supra* note 66.

98. *Kennedy v. Bar Ass'n of Montgomery County, Inc.*, 561 A.2d 200, 208 (Md. 1989).

clients and preparation of any legal documents, even on the basis of federal or foreign law, by an attorney not admitted to practice in the state whose principal office is in the state.<sup>99</sup> The court also stated, “[t]he goal of the prohibition against unauthorized practice is to protect the public from being preyed upon by those not competent to practice law from incompetent, unethical, or irresponsible representation.”<sup>100</sup>

The Maryland Court of Appeals was deciding a case involving a member of the District of Columbia bar who was admitted to practice in the federal court in Maryland but not in the Maryland state bar.<sup>101</sup> The attorney contended that he was free to practice “federal” and “non-Maryland” law.<sup>102</sup> At the outset the court made it clear that the case involved a person who was “not admitted to practice law in Maryland holding himself out to the public as an attorney engaged in the general practice of law in Maryland from a principal office in Maryland.”<sup>103</sup> The court found this to be unauthorized practice of law.<sup>104</sup> “This is so whether the legal principles he was applying were established by the law of Montgomery County, the State of Maryland, some other state of the United States, the United States of America, or a foreign nation.”<sup>105</sup> The *Sperry* argument failed here principally because the unauthorized practice of law involved in the case was not limited to the practice of federal law.<sup>106</sup>

Other state courts have also shown their negative treatment of out-of-state licensed attorneys through advertising restrictions. A New York licensed attorney brought a case against the Florida Bar challenging the state’s advertising restrictions for out-of-state counsel.<sup>107</sup> The Plaintiff claimed that he would be charged with unauthorized practice of law if his advertisement stated either “New York Legal Matters Only” or “Federal Administrative Practice” and included an address for a Florida-based law office.<sup>108</sup> He also

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99. *Id.*

100. *Id.* at 207 (citing *In re Application of R.G.S.*, 541 A.2d 977, 983 (1988)).

101. *Id.* at 200.

102. *Id.* at 203.

103. *Id.* at 207.

104. *Id.* at 208.

105. *Id.* at 208–09.

106. *Id.*

107. *Gould v. Harkness*, 470 F. Supp. 2d 1357 (S.D. Fla. 2006).

108. *Id.* at 1358.

argued that the advertising restrictions violated his First Amendment rights.<sup>109</sup> The U.S. District Court for the Southern District of Florida, however, held that advertising restrictions for out-of-state counsel did not violate the attorney's First Amendment rights.<sup>110</sup> The court found that the attorney's proposed advertisement both concerned unlawful activity and misled.<sup>111</sup> There was no state or federal law, rule, or regulation that allowed non-licensed attorneys to engage in general federal administrative practice in Florida.<sup>112</sup>

Another court in Florida found a New York-licensed attorney committed unauthorized practice of law for advertising his availability as an attorney in Miami telephone books, newspapers, and television with the implication that he was authorized to practice in Florida.<sup>113</sup> The court held that the defendant had knowingly created the impression that he was authorized to practice in Florida on his own because the advertisements did not indicate the defendant's membership in the New York bar or his limited immigration law area of practice.<sup>114</sup> Therefore, the attorney committed unauthorized practice of law.<sup>115</sup>

Clearly, as outlined in *Sperry*, states still have a substantial interest in regulating the practice of law within state borders.<sup>116</sup> In the absence of federal legislation, states could validly prohibit non-state-licensed lawyers from engaging in federal administrative practice immigration law.<sup>117</sup>

#### IV. CONCLUSION

Any attempt to practice law without admission to the state bar can be considered as unauthorized practice of law. At first blush, practicing federal immigration law is seen as a possible safe harbor for an out-of-state attorney. The complexity of federal immigration law and its impact on state laws, however, gives state bars a wide range of options to bring complaints against attorneys not licensed

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109. *Id.*

110. *Id.* at 1360.

111. *Id.*

112. *Id.*

113. Florida Bar v. Kaiser, 397 So. 2d 1132, 1133 (Fla. 1981).

114. *Id.*

115. *Id.*

116. *Sperry*, 373 U.S. 383.

117. *See id.*

in the state based on an unauthorized practice of law statute. Any attorney, before establishing a practice in a state where he or she is not licensed should familiarize himself or herself with that state bar's admission and rules for unauthorized practice of law. The highest standards of the legal profession must be preserved. This is possible only under strict supervision of the regulating authorities. An attorney whose practice is not regulated becomes no better than a *notario*. Rules are set for the legal profession not just to set minimum standards of conduct, but to protect the clients, who become the victims of unauthorized practitioners.