You Are Not a Lawyer: Does Representation of Carriers by Non-Lawyers in Federal Motor Carrier Safety Administration Enforcement Cases Constitute the Unauthorized Practice of Law?

Osman E. Nawaz*

I. INTRODUCTION

Seven years, four years of undergraduate education and three years of graduate schooling can potentially lead to a Juris Doctor ("JD") or law degree.[1] Obtaining the JD typically comprises the most important prerequisite for aspiring lawyers in the United States.[2] In order to gain admission to most states' Bars, a candidate *must* receive his or her JD from an ABA approved law school.[3] Additionally, a candidate must pass the state's Bar exam and convince the Bar that the applicant is of good moral character.[4] If a candidate can successfully accomplish these three things, the individual will likely obtain a Bar card allowing the candidate to prac-

* JD Candidate 2005, Sturm College of Law, Denver, Colorado.

1. AMERICAN BAR ASSOCIATION, WHEN YOU NEED A LAWYER, *at* http://www.abanet.org/pub-liced/practical/lawyer_requirements.html (last visited May 24, 2005); *see also* COLORADO BAR ASSOCIATION, BECOMING A LAWYER IN COLORADO, *at* http://www.cobar.org/Docs/BeALawyer%-5FBR1%2DFINAL%2Epdf (last visited May 24, 2005).

2. *Id.*; *see also* George C. Leef, *Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes*, REGULATION, *available at* http://www.cato.org/pubs/regulation/reg20n1c.html (last visited May 24, 2005).

3. AMERICAN BAR ASSOCIATION, *supra* note 1.

4. *Id.*; *see also* Leef, *supra* note 2.

tice law in a particular state. If someone attempts to practice law without a license, such person faces criminal penalties ranging from monetary fines to potential jail time.[5]

On the whole, most states prohibit the practice of law by those who do not meet requirements set by the state Bar.[6] This prohibition, referred to as the "unauthorized practice of law," makes it illegal for anyone who does not comport with state Bar requirements to render legal advice or assistance.[7] But, what actually constitutes the practice of law? The answer to that question remains unclear and with an increasing number of rights determined in federal and state agencies, where the line is drawn for unauthorized practice of law issues within the various federal and state agencies poses an even more uncertain inquiry.

Administrative adjudication and agency proceedings of various types have evolved to become critical pieces of the United States system of government.[8] The evolution and importance of agencies arose, in part, from overcrowded court dockets, increased litigation costs, and an overworked U.S. government system.[9] The paramount importance of administrative agencies in the year 2005 is without question – agencies have very real power and control over important rights of both businesses and individuals.[10]

In contrast to earlier attitudes that there was a de minimis risk of harm from unauthorized practice in front of administrative agencies, serious concerns now surround agency practice because of the powers today's agencies possess.[11] So, where does an agency's power come from? Agencies are delegated their power by Congress, or in the case of a state agency, by the state legislature, to act as agents for the executive branch of government.[12] The delegation of power comes from an enabling stat-

5. Jay M. Zitter, *What Constitutes the Unauthorized Practice of Law by Paralegal*, 109 A.L.R. 5th 275 (2004).

6. *See* Leef, *supra* note 2; *but see* Rees M. Hawkins, *Not "If," But "When" and "How": A Look at Existing De Facto Multidisciplinary Practices and What They Can Teach Us About the Ongoing Debate*, 83 N.C. L. REV. 481, 482 (2005) (all states except Arizona have unauthorized practice of law statutes; Arizona chose not to renew its statute after it expired several years ago).

7. Leef, *supra* note 2.

8. *See* JOHN H. REESE & RICHARD H. SEAMON, ADMINISTRATIVE LAW PRINCIPLES AND PRACTICE 8-10 (2d ed. 2003).

9. *Id.*; *see also* Gregory T. Stevens, Note, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach*, 43 VAND. L. REV. 245, 245-46 (1990).

10. *See* Stevens, *supra* note 9, at 273-74.

