NON-ATTORNEY SOCIAL SECURITY DISABILITY REPRESENTATIVES AND THE UNAUTHORIZED PRACTICE OF LAW

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I. INTRODUCTION

> The right of individuals to represent themselves is an inalienable right common to all natural persons. But no one has the right to represent another; it is a privilege to be granted and regulated by law for the protection of the public.
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> Rules of the Supreme Court of Virginia, Part 6, Introduction.

Meet Bob. No, not the Bob from the television commercials; this individual is a different Bob. Bob works for a nationwide company that represents people applying for Social Security disability benefits. Bob has at any given time about fifty or sixty applicants he is supposed to represent—sometimes more—all over the United States. He has never met or even spoken to any of the people he represents. Instead, he will review a form from the client listing his or her doctors, which might be accurate, and then Bob will request the medical records from those doctors. Bob will turn around and submit those records (or at least the ones favorable to his client) to the Social Security Administration. He will also submit a form to the Social Security Administration indicating that he is the claimant's representative.

Bob will eventually agree to a hearing date and time before a Social Security Administrative Law Judge, preferably on a day when he has several cases in that city so as to save the company travel expenses. Normally he will only travel to the hearing on the day it is scheduled, as the company does not want to pay for a hotel room to allow Bob to arrive the day before. Hopefully there will not be any problems with his flight or rental car as there will not be much time to spare. At the time and place of the hearing Bob will for the first time meet and talk to the individual he is representing. He will probably have to ask the Social Security office staff to point out his client to him, but they are used to doing that for representatives. At the hearing, Bob might make an opening statement (hopefully for the right case), question his client or other witnesses from a list of standard questions the company provides, and make a generic closing statement he uses in every hearing. Afterwards, Bob may even submit a

brief addressing the issues raised at the hearing. Bob, however, is not and has never been an attorney.

Under almost any definition, Bob's actions for the clients he represents would be considered the "practice of law." In all fifty states, if Bob did in a court of law what he does before the Social Security Administration, his actions would constitute the unauthorized practice of law, and depending on several factors, could be punished as a misdemeanor or even a felony. But what about Bob? Before the Social Security Administration, Bob's actions are not only completely legal, they are a common, everyday occurrence for approximately five thousand non-attorney representatives.[1] This article explores why what is a crime in one setting is not in another even though the very same actions are involved in both. The reason for the distinction is that fifty years ago the Florida Bar decided to do something about non-attorneys practicing law–which led the Supreme Court of the United States to decide that the Florida Supreme Court (which had agreed with the Florida Bar) was wrong.

This article, furthermore, argues that while the use of non-attorney representatives before the Social Security Administration does not violate over nine hundred years of evolving unauthorized practice of law doctrine, applying the safeguards provided by that doctrine to cases heard before the Social Security Administration is nevertheless essential for all parties involved. In support of this argument, this article will briefly examine the history of unauthorized practice of law doctrine, the arguments for and against this doctrine, the manner in which the Supreme Court addressed the issue of non-attorney representation before federal administrative agencies, and how the Social Security Administration needs to take action with regard to non-attorney representation to protect not only the disabled and the American taxpayer but the integrity of the entire administrative adjudicatory system it runs as well.

II. A BRIEF OVERVIEW OF THE UNAUTHORIZED PRACTICE OF LAW DOCTRINE

As a general rule in all fifty states, no one has the right to represent another individual in a legal matter unless he or she is a licensed attorney who has been admitted to the state bar after having met certain

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1. Drew A. Swank, *The Social Security Administration's Condoning of and Colluding with Attorney Misconduct*, 64 ADMIN. L. REV. (forthcoming June 2012) (manuscript at 9 n.66, on file with author).

requirements of education, examination, and moral character.[2] Those licensed to practice law are also subject to a disciplinary system run by the state bar and enforced by the state courts.[3] While Congress and the federal courts may regulate who practices in federal courts or federal proceedings, each state has the power to regulate who, and who may not, practice law in that state.[4] With the narrow exceptions of *pro se* representation and the occasionally allowed representation of third parties before local, state, or federal agencies, non-attorneys may not engage in the practice of law.[5]

Throughout the United States at both state and federal levels, non-attorneys are therefore generally prohibited from practicing law under the concept of "unauthorized practice of law."[6]

Rules regarding the unauthorized practice of law take three basic forms: rules prohibiting non-attorneys from practicing law, rules prohibiting attorneys from practicing law in a jurisdiction in which they are not admitted, and ethical prohibitions on attorneys assisting non-attorneys in the unauthorized practice of law.[7] The first category of rules prohibiting non-attorneys from practicing law, likewise, takes three basic forms: prohibitions on representing others in judicial or administrative proceedings, prohibitions on preparing legal instruments or documents which affect the legal rights of others, and prohibitions on advising others of their legal rights and responsibilities. Despite the rules prohibiting the unauthorized practice of law, it is rampant in the United States.[8]

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2. Charles H. Kuck & Olesia Gorinshteyn, *Immigration Law: Unauthorized Practice of Immigration Law in the Context of Supreme Court's Decision in* Sperry v. Florida, 35 WM. MITCHELL L. REV. 340, 342-43 (2008) (citation omitted); Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2587 (1999); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 90 (2000). *See also* Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 259 (2002).
3. Denckla, *supra* note 2, at 2581.
4. Gerard F. Glynn, *The Child Abuse Prevention and Treatment Act – Promoting the Unauthorized Practice of Law*, 9 J.L. & FAM. STUD. 53, 68 (2007); Nolan-Haley, *supra* note 3, at 259-60 (citation omitted).
5. 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, 248 (2000) (citation omitted).
6. Denckla, *supra* note 2, at 2581; Kuck & Gorinshteyn, *supra* note 2, at 342, 345-46.
7. Dzienkowski & Peroni, *supra* note 2, at 83-84 (citations omitted). *See generally* Nolan-Haley, *supra* note 2, at 260. For more information on the prohibition of attorneys assisting non-attorneys in the unauthorized practice of law, *see* Denckla, *supra* note 2, at 2586-87; Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2242-43 (1999) (citation omitted); Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 218 (1996) (citation omitted).
8. L. Bruce Ables, *Unauthorized Practice of Law*, 56 ALA. LAW. 288 (1995).

Prohibitions on the unauthorized practice of law are nothing new. Just how long ago the prohibitions date from, however, is a matter of debate. While the history of unauthorized practice of law doctrine has been described as well documented,[9] depending upon the source these efforts variously date from 1292,[10] the seventeenth century, the American colonial era,[11] the late nineteenth century,[12] and the early twentieth century.[13] The exact origin of these efforts, however, is not really relevant to the purposes of this article. Instead, conceding that the concerns about the unauthorized practice of law are nothing new is sufficient. In the United States, as the activities of non-attorneys expanded into what were historically seen as services heretofore provided by attorneys, unauthorized practice of law legislation increased.[14] In 1931, the American Bar Association created its first committee on the unauthorized practice of law.[15] Beginning in the 1930s, various states created statutory prohibitions regarding the unauthorized practice of law.[16] Since then, many states have expanded their efforts to regulate the unauthorized practice of law.[17] Beginning in the 1970s, however, a decline in unauthorized practice of law enforcement efforts has taken place.[18] This decrease was due in part to the Supreme Court's decision in *Goldfarb v. Virginia State Bar*, in which the Court ruled that the state bars' anti-competitive activity violated federal antitrust laws.[19] While enforcement may have decreased in recent years, the debate over the unauthorized practice of law has grown.[20]

