WE CAN'T ALL BE LAWYERS...OR CAN WE? REGULATING THE UNAUTHORIZED PRACTICE OF LAW IN ARIZONA

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INTRODUCTION

In the American system of government, those wrongly harmed seek and find redress through the judicial system. Therefore, unhampered access to this system is paramount. Additionally, skillful employment of the judiciary process is critical. However, an alarming number of Americans who encounter legal problems do not obtain the services of a lawyer.[1] Many believe that legal representation is too expensive.[2] Whether true or not, there is a perception that lawyers have priced themselves out of the market.[3] Those who cannot afford a lawyer often turn to a nonlawyer to obtain needed legal services.[4]

Laws that regulate the unauthorized practice of law are designed to protect these individuals. Yet, the same laws that are designed to protect the public from incompetent legal services unavoidably increase the cost of such services. Much of the debate in regulating the unauthorized practice of law involves the tension between keeping quality high and costs low.

This Note examines the general rules that govern the unauthorized practice of law in Arizona. Section One considers the importance of regulating unlicensed providers of legal services. Next, Section Two addresses enforcement problems and the difficulty of determining what constitutes the practice of law. Section Three analyzes proposed reform measures from other states as models for possible future reform in Arizona. Sections Four and Five examine the evolution of the unauthorized practice rules in Arizona and how these regulations are enforced. Section Six discusses the future of the unauthorized practice of law rules in Arizona and concludes by suggesting an approach to reform.

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1. AMERICAN BAR ASSOCIATION CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY 18 (1989) ("[a]lmost 40% of the nationwide sample reported that they have had a problem during the past year for which they did not have legal assistance").

2. *Id.* at 34 (Table 23) (the cost factor was the most often cited response (28.3%)).

3. *See* STATE BAR OF CALIFORNIA, REPORT OF THE PUBLIC PROTECTION COMMITTEE 7 (1988) [hereinafter 1988 REPORT] (stating that there is a need to provide low-to-mid level income persons with better access to the courts and "lawyers cannot provide, or are not interested in providing, this access").

4. *See id.* The term "nonlawyer," as used throughout this Note, refers to persons who are not admitted to the bar but still engage in the practice of law.

This Note is not specifically addressed to what lawyers should or should not be allowed to do. Rather, this Note is primarily concerned with how the unauthorized practice of law is regulated.

I. THE IMPORTANCE OF REGULATING THE UNAUTHORIZED PRACTICE OF LAW

Every state has rules governing the unauthorized practice of law.[5] These rules may vary in form[6] and enforcement,[7] but they all restrict the practice of law to those who are properly licensed.[8] Commentators often criticize the strict regulations as an attempt by the bar to insulate the legal profession from outside competition.[9] The bar insists that the rules that regulate the practice of law exist for the protection of the public.[10] Specifically, the American Bar Association reasons that prohibiting nonlawyers from practicing law protects the public from ineffective assistance.[11]

Many advocate a system with fewer restrictions on who may practice law.[12] They believe that allowing more nonlawyers to practice law will reduce the cost of legal assistance.[13] Lower legal costs afford greater access to the judicial system.[14] These advocates believe that the lack of consumer complaints pertaining to nonlawyer legal assistance demonstrates that public harm from such assistance is not widespread.[15]

Proponents of the strict regulation of the unauthorized practice of law emphasize the increased potential for public harm caused by the ineffective

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5. *See* Kathleen E. Justice, Comment, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 180 (1991).

6. *E.g.*, statutes, court rules, bar rules. *See infra* Section III.

7. State bar associations and state and local prosecutors are commonly used to enforce unauthorized practice of law rules.

8. Traditionally, most states have restricted the practice of law to members of the state bar. *See, e.g.*, ARIZ. SUP. CT. R. 31(a)(3); *see also* Deborah L. Rhode, *Policing the Profession Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 11 n.39 (1981). However, some states have changed or modified their laws to allow certain other licensed individuals (nonlawyers) to perform limited legal services. *See infra* Section III.

9. *See, e.g.*, Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 161–201; Rhode, *supra* note 8, at 9; Justice, *supra* note 5, at 183–84 & n.23; JAMES W. HURST, THE GROWTH OF AMERICAN LAW 313 (1950); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 15.1.3 (1986).

10. *See* Justice, *supra* note 5, at 184 n.22.

11. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 cmt. (1990).

12. *See, e.g.*, Rhode, *supra* note 8, at 97.

13. *Id.* at 97–98.

14. *See* Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 229–30 (1990).

15. *See* Rhode, *supra* note 8, at 33 (finding that of all the complaints received by the surveyed bar associations, only two percent (27 of 1,188) were initiated by injured consumers); STATE BAR OF ARIZONA, REPORT OF THE UNAUTHORIZED PRACTICE OF LAW COMMITTEE 4 (1991) [hereinafter ARIZONA REPORT] (reporting that the complaints received by the bar were "mostly lawyer-generated," and that complaints by consumers were "isolated"). Admittedly, the lack of consumer complaints, at least in Arizona, could also be attributed to the fact that many consumers may not know how or where to complain. Interview with Hon. John L. Claborne, Chairman of the Unauthorized Practice of Law Committee of the State Bar of Arizona (Aug. 20, 1991).

assistance of nonlawyers.[16] Members of the bar are required to pass a state bar examination which insures a minimum level of legal competency.[17] As members of the bar are subject to state bar disciplinary rules, lawyers also have incentive to perform competently.[18] Furthermore, most state bar associations require members to contribute to a recovery fund that provides reparation to those wronged by a lawyer.[19] Proponents of strict regulation argue that these safeguards are not present, and reparation is uncertain, when one is harmed by a nonlawyer.

Although the approaches taken by those who favor strict regulation and those who favor less drastic regulation differ dramatically, they share a common goal. The objective is to create a system that lowers the cost of legal services and allows greater access to the judicial system, while at the same time maintaining a high level of competency and accountability.

Many reform debates in this area focus on the question of whether the public is actually harmed by nonlawyers performing legal services.[20] While the question of public harm is important, it is the position of this Note that, regardless of the answer, reform is necessary because there is a segment of the population that is unable to obtain adequate access to the legal system.[21] However, the extent of the public harm (if any) should profoundly affect the direction of that reform.

II. WHAT IS THE "PRACTICE OF LAW"?

A. Historical Perspective

Prior to the 1930s, the rules regulating the unauthorized practice of law concentrated on preventing nonlawyers from appearing in court.[22] Until then the unauthorized practice of law was not viewed as a widespread problem.[23] In 1930, responding to the increased frequency of complaints and the growth of the legal profession in general, the American Bar Association established its first Committee on the Unauthorized Practice of Law.[24] By 1938 there were over 400 state and local bar associations with similar committees.[25] As concern grew, states enacted broad statutes designed to prohibit nonlawyers from engaging in many law related activities.[26] Although the organized bar main-

16. *See* 1988 REPORT, *supra* note 3, at 7 (reporting that not all nonlawyers are committed to the same high standards when performing legal services and noting that "there is significant potential for public harm caused by the [legal] activities of [nonlawyers]"); STATE BAR OF CALIFORNIA, REPORT OF THE STATE BAR OF CALIFORNIA COMMISSION ON LEGAL TECHNICIANS 17 (1990) [hereinafter 1990 REPORT] (finding that lawyers, bar associations, and judges cited instances of consumer harm resulting from legal services provided by nonlawyers).

17. *See, e.g.*, ARIZ. SUP. CT. R. 33–40.

18. *See, e.g.*, ARIZ. SUP. CT. R. 46.

19. *See* AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, 1987 CLIENT'S SECURITY FUND SURVEY (1987) (reporting 48 jurisdictions, including D.C., that have established a client security fund).

20. *See* Rhode, *supra* note 8, at 33; Justice, *supra* note 5, at 188–89.

21. *See supra* notes 1–3 and accompanying text.