11. JOHN H. REESE & RICHARD H. SEAMON, ADMINISTRATIVE LAW PRINCIPLES AND PRACTICE 7-10 (2d ed. 2003) (agencies can determine many significant rights of individuals and businesses alike, such as drivers' licenses, operating licenses for businesses, and health certification for restaurants).

12. LEGAL INFORMATION INSTITUTE, ADMINISTRATIVE AGENCIES: AN OVERVIEW, *at* http://www.law.co-rnell.edu/topics/administrative.html (last visited May 24, 2005).

ute.[13] Enabling statutes govern, *inter alia*, what authority an agency has, for example, with respect to adjudication and rulemaking.[14] In regard to representation in agency proceedings, ideally, an agency's enabling statute will prescribe the proper scope of both lawyer and non-lawyer representation of clients in front of an agency. Representation by non-lawyers is acceptable and in some of the larger agencies non-lawyer representation occurs with great frequency.[15] However, other agencies limit non-lawyer representation more narrowly.[16] In any event, when non-lawyers acting without permission, permission which is not granted through an enabling statute, attempt to perform acts that are dubiously tasks usually performed by a lawyer, questions of the unauthorized practice of law arise. Many agencies' enabling statutes fail to define with specificity what a non-lawyer can and cannot do within the agency, thereby causing this issue to arise.[17] As such, this results in a nebulous, gray area of how to precisely define the practice of law or identify the unauthorized practice of law.

This Note attempts to answer the elusive question of what constitutes the unauthorized practice of law within an agency, but, more specifically analyzes the unauthorized practice of law issue within the context of one particular case before the United States Department of Transportation Federal Motor Carrier Safety Administration ("FMCSA"): *In the Matter Of Boomerang Transportation, Inc.*[18] Briefly, the *Boomerang* matter involved a truck company that violated FMCSA regulations; Boomerang retained a non-lawyer safety consultant who assumed responsibilities of representation against the alleged violations.[19] The safety consultant sent a "Reply" to the agency thereby precipitating the FMCSA Field Administrator for the Midwestern Service Center to raise the unauthorized practice of law question.[20]

A definitive answer as to whether or not the representation was in fact the unauthorized practice of law never came to fruition because Boomerang ultimately engaged legal counsel and eventually settled the

13. WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 3 (4th ed. 2000).

14. *Id.*

15. *Id.* at 229-30 (for example, the Internal Revenue Service allows qualified C.P.A.'s to appear as 'enrolled agents').

16. *Id.*

17. The *Boomerang Transportation, Inc.* matter raises this exact situation – the Federal Motor Carrier Safety Administration's ("FMCSA") enabling statute does not clearly delineate, or for that matter address, non-lawyer representation – and as such has been the catalyst for this Note.

18. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485 (2004).

19. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485-1 (2004) (Field Administrator's Motion to Strike Respondent's Reply and Request for Advisory Opinion).

20. *Id.*

case.[21] But, prior to the case's settlement, the issue in the *Boomerang* matter went for consideration before the FMCSA Office of Hearings.[22] This leads to speculation and thoughts about what if, what if the issue was carried through to a decision by the Office of Hearings. Where would the Office of Hearings draw the line between acceptable and unacceptable non-lawyer representation in FMCSA proceedings? Despite the issue rendering itself moot due to Boomerang's retention of a licensed attorney,[23] the question remains one of significant value and is the crux of this Note.

Prior to analyzing the *Boomerang Transportation, Inc.* circumstances, this Note reviews and discusses unauthorized practice of law issues in general, beginning with an attempt to define the "practice of law" and following with a description of the agency in which the Boomerang matter took place.

