

# Ethics Alarms

SEPTEMBER 27, 2012 · 11:33 AM

## More Revelations Regarding Elizabeth Warren's Alleged Unauthorized Practice of Law, and Why This Matters



Prof Jacobson, on his blog Legal Insurrection, is in line for an Ethics Hero award with his tenacity regarding [Elizabeth Warren's dubious qualifications to engage in the practice of law in Massachusetts](#). The overwhelming reaction by his colleagues in legal academia, and mine in the legal ethics community, has been to airily dismiss his arguments as trivial, far-fetched and thinly disguised political warfare, since Jacobson is an unapologetic conservative blogger (and a distinguished one.) Meanwhile, the mainstream media has, I think it is fair to say, completely ignored the story.

Part of this is undoubtedly because of the ignorance of most journalists regarding the importance of the legal ethics rules in question. Part of it is probably due to the accurate assessment by editors and TV news producers that the average American's brain would switch off right around the time the story mentions Massachusetts Rule of Professional Conduct Rule 5.5 Subsection (c), and will start wondering about how Blair from "The Facts of Life" is going to do on "Survivor." And part of it, infuriatingly, is because most journalists are willing to forgo the ethical duties of their profession in order to ensure that a Democrat wins back Ted Kennedy's Senate seat, and character be damned.

The rude brush off Prof. Jacobson is getting in this wagon-circling exercise is wrong in every way, and does injustice to every person and institution involved, including the Massachusetts legal establishment, the legal profession, ethical lawyers (which, believe it or not, the vast majority of them are), Senator Brown, the U.S. Senate, Massachusetts voters, and the American public. Bar associations across the country regularly punish ordinary lawyers who practice law without proper authorization, and there is a

reason: *a lawyer who won't or can't obey the most basic requirement of the profession—**be sure you are practicing law legally**—should not be trusted to handle the important transactions and controversies of their clients' lives.* Those who want to minimize the relevance of this misconduct to Elizabeth Warren because she is a Democratic candidate for the U.S. Senate have their ethical standards upside-down: we must hold elected officials to *higher* standards than mere lawyers, not lower ones. If an individual shows a proclivity to cut corners, slide past compliance, ignore rules and skirt regulations for her own convenience and profit as a lawyer, imagine what someone with these habits will do in high elected office, where her power will be greater, corruption is entrenched, and the temptations and rewards are massive. The research and conclusions of Prof. Jacobson should be of urgent concern to all, not just conservatives and Republicans, but anyone who wants better, honest and effective government at a time when we desperately need it.

To make this point more specific: Elizabeth Warren has built her political career condemning the financial sector for manipulating and avoiding laxly enforced regulations for their own enrichment. If Prof. Jacobson's research and analysis is correct, and increasingly it is appearing that he had detected fire as well as smoke, then Warren has been doing *exactly* what she (accurately) accuses banks and brokers of doing...in a word, cheating. (I would also think such conduct would be worthy of serious inquiry by Warren's employer of record, Harvard Law School, whose graduates it is supposedly training to conduct themselves, in class and out, otherwise. Apparently it does not agree.)

As for Professor Jacobson, his ideological orientation should not factor into this story at all. In a Bizarro World journalistic establishment where only "conservative media" will report facts and conduct damaging to progressive and Democratic leaders and causes, and where the liberal mainstream media will proceed to dismiss the resulting reports as "conservative stories," as if they are tall tales told around the campfire, passionate bloggers like Jacobson are filling a crucial need, depressing as it is that such a need exists. One blogger, however, cannot make regulators do their jobs, journalists be responsible, or candidates come clean. The public has to care who it elects and what kind of character and habits they have displayed in their professional lives. A competent, objective and responsible news media would be committed to explaining to them why they should care. If only we had such a news media....