22. Rhode, *supra* note 8, at 7.

23. *Id.* at 7–8. *See generally*, Christensen, *supra* note 9, at 159.

24. Rhode, *supra* note 8, at 8.

25. *Id.*

26. Christensen, *supra* note 9, at 191–92.

tained that the stronger statutes were needed to protect the public,[27] commentators and historians often assert that the real motivation behind the legislation was to insulate lawyers from outside competition.[28]

The view that the bar's concern over the unauthorized practice of law was merely a self-serving attempt to enact protectionist legislation was not unfounded. Lawyers often were prominent on the committees that initiated such legislation. The bar also employed less formal means. The organized bar attempted to form mutual agreements with other professions through formal "Statements of Principles."[29] These Statements of Principles were formal agreements with accountants, bankers, and realtors designed to settle disputes over what activities constituted the practice of law.[30] In the late 1970s, the United States Justice Department began to investigate whether these agreements violated the federal antitrust laws.[31] As a result, many bar associations voluntarily rescinded their Statements of Principles.[32]

Today, virtually any attempt by the organized bar to further define who may and may not practice law invariably meets with opposition charging elitism. Consequently, many bar associations leave the task of defining and enforcing the unauthorized practice of law to the courts.[33]

B. An Attempt to Define the Problem

A major obstacle to effective regulation of the unauthorized practice of law is the practical problem of knowing what constitutes the unauthorized practice of law. The scope of such regulation necessarily depends on an understanding of what is included in the *authorized* practice of law.[34] Courts[35] and commentators[36] have struggled to develop a workable definition.

The practice of law may be divided into three categories of activities: (1) in-court representation; (2) document drafting; and (3) the giving of legal advice.[37] The first category is easily identified and controlled.[38] Consequently, most definitions are attempts to clarify the latter two categories.[39]

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27. Justice, *supra* note 5, at 184 n.22.

28. *See, e.g.*, Christensen, *supra* note 9, at 196; Rhode, *supra* note 8, at 9; Justice, *supra* note 5, at 183–84 & n.23; HURST, *supra* note 9, at 313; WOLFRAM, *supra* note 9, § 15.1.3.

29. *See* Rhode, *supra* note 8, at 9; HURST, *supra* note 9, at 324.

30. *See* Rhode, *supra* note 8, at 9–10.

31. *See id.* at 9–10 & n.36.

32. *Id.*

33. Justice, *supra* note 5, at 185.

34. It has been said that "[w]hat constitutes the practice of law is extremely difficult, if not unwise, to even attempt to define." Creditors' Serv. Corp. v. Cummings, 190 A. 2, 9 (R.I. 1937) (Capotosto, J.).

35. *See, e.g.*, State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 87, 366 P.2d 1, 9 (1961); *In re* Opinion of the Justices, 194 N.E. 313, 316–17 (Mass. 1935).

36. *See, e.g.*, Justice, *supra* note 5, at 185; Elizabeth Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation*, 12 PEPP. L. REV. 1, 3 (1984). *See generally* Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 NOVA L.J. 363 (1980).

37. *See* H.D. Warren, Annotation, *What Amounts to Practice of Law*, 151 A.L.R. 781, 781–83 (1944); Justice, *supra* note 5, at 189.

38. *See* Justice, *supra* note 5, at 189–90.

39. *Id.* at 189 n.60.

Many of the definitions are broad and overinclusive.[40] For example, in 1961 the Arizona Supreme Court defined the practice of law as "those acts ... which lawyers customarily have carried on from day to day through the centuries."[41] In an attempt to create a more useful definition, some courts have narrowed the meaning of the practice of law.[42] For example, the "professional judgment test" excludes from the definition of the practice of law any activity which is "merely incidental to another commercial, nonlegal enterprise."[43] However, narrowing the scope of the definition only leads to more specific problems of interpretation and such definitions are often underinclusive.[44] Clearly, an artful definition, although helpful, cannot precisely define everything that is included in the practice of law. Consequently, judges are left to decide what is and what is not included in the practice of law on a case-by-case basis.[45]

III. EXAMPLES OF UNAUTHORIZED PRACTICE OF LAW REFORM

Over the past decade states have proposed a wide variety of solutions to the problems encountered in the regulation of the unauthorized practice of law. Although some have met with approval, many have not. Examining the reasons why past proposals have succeeded or failed provides insight for future solutions.

Probably the most common method of reform is through legislation. However, legislative reform efforts have achieved limited success.[46] Although

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40. *See* Morrison, *supra* note 36, at 365 (noting Chesterfield Smith's comment that "[t]he practice of law is anything my client will pay me to do").

41. State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 87, 366 P.2d 1, 9 (1961).

42. *See* Justice, *supra* note 5, at 187–89. Recently, the State Bar of Arizona asked its Unauthorized Practice of Law Committee to draft a workable definition. The following was the committee's result:

> One who acts in a representative capacity in protecting, enforcing or defending the legal rights and duties of another is engaged in the practice of law. It also includes counseling or advising another in connection with their legal rights and duties. One is deemed to be practicing law whenever he furnishes to another advice or services which require the exercise of legal judgment. The practice of law creates a professional relationship of confidence and trust based upon the giving of legal advice.

ARIZONA REPORT, *supra* note 15, at 4.

43. Justice, *supra* note 5, at 188. Other refinements of the definition are the "incidental legal services test" and the public harm test. *See id.* at 188–89.

44. For example, the definition provided by Arizona's Unauthorized Practice of Law Committee (*see supra* note 42) defines the practice of law. However, left undefined are terms within the definition, such as "legal judgment." Interpreting the term "legal judgment" leads to the same problems encountered in defining the practice of law.

45. Nor do the MODEL RULES OF PROFESSIONAL CONDUCT provide any guidance, choosing instead to defer to local law for the definition of the practice of law. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 5.5 cmt. (1990).

46. *See* Justice, *supra* note 5, at 192–93. For example, a 1986 Oregon Judiciary Committee bill which authorized "legal scriveners" to complete legal forms in limited areas never made it past the committee level. *Id.* at 194. The bill, sponsored by independent paralegals, allowed nonlawyers to practice law in the areas of divorce, bankruptcy, real estate, and adoption matters. *Id.* However, the bill was defeated soon after it was introduced. *Id.*

most legislative reform efforts propose solutions similar to non-legislative schemes,[47] they often fail while their non-legislative counterparts succeed. The failure of these legislative attempts is attributable to separation of powers problems. The exclusive power to regulate the legal profession is vested with the courts.[48] Courts view legislative enactments pertaining to the legal profession as infringements on the judiciary's inherent power to regulate the bar.[49] As a consequence, most of the legislative efforts to reform the unauthorized practice of law are held unconstitutional.[50]

A. Washington's Limited Practice Rule

Court rules provide an alternative method for regulating the unauthorized practice of law.[51] Because court rules are enacted by the judiciary, they rarely encounter separation of powers problems.[52] Consequently, many states choose to regulate the legal profession through rules of court instead of legislation.[53] The State of Washington provides a successful example of regulation through court rules.

In 1979, the Washington legislature enacted a broad statute allowing nonlawyers to draft and complete specified legal documents.[54] However, two

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In 1988, the Maryland state legislature considered a bill allowing licensed legal assistants to practice law as independent contractors. Maryland House of Delegates Bill No. 1029. Shortly thereafter, the Maryland House of Delegates defeated the legislation. *See* Justice, *supra* note 5, at 196. Although the Maryland bill did not limit the legal assistants to certain fields of law, it did provide for a licensing scheme, a set of educational requirements, and a disciplinary structure. *Id.*

In 1990, an Illinois Senate bill introduced the Independent Paralegal Licensing Act. The bill allowed licensed paralegals to practice law in limited areas without the supervision of a licensed attorney. Illinois Senate Bill No. 2314; *see* Justice, *supra* note 5, at 200. However, the Illinois legislature did not take any action and the bill died in January 1991.