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9. Nolan-Haley, *supra* note 2, at 261 (citation omitted).
10. Barbara Allison Clayton, Comment, *Are We Our Brother's Keepers? A Discussion of Nonlawyer Representation Before Texas Administrative Agencies and Recommendations for the Future*, 8 TEX. TECH. ADMIN. L. J. 115, 116 (2007) (citation omitted).
11. Nolan-Haley, *supra* note 2, at 261 (citation omitted); Denckla, *supra* note 2, at 2582-83.
12. Daly, *supra* note 5, at 248. (citation omitted); Denckla, *supra* note 2, at 2582-83 (stating that while the concept of prohibiting the unauthorized practice of law has been present in America since colonial times, its current manifestation dates from the formation of state bar associations in the 1870s).
13. Susan B. Schwab, Note, *Bringing Down the Bar: Accountants Challenge Meaning of Unauthorized Practice*, 21 CARDOZO L. REV. 1425, 1432 (2000) (citation omitted).
14. *Id.* at 1435–36 (citation omitted); Daly, *supra* note 5 (citation omitted). *See also* Denckla, *supra* note 2, at 2583-84 (discussing how unauthorized practice of law regulations expanded into curtailing non-litigation related legal activities performed by non-attorneys).
15. Kuck & Gorinshteyn, *supra* note 2, at 342 (citation omitted).
16. Dzienkowski & Peroni, *supra* note 2, at 90-91 (citations omitted); Schwab, *supra* note 13, at 1428-29 (citations omitted).
17. Kuck & Gorinshteyn, *supra* note 2, at 343 (citation omitted); Nolan-Haley, *supra* note 2, at 238-39.
18. Denckla, *supra* note 2, at 2585; Nolan-Haley, *supra* note 2, at 260 (citation omitted); Dzienkowski & Peroni, *supra* note 2, at 91 (citation omitted); Daly, *supra* note 5 (citation omitted).
19. Nolan-Haley, *supra* note 2, at 262 (citation omitted).
20. Clayton, *supra* note 10, at 121 (citation omitted) ("Since the earliest days of the law, there have been discussions about the use of nonlawyers in the legal process. As the law has progressed,

Regardless of whether enforcement is as common as it once was, non-attorneys engaging in any activity that even resembles the practice of law risk exposure to civil and criminal penalties.[21] While enforcement has always varied from state to state,[22] violations of unauthorized practice of law statutes can result in injunctions, contempt proceedings, negotiated settlements, *quo warranto* writs, and even criminal prosecutions.[23] Injunctions brought by state attorneys general or state bars to prevent non-attorneys from practicing law in the jurisdiction are the most common method of enjoining the unauthorized practice of law; criminal prosecutions are the least common.[24] Violation of an injunction for the unauthorized practice of law can also result in contempt proceedings leading to fines or imprisonment.[25] In two-thirds of the states, the unauthorized practice of law is a misdemeanor.[26] Under certain circumstances, however, the unauthorized practice of law can be a felony. In Texas the unauthorized practice of law is punished as a Class A misdemeanor unless the individual has been previously convicted of it, in which case it is a third-degree felony.[27] In New Jersey, the unauthorized practice of law can be a felony if the individual charged creates or reinforces a false impression that the person is licensed to engage in the practice of law, derives a benefit from the unauthorized practice, or in fact causes injury to another.[28]

'[l]ay competition [has become] an increasingly divisive issue in an increasingly divided profession.'"). *See also* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 726 (1994); Johnstone, *supra* note 7, at 220 (explaining how over time the efforts to enforce unauthorized practice of law prohibitions have been decreasing, but that recently there has been a resurgence of scrutiny of non-attorneys performing independent legal services). *But see* Nolan-Haley, *supra* note 2, at 264-65 (citations omitted) (stating that in recent years unauthorized practice of law enforcement has been increasing).

21. Nolan-Haley, *supra* note 2, at 239.
22. *Id.* at 264-65 (citations omitted); Kuck & Gorinshteyn, *supra* note 2, at 345.
23. Denckla, *supra* note 2, at 2592-93 (stating that a writ of *quo warranto* restrains a corporation from engaging in conduct beyond the scope of its charter). *See also* Hurder, *supra* note 7, at 2242 (citation omitted); Johnstone, *supra* note 7 (citation omitted); and Nolan-Haley, *supra* note 3, at 260 (citation omitted).
24. Denckla, *supra* note 2, at 2592; *see also* Dzienkowski & Peroni, *supra* note 2, at 91 (citations omitted). Enforcement of unauthorized practice of law statutes is normally rare absent a showing of harm to the public interest. Dzienkowski & Peroni, *supra* note 2, at 95.
25. Denckla, *supra* note 2, at 2593. Contempt proceedings for the unauthorized practice of law violations can be either for direct contempt (for in court violations) or indirect contempt for outside of court violations. *Id.* at 2592–93.
26. *Id.* at 2585-87 (citations omitted).
27. TEX. PENAL CODE ANN. § 38.123 (2007).
28. N.J. STAT. ANN. § 2C: 21-22 (2009).

A. The Danger Posed by the Unauthorized Practice of Law

But why are non-attorneys prohibited from representing others in the first place? What harm is there in non-attorneys doing what attorneys do? While the potential risk posed to consumers by non-attorney practitioners varies with the specific type of legal work they perform,[29] in general:

> The stated purpose of the unauthorized-practice-of-law rules is to protect the public. The theory is that a non-lawyer delivering legal services will make errors in legal work that a lawyer would not make, and will thereby harm the consumer of the legal services. In addition, as the theory goes, because non-lawyers are not bound by the ethical rules of the legal profession and are not subject to the discipline of the courts and bar authorities, their clients do not obtain the benefit of receiving services performed by a disinterested and loyal professional. Thus, the bar wants to ensure that persons providing legal services are qualified and competent to do so.[30]

When the practice of law is restricted to licensed attorneys, the public is protected against "harmful incompetence and unscrupulous conduct" of non-attorneys.[31] Promoting competence and ethical behavior are the twin goals of the unauthorized practice of law doctrine.[32] If a person is to represent another, he or she must be able to give knowledgeable advice that

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29. Johnstone, *supra* note 7.

30. Dzienkowski & Peroni, *supra* note 2, at 92 (citations omitted).

31. Denckla, *supra* note 2, at 2594. *See also* Nolan-Haley, *supra* note 2, at 268 (citation omitted) (stating that the unauthorized practice of law doctrine is a "consumer welfare measure that was structured to protect the public against fraud and incompetent, unlicensed lawyering."); Hurder, *supra* note 7, at 2243 (citation omitted) (stating that "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."); Johnstone, *supra* note 8 (discussing how the principal rationale for excluding lay individuals and organizations from practicing law is that consumers of legal services need to be protected from the possible incompetence and dishonesty of lay legal service providers); Schwab, *supra* note 13, at 1432-33 (citations omitted); Kuck & Gorinshteyn, *supra* note 2, at 344 (citation omitted) (stating that "[t]he primary purpose of the [legislation restricting the practice of law to licensed attorneys] was to protect the public by eliminating from the law profession those morally unfit to enjoy the privileges and those lacking in proper training and other qualifications necessary to perform the services required of an attorney . . . The State has a vital interest in the regulation of the practice of law for the benefit and protection of the people as a whole, and the legislation . . . was adopted in furtherance of a wholesome public policy."); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1589 (2005); Rhode, *supra* note 20 (discussing how bar leaders have insisted that it is consumers, not attorneys, who suffer from non-attorney competition).