Today Prof. Jacobson delivers still more convincing evidence that Elizabeth Warren operated a continuous Massachusetts law practice (and not just a sporadic *Federal* law practice) without a valid law license, after his post yesterday [that raised questions about her representations regarding her license to practice in Texas.](#)\* He is doing the job that the national and Massachusetts media should be doing. In the end, the significance of this episode may make the election or defeat of Warren superfluous, as well as whether she violated the rules of her profession and escapes the consequences. It may prove conclusively that the United States no longer has a trustworthy press that is dedicated to informing the public, but an ideological press that abuses its Constitutional power in order to manipulate the public.

That is far more catastrophic, I believe, than electing one more unethical politician to the U.S. Senate.

\* **Note:** *The source for Prof. Jacobson's Texas post was Rob Eno's Red Mass Group*

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**Sources:**

- [Legal Insurrection 1](#)
- [Legal Insurrection 2](#)
- [Red Mass Group](#)

**Graphic:** [Throwing Anvils](#)

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In "Character"

## 36 responses to “*More Revelations Regarding Elizabeth Warren’s Alleged Unauthorized Practice of Law, and Why This Matters*”

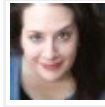
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## Becky

September 27, 2012 at 12:14 pm



She's been such a champion for the common folk. I'd like to think she couldn't have done such a thing(s?). But it does give me great pause that the evidence is mounting and there's no answer...

[Reply](#)

## beyond politics (@ByondPolitics)

September 27, 2012 at 12:23 pm



How on earth can you think she's a champion for the common folk? She represented a company AGAINST the interests of asbestos victims. She flips houses to make a quick buck off the backs of those less fortunate.

She arrogantly claims to be Cherokee when the evidence is overwhelming that she is not. Despite making those claims, she never bothered to work with, or participate in the culture of Cherokees. Given that she says she made the claim that she was identifying as "Native American" in order to "meet people like her," but then refused, as a Harvard Law professor, to network with or mentor a single Native American attorney, when extending that hand would have been enormously helpful to others, is GALLING and shows how self-centered her interests really are.

[Reply](#)

## Michael Ejercito

September 27, 2012 at 11:50 pm



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She represented a company AGAINST the interests of asbestos victims.

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I have no problem with doing such a thing in principle. There is nothing wrong with representing a company accused of wrong doing. To those who believe otherwise- what if *you* were accused of wrongdoing? Would you not want someone to defend you?

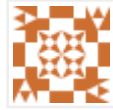
Similar arguments are made against labor unions defending their members against accusations of misconduct. Their purpose is to represent their members.

Of course, if Warren practiced law without a license, then it was indeed wrong for her to represent that company, for once they hired a lawyer, they were entitled to that lawyer being licensed to practice law.

[Reply](#)

**bob**

September 28, 2012 at 7:38 am



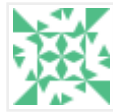
Oh come on, she contributed an article to "Pow Wow Chow". It was technically written by someone at the NY Times, but let's not focus on that. She was participating in Cherokee culture. And also let's not concern ourselves with whether "Pow Wow Chow" is itself an offensive title.

[Reply](#)

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**Sandsgrandmother**

September 27, 2012 at 12:23 pm



America for whatever reasons , will not educate themselves. Americans want to rely on news media T.V. and shows such as the Oprah Winfrey Show to receive their education. Not to sure what the Major T.V. Journalist News outlets are, other then people bought to relay their owners and/or certain individuals views...But journalist they are not. We have no major T.V. journalist out there that know how to report facts and truth to the people.

American's have been unable to think for themselves for many years now and have forgotten how to do our own research. This research skill is a huge portion of being able to keep giving future generations the ability to be free people instead of enslaved people (which we are becoming). We have forgotten how to think for ourselves and WANT to rely upon others to do it for us.

People have forgotten to look DEEP into a politicians past from childhood and beyond about their education, their associates and associations, their character, their morals and ethics. As a matter of fact people need to look into ALL areas of government for all positions, no matter how high and/or how low because that is where the most damage can / is done and/or created for every citizen.