In addition, it is worth noting that both Washington's Limited Practice Rule and California's "legal technician" proposal, discussed *infra* parts III.A.–B., were preceded by failed legislation. In California, the Eastin Bill (Assembly Bill 168, 1991–92 Reg. Sess.) was introduced in December 1990 and dropped in March 1991.

47. The term "non-legislative scheme" is used in this Note to refer to any reformation of the unauthorized practice of law by means other than through the legislature. An example of a "non-legislative scheme" is reformation of court rules. *See infra* part III.A.

48. *See* Rhode, *supra* note 8, at 11.

49. *See* Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162, 162–64 (1960).

50. *Id.*

51. Arizona has, in fact, amended its prohibition on the unauthorized practice in the form of specific exceptions to the court rules. *See infra* notes 131–39 and accompanying text.

52. *See supra* text accompanying notes 48–50.

53. *See* Rhode, *supra* note 8, at 11 n.39.

54. 1979 Wash. Laws ch. 107, § 1 (codified as WASH. REV. CODE ANN. § 19.62.101 (1989)). The legislation was a response to a Washington Supreme Court decision from the previous year. Washington State Bar Ass'n v. Great W. Union Fed. Savings and Loan Ass'n, 586 P.2d 870 (1978). In 1978, the Washington State Bar Association filed suit against Great Western Union Federal Savings and Loan Association and one of its employees, claiming that they were engaging in activities that constituted the unauthorized practice of law. *Id.* Great Western was lending money to purchasers of real property and provided a "closing service" to both the buyer and the seller. *Id.* at 872. Great Western provided and completed legal documents including promissory notes, deeds of trust, statutory warranty deeds, and real estate excise tax affidavits. *Id.* Great Western also included a disclaimer stating that the savings and loan was not acting as the seller's attorney and purported to relieve Great Western of any liability surrounding the transaction. *Id.* at 872 n.1. The Supreme Court of Washington held that the activities

years later, the Washington Supreme Court held that the statute violated the separation of powers clause of the Washington constitution[55] and declared the law unconstitutional.[56] The court held that the act improperly encroached upon the judiciary's exclusive jurisdiction over the regulation of the practice of law.[57] The court also believed that the statute did not contain appropriate safeguards to prevent potential harm to the public.[58]

In 1983, the Supreme Court of Washington adopted a "limited practice rule" allowing certain lay persons to engage in the practice of law in some real estate transactions.[59] The rule created a supreme court-appointed Limited Practice Board[60] and vested it with the power to certify "limited practice officers."[61] The officers are required to pass an examination[62] and certification is subject to continuing educational requirements.[63] Additionally, the officers must demonstrate the financial ability to cover damages that may result from their negligent acts.[64]

Washington's Limited Practice Rule also requires that officers make appropriate disclosures to their clients[65] and use only pre-approved legal forms.[66] Moreover, when practicing under this rule, the officers are held to the same standard of care as an attorney.[67] The Washington approach apparently is succeeding. The Board has issued over 1200 licenses since 1984, and only twelve complaints had been filed against the limited practice officers through 1989.[68]

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constituted the practice of law. *Id.* at 878. The court enjoined Great Western from continuing in these activities. *Id.*

55. WASH. CONST. art. IV, § 1.

56. Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc., 635 P.2d 730, 736 (1981).

57. *Id.*

58. *Id.* at 733–34. According to the court, although the statute attempted to create a high standard of care for those practicing under it, the statute did not require the same level of conduct and competence required of an attorney. *Id.* Furthermore, the statute did not consider who was to decide whether persons practicing under the new law possessed the requisite skill and competence. *Id.* at 734. Finally, the statute did not provide for a security fund, such as the one maintained by the state bar, to protect the public from practitioners' negligence. *Id.*

59. WASH. CT. R. ANN., ADMISSION TO PRACTICE RULE 12. The rule authorizes "certain lay persons to select, prepare and complete legal documents incident to the closing of real estate and personal property transactions and to prescribe the conditions of and limitations upon such activities." *Id.* ADMISSION TO PRACTICE RULE 12(a).

60. *Id.* ADMISSION TO PRACTICE RULE 12(b)(1).

61. *Id.* ADMISSION TO PRACTICE RULE 12(b)(2)(i).

62. *Id.* ADMISSION TO PRACTICE RULE 12(b)(2)(ii).

63. *Id.* ADMISSION TO PRACTICE RULE 12(f)(1).

64. *Id.* ADMISSION TO PRACTICE 12(f)(2). The Board accepts as proof of financial solvency a $100,000 individual errors and omissions insurance policy, an agency policy, or a financial responsibility form from a corporate surety. 1990 REPORT, *supra* note 16, at 47.

65. WASH. CT. R. ANN., ADMISSION TO PRACTICE RULE 12(e)(2). The disclosures include, but are not limited to, notifying the parties that the officer is not acting as a representative of either party, that the documents prepared will affect the legal rights of the parties, and that the parties have the right to be represented by their own lawyers. *Id.*

66. *Id.* ADMISSION TO PRACTICE RULE 12(d).

67. *Id.* ADMISSION TO PRACTICE RULE 12(g)(5); *see* 1990 REPORT, *supra* note 16, at 47.

68. *See* 1990 REPORT, *supra* note 16, at 47.

The Limited Practice Rule addresses all the shortcomings of the 1979 legislative attempt.[69] Furthermore, because the reform is a supreme court rule it avoids the constitutional pitfalls associated with legislative reform.[70]

B. Florida's "Unlicensed" Practice of Law Rules

Another method used to regulate the unauthorized practice of law is the adoption of rules by bar associations. Bar association rules are not enacted by the legislature, and therefore, like court rules, they do not encounter separation of powers problems. The Florida Bar Association recently amended its rules to reform Florida's regulation of the unauthorized practice of law.[71]

In 1977, the Florida Bar brought suit against Rosemary Furman alleging that, through her secretarial services, she was practicing law without a license.[72] Furman offered legal services in connection with marriage dissolutions and adoptions.[73] The bar petitioned the Florida Supreme Court to permanently enjoin Furman from continuing the questioned activities.[74]

The court held that Furman, who was not a member of the state bar, was practicing law. The court issued an injunction prohibiting her from continuing her services.[75] Several years later, the Florida Bar again petitioned the Florida Supreme Court alleging that Furman was in contempt of court because she had not complied with the court's injunction.[76] The court again found in favor of the bar and sentenced Furman to 120 days in jail.[77]

The *Furman* cases were highly publicized in the local media and the outcome was widely scrutinized.[78] Predictably, the media accused the bar of prosecuting Furman to rid the legal profession of unwanted competition.[79] In order to restore the public's faith in the profession, the leaders of the Florida Bar initiated a reform measure to amend the *Rules Regulating the Florida Bar*.[80] On January 1, 1987, the new "unlicensed" practice of law rules went

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69. *See supra* notes 54–58 and accompanying text.

70. *See supra* text accompanying notes 48–50.

Since the enactment of the Limited Practice Rule, the Supreme Court of Washington has held that the practice of law by real estate agents, such as those activities at issue in *Great Western*, is no longer unauthorized. Cultum v. Hertage House Realtors, Inc., 694 P.2d 630 (1985) (stating that "[w]e no longer believe that the supposed benefits to the public from the lawyers' monopoly on performing legal services justifies limiting the publics' [sic] freedom for choice." *Id.* at 634.

71. *See* Justice, *supra* note 5, at 195.

72. Florida Bar v. Furman, 376 So. 2d 378 (1979), *appeal dismissed*, 444 U.S. 1061 (1980).

73. *Id.*

74. *Id.*

75. *Id.* at 382.

76. Florida Bar v. Furman, 451 So. 2d 808 (1984).

77. *Id.* at 816. The court suspended 90 days of the sentence and ordered Furman to be jailed for 30 days. *Id.*

78. *See* H. Glenn Boggs, *The New Face of the Unlicensed Practice of Law*, FLA. B.J., July/Aug. 1987, at 55.