II. Defining the Practice of Law

Generally, the practice of law involves the giving of legal advice and instruction to clients in order to inform them of their rights and obligations; the preparation and drafting of legal documents requiring knowledge of legal principles not possessed by ordinary laymen; and the appearance or representation on behalf of clients in court proceedings such as lawsuits or in legal negotiations before public tribunals which possess power and authority to determine rights.[24]

According to some courts and scholars, the crucial factor in determining if an action constitutes the unauthorized practice of law is whether performance of the action involves an application of legal knowledge, skill, and expertise.[25] The Fifth Circuit Court of Appeals defined the practice of law as "any service requiring the use of legal skill or knowledge."[26] The state of Illinois followed the same line of reasoning but expanded upon this determination and held that an attorney need not necessarily appear in court to engage in the practice of law; the court went on to say that acts such as giving advice or rendering services requiring use of any degree of legal knowledge or skill may implicate the rule

21. *Id.*

22. *Id.*

23. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485-5 (2004) (Notice of Entry of Appearance).

24. 7 Am. Jur. 2d *Attorneys at Law* § 118 [hereinafter *Attorneys at Law*]; *see e.g.*, State *ex rel.* State Bar of Wisconsin v. Keller, 114 N.W.2d 796, 802 (Wisc. 1962).

25. Nathan Block & Robin Smith Houston, *Toward A Responsible System of Regulating Practice at Administrative Agencies: Administrative Agencies and the Changing Definition of the Practice of Law*, 2 Tex. Tech J. Tex. Admin. L. 251, 262 (2003).

26. O'Sullivan v. Countrywide Home Loans, Inc., 319 F.3d 732, 742 n.20 (5th Cir. 2003).

against the unauthorized practice of law.[27] A cursory review of various state definitions of the practice of law echoes the same general notion; taking Texas for example, the Lone Star State defines the practice of law as the giving of advice or the rendering of any services requiring the use of legal skill or knowledge.[28] In Colorado, per the Colorado Constitution, the Supreme Court has exclusive authority to regulate and define the practice of law[29] and has stated in the Colorado Supreme Court case of *Denver Bar Association v. Public Utilities Commission* that generally one acting in a "representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising and assisting him in connection with these rights and duties is engaged in the practice of law."[30]

Once again, the question remains what exactly constitutes the practice of law. Other side issues frame the question in a different light. For instance, there is some amount of overlap between the practice of law and various other professions where clients are represented by agents.[31] This causes question about what truly is and is not the practice of law. The professions where non-lawyers are assuming greater roles that delve somewhat into legal tasks include real estate, banking, accounting, and insurance – these are also typically areas where unauthorized practice of law claims arise with some regularity.[32]

Moreover, a growing number of tasks once considered purely "legal" are now performed by paralegals,[33] and many documents may now be drafted by computer assisted drafting libraries where the clients are asked a series of questions by software in order to construct legal documents[34] – is this the practice of law? Issues also arise with the use of forms; does

27. Colmar, Ltd. v. Fremantlemedia North America, Inc., 801 N.E.2d 1017, 1022 (Ill. App. Ct. 2003) (citing People *ex rel.* Chicago Bar Ass'n v. Tinkoff, 77 N.E.2d 693, 696 (1948)).

28. *See e.g.*, TEX. GOV'T CODE ANN. § 81.101(a) (Vernon 1998 & Supp. 2001).

29. COLO. CONST. art. III.

30. Denver Bar Ass'n v. Public Utilities Commission, 391 P.2d 467, 471 (Colo. 1964).

31. *See generally* Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 223-24 (2000); *see also* James M. McCauley, *Unauthorized Practice of Law (UPL): Law Related Services Provided by Nonlawyer Professional Service Entities, available at* http://www.vsb.org/profguides/u-pl/accountantsUPL2.htm (last visited May 24, 2005).

32. *See e.g.*, Marjorie A. Shields, *Unauthorized Practice of Law—Real Estate Closings*, 119 A.L.R. 5th 191 (2004); Michelle A. Finkowski, *Handling, Preparing, Presenting, or Trying Workers'-Compensation Claims or Cases as Practice of Law*, 58 A.L.R. 5th 449 (2004); James McLoughlin, *Activities of Insurance Adjusters as Unauthorized Practice of Law*, 29 A.L.R. 4th 1156 (2004); C.C. Marvel, *Title Examination Activities by Lending Institution, Insurance Company, or Title and Abstract Company, as Illegal Practice of Law*, 85 A.L.R. 2d 184 (2004).