[Reply](#)

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**Dr. Rick Dominique**

September 27, 2012 at 12:29 pm



Despite the oxymoron "ethical lawyer", I gave you the benefit of the doubt on your sanctimonious pontifications, until I realized that if you really believed in your high minded pronouncements and were fair and objective, your first ethics alarm raised would be from Mitt Romney's affinity for prevarications, misrepresentations and outright lies. And from a Harvard J.D. and M.B.A. to boot. And using Scott Brown as an example. I guess you haven't been following his campaign?

[Reply](#)

## Brian

September 27, 2012 at 12:47 pm



Other people behave worse so what Warren did should be given a pass. And you have 'Dr.' in front of your name? How did you get that much education and never come into contact with logic?

[Reply](#)

## doodlefarbe

September 28, 2012 at 12:25 am



“And you have ‘Dr.’ in front of your name? How did you get that much education and never come into contact with logic?”

he’s a doktor of basquette weaving.

[Reply](#)

## beyond politics (@ByondPolitics)

September 27, 2012 at 1:00 pm



Methinks thee doth protest too much....

The documents I have read show that Romney is extraordinarily generous and I have not seen anyone present a detailed case about concerns regarding his ethics in the way that Jacobson has about Ms. Warren’s. I have also read the documents about her heritage. The evidence is that she is fundamentally lax about following the letter or intent of the law, particularly when it can bring her gain.

Throwing out accusations against someone else, to deflect attention from the matter at hand is only crying “squirrel!!” The issue is, did she practice law in MA without a license and consequently broke a significant law? It certainly bears scrutiny from the MA courts.

While I also have a doctoral degree, from a school more prestigious than Harvard, I’m not wont to throw it around in blog comments. That’s just pretentious and so risible.

[Reply](#)

## Jack Marshall

September 27, 2012 at 1:13 pm



Your comment is completely irrelevant to the post, though you seem not to understand this. First, since legal ethics is my primary field, the Warren case hold double interest. Second, I have hardly

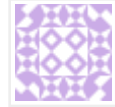
ignored Romney in criticism: I regard the campaigns of both Presidential candidates as ethically despicable, though only one of them became President in part on a pledge to be straight, open, non-divisive and transparent, promised that were either lies at the inception or promises he wouldn't or couldn't keep. This isn't a political blog, and there are plenty of others "fact-checking" the candidates. Your accusation is pure partisan name-calling.

[Reply](#)

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## Nigel Barrella

September 27, 2012 at 1:22 pm



Jacobson states that only her office location matters in the analysis — and continues to present nothing more than evidence that she practiced in federal courts. Others argue she is allowed to practice in federal courts if admitted before those courts, and can do this anywhere.

One would think this is a highly relevant question to many members of the legal profession, and I'm interested in the answer. I hope you can write a post on this issue at some point.

[Reply](#)

## Brian

September 27, 2012 at 2:20 pm

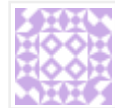


The second link to Jacobson is a post where he outlines a cases she argued on Massachusetts state law, not federal law.

[Reply](#)

## Nigel Barrella

September 27, 2012 at 4:15 pm



In the United States Court of Appeals for the First Circuit. A federal court. I think Jacobson is being dishonest by totally ignoring that fact, or the fact that it might matter.

I doubt that the answer to this question turns on what jurisdiction's law the federal court is applying. That would be an interesting rule, but I doubt that it is the rule. Again, Jack's insight on this would be great.

[Reply](#)

## Jack Marshall

September 27, 2012 at 5:04 pm



A useful article by legal ethics expert Ronald Minkoff includes this quote, which I think

captures Jacobson's point exactly:

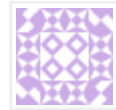
*"State courts, meanwhile, define their power to regulate lawyers broadly and will, for example, preclude a lawyer admitted to practice only in federal court from operating a law office in the state, if her practice impinges in any way on state law issues."*

The rest of Minkoff's essay makes it clear that determining whether a lawyer has met the ethical requirements practicing Federal law while not being a member of the state bar of the state involved is a complicated one, much dependent on the facts of the case...as in this case, where it is crucial to know if Warren was properly *pro hoc vici*-ed into her various federal courts, and if she was continuously licensed to practice law in *any* state.