79. *Id.*

80. *See id.*

into effect and extensively altered the regulation of the unauthorized practice of law in Florida.[81]

The new rules provide that the Florida Bar refer all unlicensed practice of law complaints to the state attorney for prosecution.[82] Consequently, the legal profession distances itself from such prosecutions and weakens the perception that the enforcement of the unlicensed practice prohibition is a protectionist measure.[83] Further, the rules allow for more nonlawyer participation in the investigation and enforcement of the laws that regulate the unlicensed practice of law.[84] They establish a system whereby the public can obtain advisory opinions from a state bar committee concerning issues related to the unlicensed practice of law.[85] The rules also were amended to allow nonlawyers to engage in "limited oral communications" to help individuals complete certain pre-approved legal documents.[86]

The main disadvantage of bar association rules is the public's negative reaction to what it sees as an elitist legal profession policing itself. However, this is also an advantage. Bar association rules are not enacted by the legislature and therefore will not encounter separation of powers problems.[87] As proven by the Florida Bar, the negative image problem is avoided by carefully distancing the profession from the enforcement of the rules.

The Florida Bar's rule is an example of the influence public opinion can have on this area of the law. The bar's primary motive in initiating the rule changes was to eradicate the public's negative image of the legal profession resulting from the *Furman* cases.[88] Whatever its impetus, the bar rule provides a useful way to deal with the regulation of the unauthorized practice of law.

C. California's "Legal Technician" Proposal[89]

For almost five years the California State Bar worked to devise, draft, and implement reform of its regulation of the unauthorized practice of law.[90] California's approach is unique because it provides reform through a joint

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81. One of the alterations made by the new rules changed the name of "unauthorized practice of law" to "unlicensed practice of law." *See* RULES REG. FLA. BAR 10–1.1(b). The name was changed to reinforce the notion that anyone who practices law must pass the bar exam, i.e., the person must be licensed. Boggs, *supra* note 78, at 55.

82. RULES REG. FLA. BAR 10–1.1(d).

83. Boggs, *supra* note 78, at 56.

84. RULES REG. FLA. BAR 10.1–1(d) mandates that at least five members of the standing committee shall be nonlawyers.

85. *Id.* at 10–7.1.

86. *See* The Florida Bar *re* Amendment to Rules Regulating the Florida Bar, 510 So. 2d 596 (1987) (promulgated as part of RULES REG. FLA. BAR 10–1.1(b)). Specifically, "limited oral communication" includes such assistance as informing the individual of the number of copies of the document that must be filed "and other matters of a routine administrative nature necessary to assure that the matter goes forward." *Id.* at 597.

87. *See supra* text accompanying notes 48–50.

88. *See* Justice, *supra* note 5, at 196.

89. For further background on the proposal by the California State Bar, see *id.* at 201; Meredith A. Munro, Note, *Deregulation of the Practice of Law: Panacea or Placebo?*, 42 HASTINGS L.J. 203, 219 (1990); Rhode, *supra* note 8, at 222.

90. *See* Rhode, *supra* note 8, at 222.

effort of all three branches of government: the executive, the legislative, and the judicial.[91]

In 1986, the California State Bar created the Public Protection Committee to research and design a system that would effectively regulate the unauthorized practice of law.[92] The Committee concluded that there was an unmet need for legal services that could be met by nonlawyers ("legal technicians").[93] The Committee recommended that the state bar support reform allowing legal technicians to practice law,[94] but specifically advised that the bar itself refrain from any role in enforcing such regulation.[95]

The bar adopted the findings of the Committee and created the Commission of Legal Technicians to draft rules and provide guidelines for legal technicians to insure the protection of the public.[96] The Commission recommended that the state bar propose a supreme court rule that would allow nonlawyers to perform legal services in specified areas.[97] The Commission also suggested that the bar sponsor legislation to create an independent paralegal regulatory system under the supervision of the Department of Consumer Affairs.[98]

The recommendations were designed to create a comprehensive and coordinated reform, involving all three branches of government.[99] First, the judicial branch, through the California Supreme Court, authorizes nonlawyer participation in the legal profession and delegates the regulation of such participation to the Department of Consumer Affairs.[100] Second, the legislature passes the enabling statutes.[101] Finally, the executive branch, through the Department of Consumer Affairs, implements the program.[102] The Commission assigned responsibility to all three branches of government in an effort to avoid any separation of powers problems.[103]

In July 1991, the Board of Governors received the Commission's proposed amended rule of court allowing "legal technicians" to practice law in prescribed areas.[104] However, in August 1991, the Board of Governors rejected the amended rule.[105] Some members of the board believed the plan allowed too many nonlawyers to practice law and provided too few safe-

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91. *Id.* at 1.
92. *See* 1988 REPORT, *supra* note 3, at 2.
93. *See id.* at 1 n.1 (defining the term "legal technicians" as a nonlawyer who is permitted to practice law).
94. *Id.* at 1.
95. *Id* at 8. The Committee explained that "the public will not view the Bar's efforts as 'public protection'; rather it will be viewed as an effort by the organized bar to protect the self-interests of its constituents." *Id.*
96. 1990 REPORT, *supra* note 16, at 8.
97. *Id.* at 1. The areas specified by the report were bankruptcy, family law, and landlord-tenant law. *Id.*
98. *Id.*
99. *Id.* at 28.
100. *Id.*
101. *Id.*
102. *Id.*
103. *See* Justice, *supra* note 5, at 204.
104. 1990 REPORT, *supra* note 16, at 1.
105. Don J. DeBenedictis, *California Bar Drops Technician Plan*, A.B.A. J., Nov. 1991, at 36.

guards to protect the public.[106] Others rejected the proposal because it did not allow enough nonlawyers to practice law.[107]

Although ultimately rejected, California's proposal involving all three branches of government provides a detailed model that is potentially useful to other states considering unauthorized practice of law reform.

The experiences in Washington, Florida, and California provide insight into the complexities involved in regulating the unauthorized practice of law.[108] Any attempt at reform must recognize the need to protect the public, while at the same time consider public needs for affordable legal services, public opinion, and constitutional constraints. Arizona, like many states, understands the need to regulate this delicate area. Nevertheless, today in Arizona there is no legal sanction for practicing law without a license.

IV. THE CREATION AND DETERIORATION OF THE UNAUTHORIZED PRACTICE OF LAW RULES IN ARIZONA

Because of a strange series of events, Arizona finds itself with no criminal statute prohibiting the unlicensed practice of law. Therefore, today it is not a crime to practice law without a license in Arizona.

In 1933, the Arizona Legislature passed the State Bar Act[109] which deemed the State Bar of Arizona a "public corporation."[110] Included in this Act was a provision that declared the unauthorized practice of law a misdemeanor.[111] The State Bar Act continued as the only authorization for the State Bar until 1973 when the Supreme Court of Arizona promulgated a set of "Supreme Court Rules."[112] These Rules purported to "create and continue ... an organization known as the State Bar of Arizona ...."[113] The Rules continued to prohibit the unauthorized practice of law.[114] However, unlike the State

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106. *Id.*

107. *Id.*

108. Judicial decrees provide yet another example of reform in the regulation of this area. In a recent Nevada case, the state district court set forth guidelines allowing nonlawyers to perform some legal services in the areas of family law and bankruptcy. State Bar of Nevada v. Johnson, No. CV89-5814 (Nev. Dist. Ct. Apr. 12, 1990). Evidence that the legal needs of low-income people were largely unmet prompted the court's "deregulation" of these "scrivener services." *Id.* However, the Nevada Supreme Court has not yet approved the district court guidelines and therefore they do not have the force of law.