32. Denckla, *supra* note 2, at 2593.

is applicable to the given situation.[33] Incomplete legal advice by a non-attorney is worse than no advice at all, as it raises the expectation of effective assistance that is in fact missing.[34] One criticism of *pro se* litigants—that they lack attorney's basic litigation skills—can also be extended to lay persons attempting to represent others.[35] Unauthorized practice of law rules ensure that consumers are provided with competent professional assistance.[36] Other professions allow only licensed individuals to perform certain functions due to required levels of competency; the practice of law should be no different.[37]

Besides a potential lack of competency in representing others, non-attorneys are not bound by the same ethical rules as attorneys.[38] If an attorney acts improperly, he or she can be sanctioned by a state bar, sued for malpractice by his or her client, and, if the misconduct is related to litigation, punished by a court.[39] Non-attorneys are not members of, nor regulated by, state bars and are not subject to the same disciplinary measures as attorneys.[40] Since no risk of bar sanctions exists, non-attorneys are less likely to be deterred from misconduct, to the detriment of both the consumer and the entire legal system.[41] Unlike most attorneys, non-attorneys usually do not carry malpractice insurance.[42] This lack of a binding ethical code and other recourses against non-attorneys has resulted in deceptive and fraudulent practices that have harmed the public and serve as a justification for the unauthorized practice of law doctrine.[43] In the specific example of the Social Security Administration hearings, non-attorney representatives are eight times more likely to be suspended or disqualified by the agency than attorneys.[44]

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33. *See* Clayton, *supra* note 10, at 116-17 (citations omitted) (discussing the belief how public welfare can be harmed by individuals without sufficient competency representing others in legal matters). *See* Augustine v. Dept. of Veterans Affairs, 429 F.3d 1334 (Fed. Cir. 2005); Glynn, *supra* note 4, at 67 (discussing how attorneys are uniquely trained and equipped to identify legal issues and to protect their clients' interests).
34. Swank, *supra* note 31 (citation omitted).
35. *See generally id.* at 1537.
36. Nolan-Haley, *supra* note 2, at 260-61 (citation omitted).
37. Dzienkowski & Peroni, *supra* note 2, at 92 (citation omitted); Denckla, *supra* note 2, at 2595.
38. Clayton, *supra* note 10, at 139 (citation omitted). *See generally* Denckla, *supra* note 2, at 2581; Hurder, *supra* note 7, at 2261 (citations omitted).
39. Clayton, *supra* note 10, at 128 (citation omitted). Admittedly, the odds of an attorney actually being sanctioned for incompetence or other failings are very low. Denckla, *supra* note 2, at 2594 (citation omitted).
40. Clayton, *supra* note 10, at 135; Kuck & Gorinshteyn, *supra* note 2, at 346; Denckla, *supra* note 2, at 2598.
41. Clayton, *supra* note 10, at 138.
42. *Id.* at 127 (citation omitted).
43. *Id.* at 139 (citation omitted); Nolan-Haley, *supra* note 2, at 260.
44. Swank, *supra* note 1, at 9 n.67.

Furthermore, non-attorneys often create additional legal problems for the individuals they represent.[45] Lack of competent assistance from a non-attorney before an administrative agency may result in a decision that will be extremely difficult to overturn on appeal.[46] "Altogether, the argument against nonlawyer representation is three-fold in the fears that the nonlawyer (i) not only will incompetently represent a claimant during the proceeding, but (ii) will destroy that claimant's chance of appeal, and (iii) leave the claimant without any significant recourse."[47]

Who, then, suffers besides the poorly-represented client?[48] Neither the non-attorney nor the company which hired him or her suffers. Nor do attorneys; instead of taking away work from attorneys, non-attorneys may–through the mistakes they make–create even more work for attorneys.[49] Non-attorneys can, however, harm the administration of justice in general.[50] If a representative acts either unethically or fails to provide competent legal representation, the "integrity of the legal system" is compromised,[51] and the scarce resources of the courts and administrative agencies, paid for by the taxpayers, are wasted.[52] Better representation can save money for the taxpayer by making the best case the first time it is heard and preclude the need for appeals or new claims.[53] As one commentator noted:

> There are strong arguments for allowing only licensed lawyers to represent litigants in contested cases. The adversary system places considerable reliance on litigants and their representatives to develop the facts of their cases, to research the law, and to frame issues for courts to decide. The legal training of lawyers prepares them for these tasks. Thus, the ethical rules imposed by courts on lawyers protect the courts as well as the public.[54]

> If a non-attorney is not under the same ethical duty to disclose relevant information as an attorney, there is a risk that cases may be decided improperly, as they are based on only limited facts–to the detriment of the

45. Ables, *supra* note 8, at 290.
46. Clayton, *supra* note 10, at 121.
47. *Id*. at 127-28 (citation omitted).
48. Florida v. Sperry, 140 So. 2d 587, 595 (Fla. 1962).
49. *Id*.
50. *See* Hurder, *supra* note 7, at 2257.
51. *Id.* at 2267 (citation omitted).
52. *Id.* at 2271.
53. Clayton, *supra* note 10, at 121.
54. Hurder, *supra* note 7, at 2270 (citations omitted). *See generally* Swank, *supra* note 31, at 1537 (discussing how for our system of justice to work fairly, practicing attorneys must follow the established rules with regard to their ethical behavior).

> legitimacy of the entire legal system that utilizes case precedents.[55] All told, proponents have argued that unauthorized practice of law statutes protect the American public . . . from shoddy work, invasion of privacy, undue influence, deception, fraud, and overreaching to the governmental interest in the operation of the legal system, which has included measures the courts have cited to preserve confidence in the legal profession, protect the attorney-client relationship, license and supervise lawyers in their role as officers of the courts, assure the economic viability of the bar, and maintain the moral and ethical fabric of the administration of justice.[56]

In other words, as the argument goes, too much is at stake for the consumer and the entire legal system to allow for legal representation by anyone but a trained attorney who is a member of a state bar.[57]

These beliefs regarding the benefits of unauthorized practice of law rules, however, are not universally shared. In fact, the arguments for the unauthorized practice of law doctrine are conjectural and subject to debate.[58] For example, some studies have demonstrated that non-attorneys can do as well as attorneys in certain legal tasks.[59] Non-attorneys frequently handle routine legal matters with no apparent adverse effects.[60] Attorneys do not by definition have a monopoly over competence or ethical behavior; individual non-attorneys can be more competent, more responsible, and more conscientious than individual attorneys.[61] As shown by legal malpractice cases, attorneys can and do make mistakes just as non-attorneys can.[62] Employing a licensed attorney is certainly no guarantee of legal success.[63] Furthermore, if non-attorneys could perform some of the legal tasks traditionally performed solely by attorneys, such practices could expand the amount of legal services available, especially for the poor.[64]

One of the most fundamental problems with unauthorized practice of law rules is the difficulty of precisely defining what constitutes the practice of law.[65] Statutes prohibiting the unauthorized practice of law generally do