[Reply](#)

**Nigel Barrella**

September 28, 2012 at 7:59 am

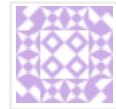


I would love to see that essay and the sources it relies on.

[Reply](#)

**Nigel Barrella**

September 28, 2012 at 9:59 am



And Jack, after some thought, I think I have to call you out on this, as you have characterized her appearance in the First Circuit (in a Massachusetts case) as "more evidence" here, and again this morning. In the previous thread you indicated that federal practice in the Supreme Court, Fifth and Seventh Circuits was probably just fine from a Massachusetts office.

Does appearing in the First Circuit applying Massachusetts law make any difference to the analysis, as far as you know?

Because it seems here that you're not addressing that question, in favor of other questions for which there is no evidence, such as proper admission (*pro hac vice* or otherwise) or her possibly non-continuous licensure in NJ (which is highly unlikely, by the fact that NJ has no inactive status and she probably would not go back to take the bar exam a second time).

[Reply](#)

**Jack Marshall**

September 28, 2012 at 10:56 am



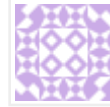


Nigel, the New Jersey question is clarifying, and not to Warren's advantage....see my most recent post. As a Mass lawyer myself, my understanding is that if I engage in representing a Massachusetts client involving Mass law from a Mass office, I am engaged in Massachusetts law practice whether it ends up in Federal Court or not.

[Reply](#)

### **Nigel Barrella**

September 28, 2012 at 11:07 am



I agree that it would be true if you take a case and don't know where the case will end up... but what if you know where it will end up, e.g. it is already on appeal in the First Circuit, when you take it on?

[Reply](#)

### **doodlefarbe**

September 28, 2012 at 12:28 am

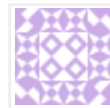


Nigel – you can be in federal court for two basic reasons. One is “federal question”, the other is “diversity”. The case you mention was in federal court via diversity jurisdiction and involved a matter of MA state law, and the DC was applying MA state law. She was representing a MA client in MA on a question of MA law. That is the practice of law in MA. It does not matter that the venue is in the DC.

[Reply](#)

### **Nigel Barrella**

September 28, 2012 at 7:47 am



I get that – and my comment was that, if that line of reasoning is correct, it would be a very interesting rule. It would mean that if she had done the exact same thing from an office in Rhode Island – represented a Massachusetts client on a Massachusetts issue in federal court – it would be fine? And similarly it's fine if she's handling an appeal from her Massachusetts office when the underlying state law (applied by the federal court through Erie doctrine) comes from ANY other state BUT Massachusetts?

Or is your view that office location does not matter – choice of law and client location does? But that would basically mean that no one can have a general, multijurisdiction federal practice if they might run into state law issues. And in which case I have no idea how any lawyer can ethically take up class actions or MDL in federal court – since many of these will be

applying state law of multiple states, and I don't think anyone's crazy enough to be admitted everywhere.

The rule is not clear and I haven't seen a good ethics opinion on this issue. But I doubt it would come out this way; I do not think it makes sense. There also might be some supremacy clause issues with such a rule. I would hope that the rule is that, federal court is federal court, and that as long as you are properly admitted before that court then it doesn't matter what law you're applying, where your clients are from, or where your office is.

[Reply](#)

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**Michael C.**

September 27, 2012 at 1:46 pm



Professor Jacobson is making a very simple point: You cannot have a law office in Massachusetts unless you are licensed to practice law there. Period. It doesn't matter that she was practicing in federal courts or bankruptcy courts and not in MA courts.