Another reform alternative is a constitutional amendment. The voters of Arizona amended their constitution to change Arizona's unauthorized practice of law rules. *See infra* text accompanying notes 175–82. This approach avoids conflicts with the separation of powers doctrine associated with a legislative enactment. A properly enacted constitutional amendment is immune from legislative or judicial attack, and can be repealed only by a subsequent amendment. *See, e.g.*, ARIZ. CONST. art. XXI.

109. 1933 Ariz. Sess. Laws, ch. 66, *repealed by* ARIZ. REV. STAT. ANN. § 41-2371(4) (1985).

110. *Id.* § 2.

111. *Id.* § 51.

112. *See* Bridegroom v. State Bar of Arizona, 27 Ariz. App. 47, 49, 550 P.2d 1089, 1091 (1976).

113. ARIZ. SUP. CT. R. 31(a)(1) (formerly ARIZ. SUP. CT. R. 27).

114. ARIZ. SUP. CT. R. 31(a)(3).

Bar Act, the Rules did not make the unauthorized practice of law a misdemeanor.[115] For several years thereafter, these two sets of laws co-existed.

In 1975, the Arizona Supreme Court held that the Arizona constitution prohibits the creation of a public corporation by special legislative acts.[116] As a result, the Arizona Court of Appeals declared in *Bridegroom v. State Bar of Arizona*[117] that, under the State Bar Act, the State Bar had "no viability" and its designation as a public corporation had no "legal efficacy."[118] The court went on to state, however, that the State Bar was a legitimate organization under the Supreme Court Rules.[119]

Although the State Bar Act was not expressly repealed, the Arizona Supreme Court in *Hunt v. Maricopa County Employees Merit System Commission*[120] further weakened it as a means of regulating the unlicensed practice of law. The petitioner in *Hunt*, a county employee, claimed the right to be represented by a layperson at her disciplinary hearing.[121] The petitioner based her contention on section 32–261(D) of the State Bar Act, which provided an exception to the prohibition against the unauthorized practice of law.[122] The court held that the judiciary has the sole authority to determine who may practice law in Arizona and under what conditions.[123] The decision implied[124] that section 32–261(D) violated the separation of powers provision of the Arizona constitution.[125] Although the court then adopted the substance

115. The Arizona Supreme Court's rule-making power is derived from the Arizona Constitution, which states that the Supreme Court shall have the "[p]ower to make rules relative to all *procedural* matters in any court." ARIZ. CONST. art. 6, § 5(5) (emphasis added). Therefore, the court does not have the authority to promulgate a rule which defines its violation as a misdemeanor because such would affect a *substantive* matter.

116. Firemen's Fund Ins. Co. v. Arizona Ins. Guar. Ass'n, 112 Ariz. 7, 7–8, 536 P.2d 695, 695–96 (1975). Art. XIV, § 2 of the Arizona Constitution states that "[c]orporations may be formed under general laws, but shall not be created by special Acts." The Court held that the term "corporations" included "public corporations."

117. 27 Ariz. App. 47, 550 P.2d 1089 (1976).

118. *Id.* at 49, 550 P.2d at 1091.

119. *Id.*

120. 127 Ariz. 259, 619 P.2d 1036 (1980).

121. *Id.* at 261, 619 P.2d at 1038.

122. ARIZ. REV. STAT. ANN. § 32–261(D) (repealed 1985). The exception allows nonlawyers to represent employees at any board hearings dealing with personnel matters, provided the nonlawyer does not charge a fee. This exception was later adopted as a Supreme Court Rule and is still in effect. ARIZ. SUP. CT. R. 31(a)(4)(B).

123. *Hunt*, 127 Ariz. at 261–62, 619 P.2d at 1038–39.

124. Although not specifically stated, at least one interpretation of the *Hunt* decision is that § 32–261(D) was "an unconstitutional violation of Article 3 of the Arizona Constitution," and that "[t]he court concluded that the statute did violate Article 3." Memorandum from Ben Ramson, Special Services Counsel of the State Bar of Arizona, to the Special Committee on the Unauthorized Practice of Law (Jan. 3, 1991) [hereinafter Memorandum] (discussing the state supreme court's authority to regulate the unauthorized practice of law).

125. *Hunt*, 127 Ariz. at 260–61, 619 P.2d at 1037–38. The separation of powers provision of the Arizona Constitution states that "no one of such departments [the legislative, executive, or judiciary] shall exercise the powers properly belonging to either of the others." ARIZ. CONST. art. III.

of section 32–261(D) as a court rule,[126] it left the constitutionality of the State Bar Act in doubt.[127]

The Arizona Legislature responded to the *Bridegroom* and *Hunt* decisions by repealing the entire State Bar Act on July 1, 1985,[128] including the provision that made the unauthorized practice of law a misdemeanor.[129] Therefore, although Supreme Court Rules continue to prohibit such conduct,[130] the unauthorized practice of law is no longer a crime in Arizona.

Arizona's sole regulation of the unauthorized practice of law lies in the Supreme Court Rules.[131] The general rule simply states that one may not practice law without a license.[132] However, the rule also provides a list of exceptions that allow nonlawyers to practice law under specified conditions.[133] In its most recent amendment to the rule, the Arizona Supreme Court stated that, through future amendments, it will provide further exceptions to allow nonlawyers to practice law when it is in the public interest to do so.[134]

Currently, there are seven exceptions to the general rule, all allowing nonlawyers to practice law under limited circumstances.[135] In addition to the exception illustrated in the *Hunt* case,[136] a nonlawyer may represent a party in small claims procedures in the Arizona Tax Court.[137] Several of the exceptions relate to representation of corporations.[138] The most recent

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126. *Hunt*, 127 Ariz. at 264, 619 P.2d at 1041 (adopted as ARIZ. SUP. CT. R. 31(a)(4)(B)). The Arizona Supreme Court has stated that "under appropriate circumstances the Court may deem it in the public interest to implement a legislative enactment providing for lay representation under specified conditions." *Id.*

127. *See* Memorandum, *supra* note 124; *but see* State v. Kennedy, 143 Ariz. 341, 693 P.2d 996 (1985) (affirming the decision in *Hunt* but referring to the provision of the State Bar Act without mention of its constitutionality).

128. ARIZ. REV. STAT. ANN. § 41–2371(4). The legislative response actually began in 1982 when the legislature added the State Bar of Arizona to the list of state agencies to be terminated on July 1, 1984 under a "sunset law." 1982 Ariz. Sess. Laws, ch. 202, § 14; 1982 Ariz. Sess. Laws, ch. 292, § 17; 1982 Ariz. Sess. Laws, ch. 310, § 33 (codified as amended at ARIZ. REV. STAT. ANN. § 41–2363(4) (1985)). A sunset law requires the legislature to "take positive steps to allow the law, agency, or functions to continue in existence by a certain date or such will cease to exist." BLACK'S LAW DICTIONARY 1436 (6th ed. 1990). Also in 1982, the legislature added the State Bar Act to the list of statutes scheduled to be repealed on July 1, 1985, under another sunset law. 1982 Ariz. Sess. Laws, ch. 202, § 17; 1982 Ariz. Sess. Laws, ch. 292, § 25; 1982 Ariz. Sess. Laws, ch. 310, § 36 (codified as amended at ARIZ. REV. STAT. ANN. § 41–2371(4) (1985)). On July 1, 1984, the State Bar of Arizona terminated as a state agency (ARIZ. REV. STAT. ANN. § 41–2363(4)).

129. ARIZ. REV. STAT. ANN. § 32–261 (repealed 1985).

130. ARIZ. SUP. CT. R. 31(a)(3).

131. ARIZ. SUP. CT. R. 31(a).

132. ARIZ. SUP. CT. R. 31(a)(3).

133. *See* ARIZ. SUP. CT. R. 31(a)(4)(A–F) and Order Amending Rule 31(a)(4), Rules of the Supreme Court, September 26, 1991 (adding ARIZ. SUP. CT. R. 31(a)(4)(G), effective December 1, 1991) [hereinafter Order].