33. Zitter, *supra* note 5.

34. William A. Scott, *Filling in the Blanks: How Computerized Forms are Affecting the Legal Profession*, 13 ALB. L.J. SCI. & TECH. 835, 837 (2003); Melissa Blades & Sarah Vermylen, *Virtual Ethics for a New Age: The Internet and the Ethical Lawyer*, 17 GEO. J. LEGAL ETHICS 637

filling in blanks on a form qualify as the practice of law? Technology and the internet modify the way in which the practice of law plays out and causes greater confusion on what exactly constitutes the practice of law.

While attempting to define this imprecise and ambiguous concept, it is without question that the United States conditions the practice of law upon admission to the Bar of a particular state or other territorial jurisdiction.[35] The unauthorized practice of law is prohibited by statute or court rules in every state but Arizona.[36] Definitions of the legal term "unauthorized practice of law" seem to vary across jurisdictions. For example, California tolerates the use of independent paralegals to a high degree, while the state of New York fails to tolerate some of the very same paralegal activities California allows.[37] The practice of law is taken seriously by state Bars, but there are few reported cases of individuals actually arrested for the unauthorized practice of law, absent fraud or other violations of consumer protection.[38] Commonly, the penalties simply consist of fines.[39]

Why do statutes prohibiting those without a law license from practicing exist? Most lawyers seem to strongly support unauthorized practice of law statutes for different reasons. Some argue unauthorized practice of law statutes further the public interest because of consumer welfare.[40] Lawyers and advocates of the statutes contend that licensure protects consumers from unqualified or unscrupulous practitioners.[41] Supporters of unauthorized practice of law statutes further opine the statutes help the public assess the competence of service providers.[42] In theory, in a free market, consumers of legal services generally would be unable to judge the quality of prospective unlicensed practitioners, but the licensure guarantees a baseline of competency in order to protect the public.[43] It is difficult for consumers to obtain information on the quality and reliability of one-time purchases of certain goods and services, of which legal services qualify. Licenses ameliorate the dilemma. Moreover, licenses of-

(2004); Cristina L. Underwood, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437 (2004).

35. AMERICAN BAR ASSOCIATION, *supra* note 1.

36. Hawkins, *supra* note 6, at 482.

37. Zitter, *supra* note 5.

38. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY, PROBLEMS AND MATERIALS 597 (8th ed. 2003).

39. *Id.*

40. CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, Written Remarks of James C. Turner submitted to the Commission on Multidisciplinary Practice (Feb. 5, 1999), *available at* http://www.abanet.org/cpr/turner1.html.

41. Deborah J. Cantrell, *The Obligation of the Legal Aid Lawyers to Champion Practice by NonLawyers*, 73 FORDHAM L. REV. 883, 893 (2004).

42. Leef, *supra* note 2.

43. *Id.*

fer a remedy or incentive for lawyers to do their job – if a lawyer does a poor or unethical job, consumers have potential malpractice claims in order to police lawyers. If someone does not have a license, where is the incentive or police for the consumer? Sure the non-lawyer without the license will face possible sanctions, but what real remedy does the actual end user have in this situation – seemingly none.

On the flip side, many people oppose these statutes and point to lawyer greed as the real reason for lawyers supporting the unauthorized practice of law rules.[44] In short, lawyers have a monopoly on legal services and, according to some, set prices that discriminate against the poor and at times even those with money.[45] The price set by lawyers does not reflect value of services but reflects what a lawyer believes the value of the services to be.[46] Also, to rebut the contention of law licenses protecting consumer welfare, the counterargument is simple, licensure does not protect consumers but protects lawyers from competition by non-lawyers.[47] Whether in support or opposition, it seems that unauthorized practice of law statutes will exist so long as those with law licenses are profitable in their ventures.