- 1.) The rule is about a law OFFICE. Hypothetically, if you are licensed in Kansas and you do all your legal work in Cambridge, MA, [where you have no license] and list Cambridge, MA as your office on your legal briefs, then the you have a law office in MA. That's a no – no. Out of state attorneys cannot set up law offices in MA and practice law in federal courts out of their MA law offices without an MA license.
- 2.) Moreover, does Prof. Warren currently have an ACTIVE law license anywhere? She admitted on radio that she has no license in MA; that she has been inactive in New Jersey for “a very, very long time’ [her words]; we now know that she RESIGNED from the NJ bar and the Internet shows she has been INACTIVE in TX since 1992.
- 3.) Not only that, did she have an ACTIVE law license when she signed her legal briefs before the U.S. Supreme Court or anywhere else? She admitted she has been active a long time in NJ [she now has resigned from NJ bar] and TX appears to be inactive since 1992. She's not licensed in MA. I'm merely asking, did she have an ACTIVE law license ANYWHERE in the last 20 years?

[Reply](#)

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**Michael C.**

September 27, 2012 at 1:49 pm



Ooops! Point number “3.)” above should read: “She admitted she has been INactive a long time in NJ [she now has resigned from NJ bar] and TX appears to be inactive since 1992.

[Reply](#)

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**porcudog**

September 27, 2012 at 1:55 pm





Losing the press, as we know it, is a loss; however, new diligence arrives in the form of this forum and others to reveal a new way to inform the public.

I presume that we substitute “the Internet” for “newspapers” in Thomas Jefferson’s quote below:

“The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter”

[Reply](#)

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## George B

September 27, 2012 at 2:40 pm



What part of “practicing law without a license” is hard for the public to understand? I disagree with the statement::

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Part of it is probably due to the accurate assessment by editors and TV news producers that the average American’s brain would switch off right around the time the story mentions Massachusetts Rule of Professional Conduct Rule 5.5 Subsection (c), and will start wondering about how Blair from “The Facts of Life” is going to do on “Survivor.”

—

If it is presented that way, sure, people’s eyes would glaze right over. But there is a much simpler way to phrase it as I stated in the first sentence that I think everyone can understand.

[Reply](#)

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## Ampersand

September 29, 2012 at 2:27 pm



In the “still more convincing evidence” you link to, Jacobson claims that “Warren’s name appears as one of the counsel of record.” But the document that Jacobson shows to support this claim identifies Warren as “NTC Retained,” not “COR” – the COR are two other lawyers listed. I’m not able to find where Warren is ever listed as a COR, although maybe I’m missing something.

NTC, for reasons that no one has been able to explain to me, stands for “To Receive Notice.” (If you can explain that, I’d be grateful.) It means that she was hired by the COR as a consultant.

Unless your claim is that there’s no legal distinction at all between the requirements for COR and NTC

— and as far as I can (and I'm not a lawyer), that would be a very dubious claim — then it seems like a fairly serious mistake for Jacobson to have falsely identified Warren as a COR in order to make his case.

However, I'm (again) not a lawyer, so maybe there's something I'm missing here.

[Reply](#)

## Jack Marshall

September 29, 2012 at 2:35 pm



Jacobson shouldn't have used COR that freely, but in the context of an unauthorized practice of law argument, it doesn't matter. Both are examples of practicing law, consulting or being a counsel of record. If you give legal advice, you are practicing law. If you give legal advice regarding Mass law in your Mass law office, you are practicing law in Massachusetts, unless it is exclusively a Federal matter.

[Reply](#)

## Ampersand

September 29, 2012 at 2:55 pm



Jack, forgive me if I question you on this a bit more.

Let's say I'm a COR (my client clearly didn't do a good job lawyer-shopping!), in a case that is in Federal court and involves aspects of both Federal law and local (Massachusetts) law. I decide to hire an expert in federal law to advise me on the federal laws brought up by this case.

Are you saying that it would be illegal for me to hire an expert to consult with me on federal law aspects of the case, unless that person is also licensed to practice Massachusetts law? And that it's illegal for an expert on federal law to consult on matters of Federal law, if the aspects of the case that the expert *isn't* consulting on, involve Massachusetts law?