134. Order, *supra* note 133, cmt.

135. *See id.* and ARIZ. SUP. CT. R. 31(a)(4)(A–F).

136. *See supra* note 122.

137. ARIZ. SUP. CT. R. 31(a)(4)(D).

138. *See* ARIZ. SUP. CT. R. 31(a)(4)(A), (C), and (G). For example, ARIZ. SUP. CT. R. 31(a)(4)(C) allows an officer of a corporation who is not a member of the state bar to represent the corporation before a justice court, provided that, *inter alia*, the corporation has specifically authorized the officer to represent it, and that such representation is not the officer's primary duty to the corporation. *Id.*

exception allows a nonlawyer to represent a corporation in small claims procedures.[139]

Because the exceptions to the general prohibition are court rules, they do not cause separation of powers problems.[140] In fact, many of the current exceptions are verbatim adoptions from the old exceptions to the State Bar Act.[141] However, the ability of the Supreme Court Rule to protect the public against incompetent providers of unauthorized legal services is uncertain. Nevertheless, neither the legislature nor the courts have taken any steps to alleviate the situation.

V. POLICING AND ENFORCING THE UNAUTHORIZED PRACTICE OF LAW RULES IN ARIZONA

Since the decriminalization of the unauthorized practice of law in 1985, whether the State Bar of Arizona or the local prosecutors have the authority to police and enforce the Supreme Court prohibition is questionable. Members of the Arizona Bar are subject to, and bound by, the *Arizona Supreme Court Rules* regulating the practice of law. However, it is unclear whether these same rules can be enforced against nonlawyers.

It is well established that state courts have the exclusive power to regulate admission to the bar.[142] This power is derived from the separation of powers clauses of state constitutions.[143] The scope of this authority includes the power to discipline members of the bar and to maintain an orderly administration of justice.[144] Thus, the power to regulate admission to the bar has evolved into a general power to regulate the practice of law.[145]

The Supreme Court of Arizona has repeatedly held that it is within its exclusive jurisdiction to regulate the practice of law.[146] An entire section of the *Arizona Supreme Court Rules* is dedicated solely to the regulation of attorneys.[147] The court often finds jurisdiction over matters concerning the legal profession based upon these rules.[148] Although the court's jurisdiction

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139. ARIZ. SUP. CT. R. 31(a)(4)(G). *See* Order, *supra* note 133.

140. *See supra* text accompanying notes 48–50.

141. *See, e.g.*, Order, *supra* note 133, cmt.

142. *See* Rhode, *supra* note 8, at 11.

143. *See* Comment, *supra* note 49, at 162–64.

144. *Id.* at 164–65. *See, In re* Baker, 85 A.2d 505, 512 (1951) ("The power to control admissions and to discipline the members of the bar necessarily carries with it the power to prevent laymen from practicing law.").

145. Comment, *supra* note 49, at 166. The breadth of this power is evidenced by the court's use of the contempt order. *See, e.g., In re* Root, 249 P.2d 628 (1952) (stating the court has the inherent power to punish the unauthorized practice of law as contempt of court). Several states have even codified the judiciary's contempt power. *See, e.g.*, COLO. REV. STAT. ANN. § 12–5–112 (West 1990); ILL. ANN. STAT. ch. 13, § 1 (Smith-Hurd 1963); UTAH CODE ANN. § 78–51–25 (1987); Rhode, *supra* note 8, at 11 & n.38.

146. *See, e.g., In re* Greer, 52 Ariz. 385 at 389–90, 81 P.2d 96 at 98 (1938); Hunt v. Maricopa County Employees Merit System Commission, 127 Ariz. 259, 261–62, 619 P.2d 1036, 1038–39 (1980).

147. ARIZ. SUP. CT. R. 31–80 (formerly ARIZ. SUP. CT. R. 27–44).

148. *See In re* Ethics Opinion No. 74–28, 111 Ariz. 519, 520, 533 P.2d 1154, 1155 (1975) (finding inherent in Rules 27–44 (now Rules 31–80.) "the power and jurisdiction of this court to further the objectives of the aforesaid rules when public interest and justice require"). *See also*, ARIZ. SUP. CT. R. 53(e) (giving appellate jurisdiction to the supreme court in State

over matters related to the unauthorized practice of law in the courtroom remains unquestioned,[149] the issue of whether the court has the power to regulate nonlawyers involved in activities outside of the courtroom is unsettled.

Based on the court's inherent power to regulate the legal profession,[150] several Arizona courts have prohibited nonlawyers from practicing law outside the courtroom.[151] In *State Bar of Arizona v. Arizona Land Title & Trust Co.*,[152] the State Bar sought declaratory and injunctive relief against certain title companies and real estate brokers who were filling out legal documents incident to the realty business.[153] Because the defendants were not attorneys, the Bar sought to hold them in contempt of court for the unauthorized practice of law.[154] Additionally, the Bar requested an injunction prohibiting the defendants from further engaging in these activities.[155]

The Supreme Court of Arizona agreed with the State Bar and declared that the defendants' conduct constituted the unauthorized practice of law.[156] The court, however, refused to issue a contempt order or an injunction, believing that it was unnecessary absent a showing that the defendants refused to

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Bar disciplinary proceedings). The courts might obtain jurisdiction over nonlawyers who practice law under ARIZ. SUP. CT. R. 46(b). The rule reads:

> A non-member [of the bar] engaged in the practice of law in the State of Arizona or specially admitted to practice for a particular proceeding before any court in the State of Arizona, or a non-lawyer permitted to appear in such capacity, thereby submits himself to the disciplinary and disability jurisdiction of this court in accordance with these rules.

Id.

The term "non-members" is used to describe a class of persons who are not members of the Arizona State Bar. Arguably, the class consists of two groups: (1) persons licensed to practice law in a jurisdiction other than Arizona, and (2) nonlawyers. Equally important, as to the non-members the rule does not distinguish between in-court representation and the practice of law outside the courtroom. Therefore, a logical reading of the rule would conclude that jurisdiction can be invoked anytime a non-member is practicing law. This, of course, implies that Arizona courts have the power to curtail the activities of a nonlawyer who practices law outside the courtroom.

149. In court activities fall within the court's power to make procedural rules pursuant to article VI, section 5(5) of the Arizona Constitution. *See* Memorandum, *supra* note 124, at 5.

150. *See* State *ex rel.* Andrews v. Superior Court, 39 Ariz. 242, 248, 5 P.2d 192, 195 (1931). The court explained the inherent powers doctrine as follows:

> These powers do not depend upon constitutional grant or in any sense upon the legislative will, and are undefined and probably undefinable as to their exact extent. ... [T]hese powers must inhere in every court ... and ... need not be given expressly by the Constitution or statute, and cannot be taken away by the latter.

Id.

The court emphasized that the inherent powers exist only when jurisdiction over the case has been established. *Id. See also* Fenton v. Howard, 118 Ariz. 119, 121, 575 P.2d 318, 320 (1978) ("Every court has inherent power to do those things which are necessary for the efficient exercise of its jurisdiction").

151. *See infra* note 158.

152. 90 Ariz. 76, 366 P.2d 1 (1961). This case is considered a landmark decision because it eventually led to an amendment to the Arizona Constitution. *See infra* text accompanying notes 175–82.

153. The cases were instituted against the title companies and the real estate brokers separately and consolidated for trial. State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 80, 366 P.2d 1, 4 (1961).

154. *Id.*

155. *Id.*

156. *Id.* at 95, 366 P.2d at 14.

act in accord with the declaratory judgment.[157] Importantly, *Arizona Land* demonstrates that the Arizona Supreme Court has the power to enjoin nonlawyers from engaging in the unauthorized practice of law *outside the courtroom.*[158]

Courts also have the power to sanction anyone who violates an injunction.[159] However, sanctions are only imposed after a specific injunction is issued.[160] Consequently, nonlawyers will continue to practice law until specifically enjoined from doing so by the court. A system is needed whereby criminal sanctions can be imposed on first-time offenders.