Whichever side of the fence one falls, the unauthorized practice of law issue affects a widespread group, especially with the increases in agency practice. Before detailing the facts of *Boomerang Transportation, Inc.*, this Note next reviews the Federal Motor Carrier Safety Administration ("FMCSA").

III. The FMCSA – History, Purpose

The Motor Carrier Safety Improvement Act of 1999 established the Federal Motor Carrier Safety Administration ("FMCSA") as a division of the United States Department of Transportation ("DOT").[48] Before the creation of the FMCSA within DOT, the Federal Highway Administration ("FHA") regulated trucking safety.[49] The new agency, FMCSA, was created because the trucking industry, safety advocates, and eventually Congress, questioned the expertise of the FHA to oversee safety since the FHA primarily built and maintained highways, not protected and promoted safety.[50] Although public interest advocates lobbied to move the

44. *Id.*

45. Leef, *supra* note 2.

46. *Id.*

47. *Id.*

48. Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat 1748; *see also* Federal Motor Carrier Safety Administration, Who We Are, *available at* http://www.fmcsa.gov/ (last visited May 24, 2005).

49. Bernard P. Haggerty, *'Tru' Cooperative Regulatory Federalism: Radioactive Waste Transportation Safety in the West*, 22 J. Land Resources & Envtl. L. 41, 61 (2002).

50. *Id.*

safety program to the National Highway Traffic Safety Administration ("NHTSA"), they agreed with both the industry and the DOT's inspector general the safety program should at least be removed from FHA.[51]

Congress believed the rate, number, and severity of crashes involving motor carriers in the United States was unacceptable.[52] Congress further opined that the DOT failed to meet statutorily mandated deadlines for completing rulemaking proceedings on motor carrier safety, and too few motor carriers underwent compliance reviews to ensure safety.[53] As a result, the FMCSA's creation took place on January 1, 2000.[54] The young agency's principal headquarters are located in Washington, D.C.; however, operations run in all fifty states employing more than 1,000 workers nationwide.[55]

The FMCSA develops and enforces data-driven regulations that balance motor carrier, truck and bus companies, safety with industry efficiency.[56] The FMCSA gathers safety information systems to focus on higher risk carriers in enforcing the safety regulations; focuses on educational messages to commercial drivers, carriers, and the public; and works with stakeholders including Federal, State, and local enforcement agencies, safety groups, the motor carrier industry, and organized labor on efforts to reduce bus and truck-related crashes.[57]

Fundamentally, the FMCSA functions to reduce crashes, injuries, and fatalities involving large trucks and buses.[58] In carrying out this mission, safety serves as the guiding star for this subdivision of DOT. As an example, one specific goal of the FMCSA is to reduce the large truck fatality rate by forty-one percent from 1996 to 2008.[59] Achieving this goal will reduce the annual number of truck-related fatalities down to 4,330 by the year 2008.[60] The FMCSA revolves around safety.[61] To carry out its mission, Congress conferred rulemaking power to the FMCSA through the Motor Carrier Safety Improvement Act.[62]

To achieve safety, many of the regulated truck and bus companies utilize outside safety consultants in order to properly align themselves

51. *Id.* at 61-62.
52. Motor Carrier Safety Improvement Act of 1999 § 3.
53. § 3.
54. § 113(e).
55. MOTOR CARRIER SAFETY ADMINISTRATION, *supra* note 48.
56. *Id.*
57. *Id.*
58. *Id.*
59. *See* MOTOR CARRIER SAFETY ADMINISTRATION, SHARING THE ROAD SAFELY, *at* http://www.sharethe-roadsafely.org/ (last visited May 24, 2005).
60. *Id.*
61. MOTOR CARRIER SAFETY ADMINISTRATION, *supra* note 48.
62. Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, 113 Stat 1748.

with FMCSA regulations.[63] Safety consultants work closely with truck and bus companies to ensure their clients understand how to comply as well as how to achieve safety.[64] Safety consultants further offer suggestions for increased safety performance. Safety consultants may advise carriers on methods to improve safety programs to avoid any violation or continued violation of FMCSA regulations.[65] Ideally, safety consultants possess years of experience along with special knowledge which aids carriers.[66] Safety consultants serve as an integral piece in regulating carriers.[67]