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55. Clayton, *supra* note 10, at 133. *See* Hurder, *supra* note 7, at 2268-69 (citations omitted).
56. Hurder, *supra* note 7, at 2258 (citation omitted).
57. Johnstone, *supra* note 7 (discussing how not only are consumers insufficiently informed to determine whether non-attorneys are competent and honest, but that the risks are too great to allow them to make the choice of using a non-attorney for legal representation).
58. Schwab, *supra* note 13 (citation omitted).
59. Clayton, *supra* note 10, at 123 (citation omitted); Nolan-Haley, *supra* note 2, at 268-69 (citations omitted).
60. Rhode, *supra* note 20, at 727.
61. Denckla, *supra* note 2, at 2594–96.
62. Swank, *supra* note 31, at 1575; Clayton, *supra* note 10, at 123 (citation omitted).
63. Swank, *supra* note 31, at 1574.
64. Denckla, *supra* note 2, at 2595 (citation omitted). *See also* Dzienkowski & Peroni, *supra* note 2, at 83.
65. Dzienkowski & Peroni, *supra* note 2, at 95; Nolan-Haley, *supra* note 2, at 262.

not clearly define which specific activities are prohibited.[66] Instead, courts have left us with broad and vague definitions of what does, and does not, constitute the practice of law.[67] This absence of a clear definition has made both enforcing the unauthorized practice of law rules[68] and non-attorneys' efforts to predict which of their actions will violate the rules difficult.[69] Historically, courts have applied three tests to determine if an activity constitutes the practice of law: first, if the activity requires specialized training and skills; second, if the activity is one traditionally performed by attorneys; and third, whether the activity is incidental to other non-legal services.[70] One activity, however, that has consistently been found to be the "the practice of law" is representing others before courts and administrative agencies.[71]

These various criticisms suggest that the unauthorized practice of law doctrine benefits the legal community more than the public at large.[72] The argument most often advanced against the unauthorized practice of law doctrine is that it is a form of trade protection designed to give attorneys a monopoly over the practice of law rather than to protect the public.[73] Ever since the beginning of efforts to limit the unauthorized practice of law, the argument maintains, the motivation has been "[t]he self-interest of lawyers as a collective group."[74] Perhaps the greatest support for this monopoly argument is the absence of extensive empirical evidence that the public is being harmed by the unauthorized practice of law.[75] The unauthorized practice of law rationale of wanting to ensure competency assumes that bar membership, the ability to pass a bar exam, and a law school education are the hallmarks or guarantors of competency.[76] No proof of that assumption,

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66. Schwab, *supra* note 16, at 1436 (citation omitted).
67. *Id*. at 1430 (citations omitted).
68. *Id*.
69. *Id*. at 1442 (citation omitted).
70. *Id*. at 1443–44 (citations omitted); Nolan-Haley, *supra* note 2, at 263 (citations omitted). *See also* Dzienkowski & Peroni, *supra* note 2, at 95 (citations omitted).
71. Johnstone, *supra* note 7; Hurder, *supra* note 7, at 2266-67 (citations omitted).
72. Rhode, *supra* note 20, at 727.
73. Dzienkowski & Peroni, *supra* note 2, at 93 (citation omitted); Nolan-Haley, *supra* note 2, at 238 (citation omitted); Ables, *supra* note 8, at 290; Clayton, *supra* note 12, at 117 (citations omitted); Johnstone, *supra* note 8; Schwab, *supra* note 13, at 1432-33 (citations omitted). *See generally* Denckla, *supra* note 2, at 2581; Rhode, *supra* note 20, at 665.
74. Dzienkowski & Peroni, *supra* note 2, at 90–91, 94 (citation omitted). *See generally* Schwab, *supra* note 13, at 1436 (citations omitted) (discussing how during the Great Depression the American Bar Association and state bars began to focus on unauthorized practice of law prohibitions); Nolan-Haley, *supra* note 2, at 261-62 (citation omitted) (discussing how the legal profession's organized opposition to the unauthorized practice of law began in 1930 as attorneys attempted to protect their economic livelihood during the Great Depression).
75. Dzienkowski & Peroni, *supra* note 2, at 94 (citation omitted).
76. Rhode, *supra* note 20, at 727. *See generally* Denckla, *supra* note 2, at 2581.

however, exists.[77] In fact, in the realm of administrative adjudication (e.g., before state or federal administrative agencies), empirical evidence exists indicating that attorneys and non-attorneys are almost equally successful, indicating that non-attorneys can provide competent assistance to claimants.[78] As stated in *Sperry v. Florida* regarding cases brought before the Patent and Trademark Office, "there is no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct."[79] Other arguments against unauthorized practice of law rules include that they violate "First Amendment or due process considerations," are racist, or are designed to deny the poor access to the legal system.[80] A different argument even asserts that unauthorized practice of law rules are unnecessary, as the free market already gives attorneys an advantage over non-attorneys in that consumers will want the very best legal assistance available and will naturally hire licensed attorneys.[81]

The problem with the monopoly argument is that, even assuming *arguendo* that there is a protectionist element in unauthorized practice of law rules, such protectionism is not necessarily mutually exclusive to the stated objective of consumer protection through greater competency and ethics. Just because unauthorized practice of law rules help attorneys financially does not mean that they do not also help protect the public. Some have argued that the monopoly created by unauthorized practice of

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77. Nolan-Haley, *supra* note 2, at 261 (citations omitted) (stating that "[t]he assumption is that lawyers are forced to exhibit a level of education and ethical standards whereas non-lawyers are not regulated 'as to integrity or legal competence by the same rules that govern the conduct of [lawyers].'").

78. Clayton, *supra* note 10, at 128–29 (2007) (citations omitted). The evidence also demonstrates that individuals represented by either attorneys or non-attorneys are more likely to be successful than those who represent themselves. Denckla, *supra* note 2, at 2596 (citing A.B.A., COMMISSION ON NONLAWYER PRACTICE, ACTIVITY IN LAW-RELATED SITUATIONS 17 n.46 (1995)). Part of the reason for this, however, may be the merits of the case. It is inevitable that some cases, including by definition some *pro se* cases, are fundamentally flawed, and their lack of success should not be used as evidence of the advantages of having representation. In a free market, both attorneys and non-attorneys would naturally wish to accept strong cases (hopefully requiring minimal work) and such cases would usually have no shortage of representatives willing to handle them. The opposite of this is likewise true; cases that are hopeless on the merits are unlikely to attract counsel absent fees being paid sufficiently in advance. *See* Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373 (2005). As charging fees in advance is supposedly prohibited in the Social Security disability scheme, the result is that there would be some cases which representatives would be unwilling to take, absent having one of the administrative law judges who routinely awards benefits in every case regardless of the merits. Swank, *supra* note 1, at 12.

79. Clayton, *supra* note 10, at 130 (citing Sperry v. Florida, 373 U.S. 379, 402 (1963)).

80. Nolan-Haley, *supra* note 2, at 266-68 (citations omitted). *See* Clayton, *supra* note 10, at 122 (citations omitted) (stating unauthorized practice of law prohibitions prevent the poor from gaining representation before administrative agencies).

81. Denckla, *supra* note 2, at 2598.

law rules is merely a side effect of protecting the public "from being advised and represented in legal matters by incompetent and unreliable persons, over whom the judicial department could exercise little control."[82] Others have argued that unauthorized practice of law rules protect the public by restricting legal services to those individuals who are regulated by the bars, and in exchange for attorneys submitting to this regulation they are rewarded "with an economic advantage over their potential and actual competitors" by the monopoly these rules create.[83] The rules against unauthorized practice of law therefore "serve the dual missions of protecting consumers and, without a doubt, protecting the reputation of members of a given state bar."[84] Regardless of whether a monopoly over providing legal services is intentional or not, the arguments for protecting the public from incompetent or unethical legal representation outweigh the economic criticisms.