In addition to the courts, the State Bar of Arizona is an important player in regulating the unauthorized practice of law.[161] In the past, the State Bar has actively policed the unauthorized practice of law.[162] Currently, however, the State Bar plays a passive role in regulating the unauthorized practice of law.[163]

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157. *Id.*

158. *See* Memorandum, *supra* note 124, at 5. Although the case was decided when the unauthorized practice of law was a misdemeanor, the court made no mention of the statute as needed authority for issuing the injunction.

The Arizona courts, on two other occasions, in fact have enjoined a nonlawyer from practicing law outside the courtroom. *See* State Bar of Arizona v. Franklin, Ariz. Super. Ct. No. C–404422 (July 18, 1980); State Bar of Arizona v. Tucker, Ariz. Super. Ct. No. C–447254 (July 9, 1982). These cases involved document preparation and the giving of legal advice. In both cases the State Bar of Arizona brought suit alleging that the defendants were nonlawyers engaged in the practice of law. *See id.* The court enjoined the defendant in *Franklin* from preparing legal documents including petitions for dissolution of marriage, final decrees of dissolution of marriage, and petitions in bankruptcy. *Franklin*, No. C–404422, Consent Decree and Permanent Injunction, at 1. The court enjoined the defendant in *Tucker* from drafting legal documents which included articles of incorporation, partnership agreements, and applications for registration of trade names. *Tucker*, No. C– 447254, Permanent Injunction Against Howard Tucker and King Business Products, Inc., at 1–2. The court also enjoined both defendants from giving any legal advice or opinions. *Id.* at 2; *Franklin*, No. C–404422, Consent Decree and Permanent Injunction, at 1. However, in neither case did the defendant or the court challenge the court's jurisdiction. *Id.*; *See* Memorandum, *supra* note 124, at 3.

159. *See* ARIZ. R. CIV. P. 65(j). Sanctions include fines and/or incarceration.

160. The court's reluctance to impose sanctions before a court order is violated is evident in *Arizona Land Title & Trust.* Although the court found that the defendants were engaged in the unauthorized practice of law, it refused to hold them in contempt without a showing that they would not comply with the court order. *Arizona Land Title & Trust*, 90 Ariz. at 95, 366 P.2d at 14.

161. For an in depth empirical analysis of the power of state and local bar associations to enforce the unauthorized practice of law prohibitions, see Rhode, *supra* note 8, at 11–44. Bar associations derive their powers from statutes, court rules, and judicial decisions. *See id.* at 12 & nn. 41–43. Enforcement mechanisms vary from informal agreements to criminal proceedings. *Id.* at 16 (Table 1) (the results of Professor Rhode's study contained six different types of enforcement mechanisms used by the surveyed bar associations: 1) reaching informal agreements terminating unauthorized practice, 2) issuing cautionary or cease and desist letters, 3) requiring individual to appear before a bar committee, 4) issuing informal opinions in response to inquiries, 5) initiating civil proceedings and 6) initiating criminal proceedings). The study revealed that while almost all bar associations have the power to initiate civil proceedings, very few have the power to unilaterally initiate criminal proceedings. *Id.* However, the mere threat of referring cases to the state or local prosecutors for criminal sanctions often results in reaching informal agreements. *See id.* at 16 (Table 1, at n.k).

162. The bar was instrumental in initiating the *Arizona Land Title & Trust, Franklin*, and *Tucker* lawsuits. However, all three of these cases were decided before the State Bar Act was repealed.

163. Telephone interview with Harriet Turney, Chief Bar Counsel of the Arizona State Bar (Sept. 16, 1991). Ms. Turney stated that, in light of the sunsetting of the State Bar Act in

The State Bar does receive complaints pertaining to unlicensed practice,[164] but because the law is now unsettled, the State Bar does not actively investigate such matters.[165]

State and local prosecutors are also important participants in regulating the unauthorized practice of law.[166] In Arizona, however, since the sunsetting of the State Bar Act in 1985, neither the state attorney general nor the county prosecutors have the express authority to enforce the Arizona Supreme Court's prohibition on the unlicensed practice of law. However, if the *Arizona Supreme Court Rules* have the force of a statute, the bar or the prosecutors might have the authority to police the prohibition.[167]

It is not inconceivable that Arizona's prohibition might have the same force as a legislative enactment. The Arizona Supreme Court, on several occasions, has held that other Arizona court rules, such as the *Arizona Rules of Civil Procedure*, have the force and effect of a statute.[168] According to these holdings, granting statutory strength to the rules depends only on whether the rules were properly enacted under article VI, section 5 of the Arizona constitution.[169] When given the effect of statute, the rules are applicable to the general public and can be enforced by the state prosecutor or the state bar.[170] Therefore, if the *Arizona Supreme Court Rules* are given the force and effect of a statute, the state prosecutor or the state bar could

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1985, it is uncertain as to whether the Bar or the courts actually have the authority to enforce the unauthorized practice of law rules. *Id.* The State Bar has adopted a wait-and-see attitude until the Arizona Supreme Court issues a ruling that clarifies the situation. *Id.* In July 1991, the State Bar Board of Governors decided to research the issue themselves and attempted to develop specific ideas for reform. Sally Simmons, *Board of Governor's Report*, THE WRIT, Aug. 1991, at 2.

164. A majority of the complaints received by the State Bar are from attorneys (or from attorneys on behalf of their clients). State Bar of Arizona Unauthorized Practice of Law Committee files. Most of the complaints pertain to nonlawyers who draft and prepare legal documents. *Id.*

165. Telephone interview with Harriet Turney, Chief Bar Counsel of the Arizona State Bar (Sept. 16, 1991).

166. In most jurisdictions, state and local prosecutors play a minor, or nonexistent, role in policing the unauthorized practice of law. *See* Rhode, *supra* note 8, at 18–19 (Table 2). It is estimated that only half of the nation's state and local prosecutors' offices even have the power to initiate civil proceedings. *Id.* Far less use that power. *Id.* at 19 (Table 2, at n.b) (finding that none of the prosecutor's use of the enforcement power could be characterized as "frequent" (i.e., more than five times in 1979)). In states where the unauthorized practice of law is a crime, the prosecutors obviously have the authority to initiate criminal proceedings. However, even in these jurisdictions prosecutions are uncommon. *See id.* The study found that in only 13% (4 of 32) of the jurisdictions could use of that power be characterized as "occasionally active," (i.e., used one to five times within the last year). In the remaining jurisdictions where the unauthorized practice of law is a misdemeanor, the use of the power to initiate criminal proceedings was characterized as "inactive" (i.e. the power was exercised "rarely or virtually never"). *Id.* at 19 (Table 2, at n.c). None of these prosecutors used the power frequently. *Id.* at 18–19 (Table 2).

167. *See* Memorandum, *supra* note 124, at 5.

168. *See* Preston v. Denkins, 94 Ariz. 214, 219 n.2, 382 P.2d 686, 689 n.2 (1963) (ARIZ. R. CIV. P.); *See also*, DeCamp v. Central Arizona Light & Power Co., 47 Ariz. 517, 522, 57 P.2d 311, 313 (1936) (regarding UNIFORM RULES OF THE SUPERIOR COURT); Valley Nat'l Bank of Arizona v. Meneghin, 130 Ariz. 119, 122, 634 P.2d 570, 573 (1981) (regarding UNIFORM RULES OF PRACTICE OF THE SUPERIOR COURT OF ARIZONA).

169. *See, e.g., Valley Nat'l Bank*, 130 Ariz. at 122, 634 P.2d at 573.