IV. FMCSA ENFORCEMENT

In enforcing FMCSA regulations, the agency uses Statutory Authority. Section 222 of the Motor Carrier Safety Improvement Act of 1999 directed the Secretary of Transportation to:

> (a) [E]nsure that motor carriers operate safely by imposing civil penalties at a level calculated to ensure prompt and sustained compliance with Federal motor carrier safety and commercial driver's license laws.
> (b) Establish and assess minimum civil penalties for each violation of laws referred to [under (a) above]; and . . . assess the maximum civil penalty for each violation . . . by any person who is found to have committed a pattern of violations of critical or acute regulations . . . or to have previously committed the same or a related violation of critical or acute regulations. . . .
> (c) If the Secretary determines and documents that extraordinary circumstances exist which merit the assessment of any civil penalty lower than any level established [above], the Secretary may assess such lower penalty. In cases where a person has been found to have previously committed the same or a related violation of critical or acute regulations . . . extraordinary circumstances may be found to exist when the Secretary determines that repetition of such violation does not demonstrate a failure to take appropriate remedial action.[68]

Section 222 of the Motor Carrier Safety Improvement Act of 1999 provides statutory authority for the FMCSA to fine carriers that violate regulations.[69] The typical FMCSA enforcement process against those who violate the rules begins with a Notice of Claim.[70] The Notice of Claim resembles the beginning of a legal proceeding, except the proceed-

63. *See* MOTOR CARRIER SAFETY ADMINISTRATION, *supra* note 48.
64. *See id.*
65. *See id.*
66. *See id.*
67. *See id.*
68. Motor Carrier Safety Improvement Act of 1999 § 222(a)-(c).
69. § 222(b)(1).
70. Telephone Interview with Richard A. Westley, Westley Law Offices (Jan. 10, 2005).

ing is an administrative one in which the FMCSA assesses a civil penalty against the party in violation, pursuant to statutory authority.[71] The enforcement process takes place through Enforcement Cases, with key players such as Field Administrators, Chief Safety Officers, and other Enforcement personnel.[72] An enforcement case is the backdrop for Boomerang's retention of a safety consultant in response to a Notice of Claim, resulting in the flag being raised on the unauthorized practice of law question.

V. In The Matter of Boomerang Transportation, Inc.

FMCSA Safety Specialist, Eric Teel, performed a compliance review on Boomerang Transportation, Inc. in July of 2003.[73] The compliance review yielded numerous violations; as a result, the FMCSA issued a Notice of Claim to Boomerang on July 29, 2003.[74] A Notice of Claim essentially amounts to a complaint against Boomerang for the alleged violations and typically contains a series of fines assessed against the party. The Notice of Claim against Boomerang included seven counts charging them of violating 49 C.F.R. 395.8(e), false reports of records of duty status.[75] Roughly one month after the Notice of Claim against Boomerang, Boomerang submitted a Reply to the Notice of Claim.[76] The hitch was who submitted the Reply – non-lawyer Eric J. Arnold, doing business as Arnold Safety Consulting, mailed the Reply to the FMCSA Field Administrator (FMCSA Enforcement counsel).[77]

Mr. Arnold's Reply reviewed the counts charged against Boomerang in the Notice of Claim, demanded discovery, challenged "material facts in dispute," argued the penalty imposed by the FMCSA was excessive, and offered justifying circumstances in Boomerang's case.[78] In response, the FMCSA Field Administrator filed a Motion to Strike the Reply and also requested an advisory opinion – as to the issue the Field Administrator raised was that of the unauthorized practice of law by Eric Arnold.[79] Basically, the FMCSA Field Administrator avers Eric Arnold was practicing law through his Reply and to respond to the Reply would be to further this breach.[80] The Field Administrator claimed Mr. Arnold was a non-