B. The Exception of Federal Administrative Agency Practice from the Unauthorized Practice of Law Doctrine

Certain exceptions to the unauthorized practice of law doctrine exist, including self-representation, law student practice, and representing others in federal and some state administrative proceeding.[85] How non-attorney representatives came to practice before federal agencies involves the growth of administrative agencies, the Administrative Procedure Act, and, most importantly, a man named Sperry. The Industrial Revolution was the creative force behind the creation of many administrative agencies in the United States.[86] As administrative agencies were designed without the formalities and rules of the courts, they were ideally suited for non-attorney representatives.[87] As the number of administrative agencies increased, so too did the opportunities for non-attorneys to practice law. Historically, non-attorneys have routinely appeared before certain federal administrative agencies. Non-attorneys represent claimants ranging from eleven[88] to

82. Clayton, *supra* note 10, at 121-22 (citation omitted).
83. Denckla, *supra* note 2, at 2594. *See also* Dzienkowski & Peroni, *supra* note 2, at 95-96 (citation omitted).
84. Kuck & Gorinshteyn, *supra* note 2, at 344. *See also* Hurder, *supra* note 7, at 2258 (citation omitted) (discussing how, in addition to the protections offered to the public by unauthorized practice of law statutes, they also assure the economic viability of the bar).
85. *See* Denckla, *supra* note 2, at 2591-92; Nolan-Haley, *supra* note 2, at 263-64 (citation omitted).
86. Clayton, *supra* note 10, at 117-18 (citations omitted).
87. *Id.* at 118 (citation omitted).
88. SOC. SEC. ADMIN., Office of the Inspector Gen., Audit Report A-12-06-16013: Demonstration Project for Non-Attorney Representatives 3 (June 2006).

fourteen percent[89] of the more than 700,000 cases heard by the Social Security Administration each year.[90] This equates to a minimum of 77,000 to 98,000 cases per year. As the Social Security Administration is the largest adjudicatory system in the world,[91] more non-attorney representatives likely appear before it than in any other forum. Besides the Social Security Administration, non-attorney representatives appear before other federal agencies such as the Department of Health and Human Services,[92] Immigration and Naturalization Service,[93] Department of Labor,[94] Patent and Trademark Office,[95] and Merit Systems Protection Board.[96]

This approach of allowing—or at least tolerating—non-attorney representation was codified in the Administrative Procedure Act. Enacted in 1946, the Administrative Procedure Act has been referred to as one of the most important pieces of legislation ever created.[97] Among other things, the Administrative Procedure Act sets the framework for federal administrative agency adjudication, including the hearings conducted by the Social Security Administration and other federal agencies.[98] With the exception of the Internal Revenue Service, the Administrative Procedure Act neither grants nor denies non-attorneys permission to represent others before federal administrative agencies.[99] Rather, it allows each federal agency to determine who may, and who may not, represent others before it. While both the historical precedent and the Administrative Procedure Act allowed for non-attorney representation before federal administrative agencies, it was not until 1963 that the Supreme Court of the United States announced the basis as to why the states are unable to challenge who may represent others before federal administrative agencies.

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89. Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 370 (2007) (citation omitted).
90. Swank, *supra* note 1, at 11 n.78.
91. Rains, *supra* note 89, at 364.
92. 45 C.F.R. § 205.10(a)(3)(iii) (2011).
93. 8 C.F.R. § 292.1 (2011).
94. 29 C.F.R. § 18.34 (2011).
95. 37 C.F.R. § 1.31 (2011).
96. 5 C.F.R. § 1201.31(b) (2011).
97. Jill Nylander, *The Administrative Procedure Act*, MICH. BAR J., Nov. 2006, at 39.
98. *Id*.
99. 5 U.S.C. § 500(d)(1) (2006). The exception is found in 5 U.S.C. § 500(c), which provides that a certified public accountant may represent an individual before the Internal Revenue Service.

C. Sperry versus the State of Florida

Alexander T. Sperry was a person who advertised himself as a patent attorney with an office in Tampa, Florida.[100] Since 1928 he had represented clients before the United States Patent and Trademark Office and did everything that patent attorneys do, such as preparing legal documents and rendering legal opinions.[101] However, he was neither an attorney nor a member of the Florida or any other state bar.[102] The Florida Bar petitioned the Supreme Court of Florida to hold Sperry in contempt for the unauthorized practice of law and to enjoin him from practicing law in the state in the future.[103] In his defense, Sperry questioned, among other things, whether his actions before the Patent and Trademark Office, a federal administrative agency, constituted the practice of law.[104]

The Supreme Court of Florida did not find that by definition representing others "before any or all federal administrative agencies necessarily constitutes the practice of law."[105] Rather, it adopted a test to examine the actions of the individual accused of the unauthorized practice of law, and not the forum in which he or she performs those actions, to determine if the person in fact was "practicing law."[106] The court acknowledged a split of authority among jurisdictions on both the issue of whether practice before federal administrative agencies constitutes the practice of law and the issue of whether a person who practices solely before federal administrative agencies needs to be a member of the bar of the state in which his or her actions take place.[107] After examining the actions of Sperry, however, the court concluded that his preparation of patent applications for others in a representative capacity constituted the

100. Florida v. Sperry, 140 So. 2d 587, 588 (Fla. 1962).
101. *Id*.
102. *Id*.
103. *Id.*
104. *Id.*
105. *Id*. at 590.
106. *Id*. at 591. The court, in expressing the test it adopted, wrote:

> We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

Id.
107. *Id*. at 591-93.

practice of law.[108] The court also held that merely because a federal administrative agency allowed an individual to practice before it did not authorize the person to practice law in the state.[109] Stated another way, a federal agency could not determine who may practice law in a state; only the state could do that.[110]

The Supreme Court of Florida, deciding that it not only had the authority to admit attorneys to the practice of law in the state but also "the power to prevent the practice of law by those who are not admitted to the practice,"[111] enjoined Sperry from the unauthorized practice of law–which in his case meant solely the work he did before the Patent and Trademark Office–within the confines of Florida.[112] While the court held it had the power to punish the unauthorized practice of law as contempt of court,[113] it found that Sperry had not intentionally violated any order or rule of the court and therefore declined to hold him in contempt provided that he did not violate the injunction order.[114] The rationale the court gave for its ruling was the same that has been propounded at every opportunity when unauthorized practice of law prohibitions are enforced: a desire to protect the public from unqualified persons who are not subject to ethical restraints imposed by codes of conduct.[115]

One year later, the Supreme Court of the United States reserved the Florida court's decision and vacated the injunction against Sperry.[116] The Court agreed with the Supreme Court of Florida's determination that what Sperry did before the Patent and Trademark Office constituted the practice of law[117] and that Florida had a substantial interest in prohibiting the unauthorized practice of law.[118] It disagreed with the Florida court's holding, however, that neither a federal law nor the Constitution authorized Sperry's actions notwithstanding the state's prohibitions on the unauthorized practice of law.[119] As the statutes passed by Congress specifically allowed for the Commissioner of Patents to permit non-attorneys to practice before it, by virtue of the Constitution's Supremacy Clause, "Florida may not deny to those failing to meet its own

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108. *Id*. at 593.
109. *Id*. at 594-95.
110. *Id*. at 595.
111. *Id*. at 588.
112. *Id*. at 596. The court was clear in stating that the injunction in no way limited any right Sperry had to practice before the Patent and Trademark Office outside of Florida. *Id.*
113. *Id*. at 589.
114. *Id*. at 596.
115. *Id*. at 595.
116. Sperry v. Florida, 373 U.S. 379, 404 (1963).
117. *Id*. at 383.
118. *Id*.
119. *Id*.

qualifications the right to perform the functions within the scope of the federal authority."[120] The Court held that the state could continue to maintain control over the practice of law within its boundaries, except, as in this case, where preempted by federal law.[121] Federal administrative agencies may therefore create their own rules, consistent with the Administrative Procedure Act,[122] to permit non-attorneys to appear before them, and, through the federal preemption doctrine, the states are powerless to prohibit it as the unauthorized practice of law.[123] While non-attorneys were in fact practicing law, it was deemed an exception to the unauthorized practice of law doctrine because it was limited to a federal administrative agency that had authorized it.