[Reply](#)

## Jack Marshall

September 29, 2012 at 3:11 pm



It's not illegal for *you* to hire any lawyer, or a non-lawyer—UPL is an offense for the lawyer.non-lawyer, not his or her client.

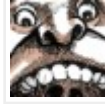
The second question needs to be understood in this context: the Mass case Jacobson cites didn't involve federal law. It was in federal court via diversity—the plaintiff and defendant resided in different states. Jacobson believes that the act of advising a client in Mass on Mass law is practicing law in Massachusetts, regardless of whether the case ends up in

Federal court. I think that's strong argument, though not a decisive one. See John Steele's excellent analysis, which comes out the other way, mostly...<http://www.legaethicsforum.com/blog/2012/09/elizabeth-warren-and-upl.html>

[Reply](#)

## Ampersand

September 29, 2012 at 3:52 pm



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The second question needs to be understood in this context: the Mass case Jacobson cites didn't involve federal law.

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You're mistaken, Jack. Read the decision — much of it hinges on Federal Bankruptcy law (e.g., “Schlichtmann attempts to characterize his claim to the fee as post-petition earnings, personal property acquired after his debts were discharged. This argument is foreclosed by § 552 of the Bankruptcy Code, which concerns the effect of pre-petition security interests on post-petition earnings.”)

This is especially important because that's exactly the federal law that Warren is an expert on. (As I understand it.)

So I ask you again — if a COR has a case which involves both the Federal Bankruptcy code, and Massachusetts law, is it illegal for an expert on federal bankruptcy law to consult on the Federal Bankruptcy aspects of the case, if she's not licensed in Massachusetts?

[Reply](#)

## Jack Marshall

September 29, 2012 at 6:24 pm

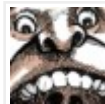


Yes, but that doesn't make it a bankruptcy CASE. There is no question about the bankruptcy itself, and were this not a diversity case, a state court could and would have handled it. The fact and terms of the bankruptcy were *involved*, yes, but this would not ordinarily be a federal case without the diversity.

[Reply](#)

## Ampersand

September 29, 2012 at 8:16 pm



Jack, you're shifting your goalposts like crazy. Your earlier claim was that this case “didn't involve federal law.” That's obviously not true if you read the

court's decision. So now you've shifted to saying, yeah, but it's not "a bankruptcy CASE."

Saying it's not "a bankruptcy case" doesn't help your argument at all. Whether or not it was "a bankruptcy case," the court's decision hinged in part on federal bankruptcy law. Under that circumstance, it's reasonable to hire an expert consultant on federal bankruptcy law.

I'll ask again: If a COR has a case which involves both the Federal Bankruptcy code, and Massachusetts law, is it illegal for an expert on federal bankruptcy law to consult on the Federal Bankruptcy aspects of the case, if she's not licensed in Massachusetts?

[Reply](#)

### Jack Marshall

September 30, 2012 at 12:58 am



Barry, bankruptcy practice is like patent practice— its a federal practice independent of state law. Simply *involving* federal law doesn't make it a federal case—it is a state case, involving Mass law, and Warren was arguing Mass law, for a Mass resident. If Warren was properly admitted to the district court, which we don't know, and was authorized to practice *somewhere*, which is at least a matter of some controversy, Jacobson argues that she was UPL-ing by advisng and representing a Mass resident on Mass law in Mass. without a Mass license, even if it was before a federal court.

I can't find any authority on such a situation. John Steele, who knows his legal ethics as well as I do (or better), has searched, and he can't find it either, concluding that Warren is in the clear. My inclination would be to follow John, but the matter is still fairly described as unsettled.

[Reply](#)

### Jack Marshall

September 29, 2012 at 3:11 pm



It's not illegal for *you* to hire any lawyer, or a non-lawyer—UPL is an offense for the lawyer.non-lawyer, not his or her client.

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