71. *Id.*
72. *Id.*
73. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485-1, at 1 (2004) (Field Administrator's Motion to Strike Respondent's Reply and Request for Advisory Opinion).
74. *Id.* at 2.
75. *Id.* at 3.
76. *Id.*
77. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485-1, at 3.
78. *Id.*
79. *Id.*
80. *Id.*

party to the litigation lacking standing to file a Reply and was not a licensed attorney qualified to practice law in any state within the United States, as such unauthorized to practice law.[81] The Field Administrator requested Boomerang obtain appropriate counsel within fifteen days and for the Court to strike the Reply. The Field Administrator also sought an advisory opinion.[82] As previously stated, Boomerang eventually retained counsel, Andrew C. White, to represent them,[83] thereby mooting the unauthorized practice of law issue unsettled by the Office of Hearings. The Notice of Entry of Appearance by Mr. White was filed on May 19, 2004 and the case settled soon thereafter.[84] But, what would the Office of Hearings done had they decided the issue?

The recurring theme of this Note is how we define the practice of law or how we identify the unauthorized practice of law. Eric Arnold responded to the Notice of Claim similar to how an attorney responds to a complaint. Eric Arnold stated he had been retained to act on behalf of Boomerang; Arnold requested an oral hearing on the Notice of Claim, demanded discovery, challenged "material facts in dispute," argued the penalty imposed by the FMCSA was excessive, and offered justifying circumstances in Boomerang's case.[85] All of these acts are typically handled by lawyers in the analogous lawsuit context. Was the Boomerang matter the unauthorized practice of law? The issue was to be decided by the Office of Hearings, but no answer was reached due to settlement. We are only left to speculate how the issue would have been decided.

VI. Unauthorized Practice of Law?

Representation by non-lawyers in agencies is acceptable, but when a non-lawyer attempts to perform tasks that are usually performed by a lawyer, questions of the unauthorized practice of law arise. Applying the earlier definition of the practice of law, performance of an action involving an application of legal knowledge, skill, and expertise,[86] Eric Arnold seemingly engaged in the practice of law. Mr. Arnold stated he was retained to act on behalf of Boomerang, requested an oral hearing, demanded discovery, challenged "material facts in dispute," and argued how the fines facing Boomerang were excessive.[87] These are all acts that an attorney would do when answering a complaint. For example, in re-

81. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485-1, at 3.
82. *Id.*
83. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485-5 (2004) (Notice of Entry of Appearance).
84. *Id.*
85. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485-1, at 3.
86. *Attorneys at Law*, *supra* note 24, § 118; *see e.g.*, *Keller*, 114 N.W.2d at 802.
87. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485-1, at 3.

sponse to a complaint in the traditional judicial system, an attorney reviews the complaint and responds with affirmative defenses, denials, counter-arguments, and sometimes crafty legal wrangling.[88] Eric Arnold, arguably, was denying (he challenged material facts in dispute), offering affirmative defenses (he advanced mitigating or justifying circumstances for Boomerang's alleged violations), and wrangled for position (he argued how the fines were excessive and even demanded discovery).[89] But does that mean the acts involved the application of legal knowledge, skill, and expertise? This question is not easy to answer.

It seems Mr. Arnold was performing legal wrangling and jockeying for his client's best interests by advocating. The role of advocate usually belongs to an attorney and this, in turn, pushes the scales more towards the unauthorized practice of law versus the permissible actions of a non-lawyer. But, the real problem in this matter results because the FMCSA enabling statute fails to clearly define the role of a non-lawyer within agency proceedings; and fails to clarify whether or not a non-lawyer is even allowed in agency proceedings.[90] Eric Arnold's job title and company name, Arnold Safety Consulting, revolve around consulting. A Delaware Supreme Court case stated "counsel have inherent and presumptive representational ability and authority, while . . . consultants do not."[91]

The preceding statement came in a Delaware case involving an unauthorized practice of law claim before a state administrative agency; the case resulted in a finding that the unauthorized practice of law indeed took place.[92] The non-lawyers representing the party possessed special knowledge and training but no law license.[93] Ultimately, the court viewed the manner in which the hearing proceeded and its adversarial nature as a factor holding that the unauthorized practice of law took place.[94]

The nature of an FMCSA Enforcement Case seemingly would be adversarial if the alleged violator contested the Notice of Claim. Dispute over whether or not a violation occurred would inherently assume an adversarial nature. Based on the facts, Eric Arnold disputed material facts and seemingly had something to argue against the Field Administrator, otherwise a check for the fines assessed would have been returned to the FMCSA in lieu of Eric Arnold's reply.