In the decision, the Supreme Court of the United States focused on two fundamental ways that attorneys and non-attorneys in the Patent and Trademark Office context were similar. First, it stressed that all individuals practicing before the Patent and Trademark Office, whether attorney or not, have to pass the same examination; second, that those practicing before it, whether attorney or not, had to '"conform to the standards of ethical and professional conduct generally applicable to attorneys before the courts of the United States,'" with the failure to do so potentially resulting in suspension or disbarment from practice.[124] Because the Patent and Trademark Office used the same examination and ethics requirements for both attorneys and non-attorneys, the Supreme Court of the United States found that there was '"no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct.'"[125] Accordingly, the two problems associated with non-attorney unauthorized practice of law—competency and ethical misconduct—were addressed in the federal scheme of practicing before the Patent and Trademark Office by standardized examinations and an ethical code binding on both attorneys and non-attorneys alike.

III. THE SOCIAL SECURITY ADMINISTRATION'S FAILURE WITH REGARD TO NON-ATTORNEY COMPETENCY

But what about the Social Security Administration? With regard to who can serve as a representative, the Social Security Act provides that non-attorneys wishing to represent disability claimants may be required to

120. *Id.* at 385. *See also* Kuck & Gorinshteyn, *supra* note 2, at 351.
121. *Sperry*, 373 U.S. at 402.
122. 5 U.S.C. § 500 (2006), *et seq.*
123. Denckla, *supra* note 2, at 2588-91 (citing *Sperry*, 373 U.S. at 388).
124. *Sperry*, 373 U.S. at 395–96, 402. *See also* Kuck & Gorinshteyn, *supra* note 2, at 353 (citation omitted).
125. *Sperry*, 373 U.S. at 402.

show three things: first, that they "are of good character and in good repute;" second, that they possess the "necessary qualifications to enable them to render such claimants valuable service;" and third, that they are "otherwise competent to advise and assist such claimants in the presentation of their cases."[126] For some unexplained reason, however, two of the three criteria—possessing necessary qualifications and competency to advise and assist—are not included in the regulations written by the Social Security Administration to implement the law duly passed by Congress. Entitled "Who may be your representative," 20 C.F.R. § 404.1705(b) and its Title XVI companion 20 C.F.R. § 416.1505(b)[127] provide that a non-attorney may serve as a claimant's representative if he or she is generally known to have a good character and reputation; is capable of giving valuable help; is not disqualified or suspended from acting as a representative; and is not prohibited by law from acting as a representative. The second and third requirements passed by Congress in the Social Security Act of possessing "necessary qualifications to enable them to render such claimants valuable service" and being "otherwise competent to advise and assist such claimants in the presentation of their cases"[128] is diluted in the Social Security Administration's enacting regulations to merely being "capable of giving valuable help."[129] Competency is replaced by helpfulness. As holding a door open or driving a claimant to a hearing may be "valuable help," the Social Security Administration has truly lowered the bar for what it expects from non-attorney representatives. What gives the Social Security Administration the authority to change the specific requirements of a law passed by the United States Congress is a mystery.

In fact, non-attorney representatives in Social Security disability hearings only have to meet competency standards *if they want to be paid faster by the Social Security Administration*. The Social Security Protection Act (SSPA) of 2004 required the Social Security Administration to develop and implement a five-year nationwide demonstration project that extended

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126. 42 U.S.C. § 406 (a)(1) (2006).

127. Drew A. Swank, *Welfare, Income Detection, and the Shadow Economy*, 8 RUTGERS J. L. & PUB. POL'Y 614, 618-20 (2011) (discussing an overview of Social Security disability programs).

128. 42 U.S.C. § 406 (a)(1).

129. This even lower standard from the Code of Federal Regulations is repeated verbatim in the Social Security Administration Office of Disability Adjudication and Review's specific manual, which governs disability hearings. *See* SOCIAL SECURITY ADMINISTRATION, OFFICE OF DISABILITY ADJUDICATION AND REVIEW, HEARINGS, APPEALS AND LITIGATION MANUAL (HALLEX) I-1-1-2(B) (2005) [hereinafter HALLEX]. It is important to note that after an individual has been appointed a representative in a Social Security disability hearing, he or she is expected to provide competent assistance; but unlike the specific wording of the Social Security Act, the agency does not require any demonstration of competence in order to be appointed in the first place other than being "helpful." *See* 20 C.F.R. § 404.1740 (2011); 20 C.F.R. § 416.1540 (2011); HALLEX at I-1-1-40.

to certain non-attorney representatives the ability to have their approved fees withheld and paid directly to them from the claimant's past due benefits through a fee agreement just as attorneys do.[130] To qualify for the program, the non-attorney representative would have to have a bachelor's degree or equivalent, pass a written examination, secure professional liability insurance or the equivalent, undergo a criminal background check, complete continuing education classes in the years following eligibility, and have demonstrated experience in representing claimants before the Social Security Administration.[131] The only competency examination contemplated by the Social Security Administration for non-attorney representatives therefore has been to qualify them for automatic payment under fee agreements instead of relying upon fee petitions, which require individual approval by an Administrative Law Judge. In other words, the only instance in which Social Security non-attorney representatives have to demonstrate any measure of competency is when they want to be paid faster; no examination, no qualifying test, nothing at all exists to qualify them for the job in the first place.

IV. THE SOCIAL SECURITY ADMINISTRATION'S NON-APPROACH TO ETHICS

Unlike with its specific references to competency, the Social Security Act is mostly silent with regard to the ethical standards representatives are required to meet. The Act specifically authorizes the Commissioner of the Social Security Administration to disqualify a representative who has been disbarred, suspended from any court, or otherwise disqualified from appearing before a federal agency.[132] Likewise, the Act allows for the Commissioner to suspend or disqualify a representative who refuses to comply with the Administration's rules and regulations.[133] The Code of Federal Regulations' provisions regarding ethics, written by the Social Security Administration, are more specific. They provide that representatives, whether attorney or non-attorney,[134] shall faithfully execute their duties as agents or fiduciaries of a party;[135] be forthright in dealing with the Administration and claimant;[136] comply with the Administration's

130. 42 U.S.C. § 406 (e). *See also* Audit Report A-12-06-16013, *supra* note 88.
131. *Id.*
132. 42 U.S.C. § 406(a)(1).
133. *Id.* Additionally, the Act proscribes criminal penalties for defrauding, deceiving, or misleading claimants regarding fees collectable in Social Security disability cases. 42 U.S.C. § 406(a)(5).
134. 20 C.F.R. § 404.1740(a)(1) (2011). *See* Rains, *supra* note 89, at 373 (citing 20 C.F.R. §§ 404.1740(a)(1), 416.1540(a)(1) (2006)).
135. 20 C.F.R. § 404.1740(a)(1); 20 C.F.R. § 416.1540(a)(1).
136. 20 C.F.R. § 404.1740(a)(2), (b)(3); 20 C.F.R. § 416.1540(a)(2), (b)(3).