170. *See* ARIZ. REV. STAT. ANN. § 11–532(A)(2) (1990); ARIZ. REV. STAT. ANN. § 13–105(20) (1989); ARIZ. SUP. CT. R. 31(a)(1).

enforce the prohibition against the unauthorized practice of law.[171] Furthermore, the Rules would more clearly apply to conduct outside, as well as inside, the courtroom. However, because the court has never specifically ruled on the status of the *Arizona Supreme Court Rules*, whether they can be enforced as a statute remains uncertain.[172]

VI. THE FUTURE OF THE REGULATION OF THE UNAUTHORIZED PRACTICE OF LAW IN ARIZONA

The situation in Arizona is undesirable. Currently, it is not a crime to practice law without a license.[173] Given the uncertain status of the unauthorized practice of law rules in Arizona, courts are hesitant to sanction nonlawyers practicing law.[174] Moreover, there is a great deal of confusion concerning who should initiate legal action against nonlawyers. If the situation is to be resolved, Arizona must implement a reform program that clarifies who may and who may not practice law in the state. Moreover, clear guidelines are needed to allow nonlawyers to participate in some traditional lawyering activities, thereby lowering the cost of legal assistance. Yet at the same time these guidelines must continue to protect the public from incompetent legal services.

The idea of reforming the unauthorized practice of law rules is not new to the Arizona legal community. In 1962 the voters of Arizona approved an initiative amending their constitution to allow real estate brokers to prepare certain legal documents.[175] The controversy that sparked the initiative began nearly a decade earlier.

In 1953, Arizona's Unauthorized Practice of Law Committee filed a lawsuit against two real estate salesmen.[176] The court consolidated the suit with another case brought by the state bar against several title companies.[177] The complaints alleged that the defendants were preparing legal documents

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171. ARIZ. SUP. CT. R. 31(a)(3).

172. *See* Memorandum, *supra* note 124, at 3.

173. *See supra* text accompanying notes 109–30.

174. *See supra* Section V.

175. *See* ARIZ. CONST. art. XXVI. Article XXI of the Arizona Constitution sets forth the amending process. The amendment's passage was a culmination of many interrelated events. In 1942, the American Bar Association and the National Association of Real Estate Boards met in Memphis, Tennessee to form an agreement designed to ease the tensions between the two professions. Melvin F. Adler, *Are Real Estate Agents Entitled to Practice a Little Law?*, 4 ARIZ. L. REV. 188, 192 (1963). The product of the meeting was a "statement of principles and agreements." For text of the statement, see 86 A.B.A. REP. app. 108 [hereinafter *Memphis Agreement*]. Although not legally binding on either group, (*see* ROBERT E. RIGGS, *VOX POPULI*: THE BATTLE OF 103, at 10 (1964)) the agreement allowed realtors to prepare certain legal forms incident to the real estate business. *Memphis Agreement, supra*, art. I. However, only those forms that the local bar associations pre-approved could be used. *Id.* A few months after the groups approved the Memphis Agreement, the American Bar Association issued an opinion which stated that local bar associations were not bound to approve any forms for use by realtors. 8 UNAUTH. PRAC. NEWS 31 (1942). Although not one legal form was ever approved in Arizona, local realtors continued to draft and prepare legal documents incident to their business. RIGGS, *supra*, at 11.

176. State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961). *See supra* text accompanying notes 152–58.

177. *Arizona Land Title & Trust*, 90 Ariz. at 76, 366 P.2d at 1.

and therefore were practicing law without a license.[178] The Supreme Court of Arizona found in favor of the bar and issued a declaratory judgment stating that the defendants were engaging in the unauthorized practice of law.[179]

In response, the Arizona Association of Realtors began a well-organized movement designed to nullify the court's decision through a constitutional amendment.[180] The realtors found widespread support among Arizona voters, easily collecting the requisite number of signatures to place the initiative on the ballot.[181] In November, after heated debates between the bar and the realtors, the voters passed the amendment by a ratio of nearly four to one.[182]

Arizona's unauthorized practice of law rules have significantly changed in the thirty years since the amendment's passage. Although another constitutional amendment may be unnecessary, Arizona is again in need of a change. The *Arizona Supreme Court Rules* provide the means for such a change. The rules already list exceptions to the general prohibition.[183] The Arizona Supreme Court should add to this list carefully defined categories of individuals who may practice law under certain circumstances.[184] Arizona ought to take the same careful approach as that taken in Washington.[185] By authorizing more individuals to lawfully engage in the practice of law and implementing consumer safeguards the cost of legal assistance decreases, thereby affording greater access to the legal system.[186]

In order to initiate reform through court rules, it is necessary to bring the issue of the unauthorized practice of law before the court. Therefore, the State Bar should abandon its "wait-and-see" attitude[187] and actively police and enforce the unauthorized practice of law rules by taking legal action against

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178. *Id.* at 80, 366 P.2d at 4.

179. *Id.* at 95, 366 P.2d at 14. The court did not issue an injunction, stating that it was unnecessary absent a showing that the defendants would not abide by the declaratory judgment. *Id.*

180. RIGGS, *supra* note 175, at 18.

181. *Id.* at 23. Although only 59,566 signatures were required to put the initiative (Proposition 103) on the ballot, the Arizona realtors turned in 107,420 signatures, representing nearly 28% of the voters in Arizona. *Id.* at 19, 23.

182. *Id.* at 34. Despite its support, the amendment has conspicuous shortcomings. The amendment contains nothing that guarantees that the realtor is competent in legal drafting. Additionally, unlike the standards for the legal profession, the amendment does not require a minimum level of education for realtors, nor a minimum standard of care. RIGGS, *supra* note 175, at 39. However, the Arizona Association of Realtors immediately instituted a program of classes in which realtors were schooled in the preparation of legal documents. *Id.* at 38. The following year, the realtors supported legislation creating the Real Estate Recovery Fund (1963 Ariz. Sess. Laws, ch. 42, § 1 (codified as amended at ARIZ. REV. STAT. ANN. § 32–2186 to –2193 (West Supp. 1990)) to indemnify those injured by the negligence of a licensed real estate broker or salesperson. *Id.* § 32–2186(A). These measures are designed to assure that the realtors are competent and accountable when preparing legal documents.

183. *See* ARIZ. SUP. CT. R. 31(a)(4).

184. The State Bar should act as a catalyst for the reform process by investigating the complaints it receives. If the complaints prove to be valid, the State Bar should initiate a lawsuit. Eventually, the issue of whether (and to what extent) the State Bar and the courts have the authority to enforce the supreme court rule will reach the Arizona Supreme Court. The court may then adopt a rule defining such powers.

185. Washington's Limited Practice Rule allows qualified nonlawyers to perform legal services incidental to real estate and personal property transactions. *See supra* part III.A.

186. *See* text accompanying notes 12–15.

187. *See supra* note 163.

any offenders. Such "test cases" provide the vehicle through which the court may further define who may and may not practice law. In making this determination, the court may also implement safeguards insuring competent legal services. Such safeguards may include additional licensing and continuing legal education requirements. The court may also clarify who has the authority to enforce and police the unauthorized practice of law rules in Arizona.

VII. CONCLUSION

The regulation of the unauthorized practice of law plays a critical role in the distribution of legal services. Such regulation is a balance between competing interests. Allowing more individuals to practice law will lower the overall costs of legal services, and therefore, enable more people to obtain needed legal services. However, allowing only properly licensed individuals to practice law will increase the overall competence of legal services received by the public.

This Note illustrates that there are many different ways to reform the regulation of the unauthorized practice of law. However, it is evident that some methods are more successful than others. As a means of reform, legislation seems to be the least successful method. Although the content of the proposed legislative measures is substantially identical to the content of many of the non-legislative reform proposals, these legislative measures continually fail.

The sunsetting of the State Bar Act in 1985 has left Arizona without an effective means of regulating the unauthorized practice of law. Carefully expanding the existing exceptions to the court rules would best serve Arizona.