Applying the earlier definition of the practice of law to the facts of

88. STEPHEN C. YEAZELL, CIVIL PROCEDURE 456-66 (5th ed. 2000).
89. *In re* Boomerang Transportation, Inc., FMCSA 2004-17485-1, at 3.
90. Motor Carrier Safety Improvement Act of 1999.
91. *In re* Arons, 756 A.2d 867, 870 (Del. 2000).
92. *Id.* at 874.
93. *Id.*
94. *Id.*

Boomerang, it seems that Eric Arnold in fact crossed over into the practice of law. But, we will never know what the FMCSA Office of Hearings believes on the issue.

VII. Potential Solutions

Reformers of unauthorized practice of law statutes call for refinements to current laws and regulations; a commonly advanced solution includes the creation of a licensing scheme so that paraprofessionals and non-lawyer professionals can qualify to perform certain tasks currently handled solely by lawyers.[95] An exam could be administered for non-lawyers to ensure they possess necessary skills or competency to represent, whether it be in an agency or courtroom proceeding.[96] The problem here centers on the resources and time necessary for an exam for every non-lawyer desiring these representation or practice rights. Other suggestions ask that restrictions on who may provide legal services should be abandoned and replaced with a system where all may provide services, with only licensed lawyers being able to hold themselves out as such.[97]

In the case of Boomerang, the answer would be relatively clearer if the enabling statute offered guidance. Additionally, precedent within the agency might also be helpful. But, as Boomerang illustrates, how should the unauthorized practice of law issue be handled when an enabling statute fails to guide and how should the issue be handled when there is no precedent? Solutions such as tests for non-lawyers or eliminating restrictions on who can provide legal services do not answer the current question posed. The matter seemingly should be analyzed according to what has taken place in other similar situations. The aforementioned Delaware case seems to help generate a plausible answer. "Counsel have inherent and presumptive representational ability and authority, while . . . consultants do not."[98] Taking this statement alone would place Eric Arnold in the consultant role and outside the possession of inherent representational ability and authority, thereby qualifying what he has done as the unauthorized practice of law.

VIII. Conclusion

Eric Arnold's principal occupation consisted of safety consulting. The value of a safety consultant to those regulated by the FMCSA is not

95. *See, e.g.*, Deborah L. Rhode, Access to Justice 79-102 (2004).

96. *Id.*

97. *See* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1269-70 (1995).

98. *In re Arons*, 756 A.2d at 870.

easily measured. The mission of the FMCSA is safety, as such, Eric Arnold's job runs tantamount to the mission of the FMCSA. The Wisconsin Supreme Court recognized that a non-lawyer with familiarity of a particular industry, such as the trucking industry, may possess or acquire knowledge of value to a client and may be in a position to give technical non-legal advice for such matters that does not constitute the practice of law.[99] This seems to guide us on the inquiry of the proper role of a safety consultant in this instance. Eric Arnold should consult and help his clients achieve safety, but whether or not Eric Arnold can take on the role of someone with specialized knowledge and legal skill is another story.

It seems we come full circle to seven years. In those seven years it takes to become a lawyer and, presumably, receive a law license, the lawyer may not actually possess superior legal skill or knowledge then that of laymen like Eric Arnold. But, rules are rules and the way the definition for the practice of law has been crafted, it does take seven years before someone can offer legal advice in a permissible fashion.

99. *Keller,* 114 N.W.2d at 802.