rules and standards;[137] act promptly in obtaining information and evidence regarding disability and ability to work;[138] and act with diligence and promptness in representing a claimant.[139]

The provisions also specify certain behavior forbidden of the representative, including making or participating in the making of false or misleading statements, assertions, or representations regarding a material fact or law; unreasonably delaying or causing to be delayed the processing of a claim for benefits;[140] attempting to improperly influence an Administration employee or witness;[141] and engaging in other behavior that is "prejudicial to the fair and orderly conduct of administrative proceedings, including but not limited to" repeated absences, persistent tardiness, disruptive or obstructing behavior, and threatening or intimidating language or actions.[142] Failure to conform with these ethical duties may result in administrative action to suspend or disqualify the person from acting as a representative.[143] Besides the provisions of the Code of Federal Regulations, both the Social Security Administration's hearing manual and policy manual reiterate the same requirements and likewise provide for the suspension or disqualification of representatives who violate "the affirmative duties of a representative or engage[] in actions prohibited by the Commissioner's rules and regulations."

Social Security Administrative Law Judges, however, may not take action regarding attorney misconduct they discover other than reporting it to agency management. Chief Administrative Law Judge Bulletin 09-04 from the Social Security Administration's Office of Disability Adjudication and Review (ODAR)[144] mandates that if a Social Security Administrative Law Judge discovers representative misconduct he or she is to only report it to the Hearing Office Management Team and take no further action, including not reporting the suspected misconduct to the representative's state bar.[145] If any action is to be taken, it is up to management to pursue it. This approach obviously can place the Administrative Law Judge in an awkward position of having to violate his or her own bar rules if they require reporting of misconduct.[146] The Administrative Law Judge either has to violate his or her bar rules by not reporting the misconduct or violate

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137. 20 C.F.R. § 404.1740(a)(2); 20 C.F.R. § 416.1540(a)(2).
138. 20 C.F.R. § 404.1740(b)(1); 20 C.F.R. § 416.1540(b)(1).
139. 20 C.F.R. § 404.1740(b)(3)(ii); 20 C.F.R. § 416.1540(b)(3)(ii).
140. 20 C.F.R. § 404.1740(c)(4); 20 C.F.R. § 416.1540(c)(4).
141. 20 C.F.R. § 404.1740(c)(6); 20 C.F.R. § 416.1540(c)(6).
142. 20 C.F.R. § 404.1740(c)(7); 20 C.F.R. § 416.1540(c)(7).
143. 20 C.F.R. § 404.1745; 20 C.F.R. § 416.1545.
144. Swank, *supra* note 1, at 1 n.1.
145. *Id.*,at 1.
146. *Id* at 6.

the Social Security Administration rules by reporting the misconduct to the bar.[147] The Social Security's approach to prohibiting Administrative Law Judges from complying with their state bar duties is a wonderful incentive for the individual to overlook representative misconduct.

Having rules and regulations and actually *following* them are two very different things. With regard to actually enforcing its ethical rules, the Social Security Administration is a complete, abject failure.[148] This fact is demonstrated by the agency's dismal statistics regarding its dealings with representative misconduct under its own authority to suspend or disqualify representatives who appear before it. While the Social Security Administration has the specific authority from its own regulations to investigate and punish representative misconduct, it is extremely unlikely to do so. Approximately 31,000 attorneys and non-attorney representatives are currently participating in Social Security Administration disability hearings.[149] Since 1980, when records were first maintained, a total of 178 representatives have been suspended or disqualified from representing claimants before the Social Security Administration.[150] Of the 178 suspended or disqualified representatives, 101 have been non-attorney representatives.[151] The average number of non-attorneys suspended or disqualified each year by the Social Security Administration is 3.2, or .064% of the estimated total number of non-attorney representatives.

It is something that just does not happen very often. State bars, by comparison, are two and a half times more likely to disbar an attorney—something they rarely do—than the Social Security Administration is to disqualify or suspend a non-attorney representative.[152] As referenced *supra*, however, in those extremely rare instances when the agency actually does take action, non-attorney representatives are seven times more likely to be suspended or disqualified than attorneys.[153] This statistic demonstrates that non-attorney representative competency and ethics in Social Security disability hearings have been a problem in the past, and will likely continue to be a problem in the future.

What is the incentive, however, for a representative to act unethically? Like contingency fees, for a representative to be paid in a Social Security disability case, the claimant must prevail and be owed past-due benefits.[154]

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147. *Id*.
148. *See generally id*.
149. *Id.* at 9 n.66.
150. SOC. SEC. ADMIN., Office of Disability Adjudication and Review, List of Sanctioned Representatives (Apr. 11, 2011), *available at* http://odar.ba.ssa.gov/odarweb/oac/scsrep.cfm.
151. *Id*.
152. Swank, *supra* note 1, at 10.
153. List of Sanctioned Representatives, *supra* note 150.
154. 20 C.F.R. § 1720(b) (2011).

If the claimant does not "win," the representative does not get paid. The fee amount is set at either twenty-five percent of the back benefits or $6,000, whichever is less.[155] Six thousand dollars versus nothing is an incentive, unfortunately for some representatives, to insure that the client prevails. The fact that some Social Security representatives are unethical therefore is no surprise.[156] Money, of course, is the motivation for firms to hire non-attorney representatives over attorneys. The $6,000 or 25% fee mandated by the Social Security Administration is exactly the same for both attorneys and non-attorneys. If the case is going to be paid anyway,[157] the firm has a greater profit using non-attorney representatives, as the firm would pay them less, on average, than attorneys.[158]

V. WHY DOES IT MATTER?

The harm posed by a non-attorney representative's incompetence or unethical behavior in a Social Security disability hearing depends on who is affected and whether the representative's actions result in an improperly denied or granted claim for benefits. For example, if the non-attorney representative is incompetent, he or she may harm the claimant if benefits are not granted due to the failure of the non-attorney representative. Approximately 8,403,000 individuals receive Title II benefits[159] and 7,912,266 receive Title XVI benefits.[160] For the claimant, the amount of benefits—the average Title II award is $1,070 per month[161] and the average Title XVI award is $493.70 per month[162]—may be their only source of

155. 74 Fed. Reg. 6080 (Feb. 4, 2009).

156. Swank, *supra* note 1, at 8 n.57 (citing Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J. (Mar. 22, 2011), http://online.wsj.com/article/SB10001424052748703752404576178570674769318.html). *See also* Sam Dolnick, *Suit Alleges Bias in Disability Denials by Queens Judges*, N.Y. TIMES (Apr. 12, 2011), http://www.nytimes.com/2011/04/13/nyregion/13disability.html (stating that some attorneys advise their clients to move to different locations so as to select offices with higher payment rates of disability benefits).

157. Swank, *supra* note 1, at 12.

158. An average attorney's salary is $88,891 per year. Salary.com, *at* http://www1.salary.com/Attorney-I-salary.html (last visited Nov. 1, 2011). The average paralegal makes only make $47,516. *Id.* at http://swz.salary.com/SalaryWizard/Paralegal-I-Salary-Details.aspx.

159. SOC. SEC. ADMIN, Actuarial Publications, Social Security Program Fact Sheet (June 30, 2011), http://mwww.ba.ssa.gov/OACT/FACTS.

160. The Henry J. Kaiser Family Foundation, Total Supplemental Security Income (SSI) Beneficiaries, 2010, http://www.statehealthfacts.org/comparemaptable.jsp?cat=4&ind=253#notes-1 (last visited Nov. 13, 2011).

161. Social Security Program Fact Sheet, *supra* note 159; Swank, *supra* note 1, at 8 n.57 (citing Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J. (Mar. 22, 2011), http://online.wsj.com/article/SB10001424052748703752404576178570674769318.html).

162. SOC. SEC. ADMIN., Office of Retirement and Disability Policy, Annual Statistical Supplement 2009, Supplemental Security Income, www.ba.ssa.gov/policy/docs/statcomps/supplement/2009/

income. Additionally, approximately 162,000 spouses and 1,862,000 children of disabled individuals receive money due to the awarding of Title II benefits.[163] Money, of course, is not the only measure of harm. On average, some claimants have had to wait an average of sixteen months merely to get a disability hearing from the time they requested it.[164] If they then have to file an appeal or new application due to errors made by the incompetence of their representative, they will lose even more time before they could potentially receive benefits.[165]

Claimants, however, are not the only people harmed. If, due to representative incompetence, the claimant has to file a new application for benefits, the cost to the taxpayer for merely processing a new claim for disability benefits is almost $1,200, while the cost of each hearing before a Social Security Administrative Law Judge is almost $4,800.[166] This amount wasted due to representative incompetence, however, is miniscule compared to the cost to the taxpayer if the representative is unethical and, through falsifying testimony or evidence, gets a disability case improperly paid. Social Security Administrative Law Judges issue over 700,000 decisions per year[167] with an average total lifetime benefit amount of $300,000.[168] Because of the eighteen million Social Security disability recipients receiving a combined amount of over 162 billion dollars a year, even if one percent of cases were improperly paid due to non-attorney representatives' misconduct, the cost to the taxpayer would be approximately $1.6 billion dollars each year in improperly awarded benefits. In addition to direct monetary payments, receiving Social Security disability benefits is a gateway to other government programs—such as Medicare and Medicaid—multiplying the ultimate cost to taxpayers of

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7a.html (last accessed Feb. 28, 2011).

163. Social Security Program Fact Sheet, *supra* note 159. The average amount paid to eligible spouses is approximately $288 per month, and children receive $319 per month in addition to what the disabled individual receives. *Id.*

164. Netstat Report, SOC. SEC. ONLINE (Oct. 18, 2011), http://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html.

165. Swank, *supra* note 1, at 14 n.97. Beginning July 28, 2011, a claimant who has a claim pending in the Social Security Administration's administrative review process may not file a new claim of the same benefit type until the previous claim is adjudicated. There is no prohibition on filing a different type of claim (for instance, filing a Title XVI claim if there is already a Title II claim) nor any limit on the total number of claims that may be filed during a person's lifetime. 76 Fed. Reg. 45,309 (July 28, 2011).

166. *Id.* at 14 n.98 (citing Tim Moore, *How much does it cost to process a Social Security Claim?*, MY DISABILITY BLOG (June 8, 2008), http://disabilityblogger.blogspot.com/2008/06/how-much-does-it-cost-to-process-social.html).

167. *Id.* at 11 n.78.

168. *Id.* at 8 n.57 (citing Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J. (Mar. 22, 2011), http://online.wsj.com/article/SB10001424052748703752404576178570674769318.html). This amount is merely the average for Social Security disability benefits and not the total amount, which could include additional government benefits that can become available – such as Medicaid – with an award of Social Security disability benefits.

improperly paid benefits many times over.[169] Ultimately, the harm to the taxpayer leads directly to the harm posed to the entire concept of awarding federal disability benefits. Beyond the monetary cost to the taxpayer, if due to representative unethical behavior Social Security disability cases are improperly paid, the legitimacy and integrity of the entire system is undermined.[170] The taxpaying public will only support Social Security disability programs if they believe that those in need of aid are the ones actually receiving the aid.[171]

Ironically, the people most harmed by incompetent or unethical representatives are the very same people the Social Security Administration is supposed to be helping—the disabled. If a non-attorney representative is incompetent, and his or her client has to re-file a new application for benefits or requires an additional hearing, not only does his client have to wait longer to get benefits but so does every other applicant. In 2010, approximately 3.3 million people applied for disability benefits.[172] That number was 300,000 more than in 2009, and 700,000 more than 2008.[173] This was a fifty percent increase over the number of applications in 2006.[174] Because of this growth in applications for Social Security disability benefits, 705,370 disability hearings were pending in fiscal year 2010.[175] This backlog of disability cases has been growing over the past five years, and it is only going to get worse.[176] Congress has consistently investigated, criticized, and publicly chastised the Social Security Administration for this backlog.[177] For the truly disabled, the backlog prolongs the amount of time they must wait for the Social Security Administration to adjudicate their claim. Every additional case filed due to a representative's incompetence prolongs everyone else's wait to have their disability claim processed or case heard.

Furthermore, the disabled can be harmed by a non-attorney representative who, because of unethical conduct, succeeds in winning disability benefits for an individual who does not deserve them.

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169. *Id.* at 8 n.57 (citing *Disability Payments: The elephant in the waiting-room*, THE ECONOMIST (Mar. 10, 2011), http://www.economist.com/node/18332928?story_id=18332928; Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J. (Mar. 22, 2011), http://online.wsj.com/article/SB10001424052748703752404576178570674769318.html.

170. *Id.* at 16.

171. *Id.* (citing Swank, *supra* n. 127, at 638).

172. *Id.* at 8 n.54 (citing Stephen Ohlemacher, *Social Security disability system bogged down with requests*, THE ONEIDA DAILY DISPATCH (May 9, 2010), http:/www.oneidadispatch.com/articles/2010/05/09/news/doc4be763e82502259319203.prt.).

173. *Id.*

174. *Id.* at 8 n.56.

175. *Id.* at 8 n.57.

176. *Id.* at 8 n.56.

177. *Id.* at 8 n.60.

Fraudulently-paid disability claims stigmatize the people who properly receive disability benefits, as it calls into question the validity or degree of their own disability.[178] "The fact that some people cheat the welfare system can lead to suspicion that anyone or even everyone receiving benefits is likewise cheating, which is clearly not true."[179] Also harmed by improperly awarded disability benefits are those individuals whose representatives did not cheat. "It is fundamentally unfair that individuals who intentionally cheat can get benefits, while those who follow the rules may not."[180] The consequences of benefits being improperly paid are even more dire due to the financial insolvency of the Social Security disability programs. In 2005, the Title II program began spending more money than it brought in through tax receipts.[181] Within the next four years, it is projected to spend $22 billion more than it receives.[182] The Title II trust fund that had been accruing for years is projected to expire in 2018, twenty-two years prior to the Social Security retiree trust fund.[183] The disabled who rely upon this fund are the ones most harmed by representatives who falsify evidence or testimony and improperly deplete what little money is left.

VI. APPLYING THE LESSONS FROM THE UNAUTHORIZED PRACTICE OF LAW DOCTRINE TO SOCIAL SECURITY NON-ATTORNEY REPRESENTATIVES

With so much at stake for the disabled and the taxpayer, the remedies to the problems with non-attorney representatives in the Social Security disability process are very simple in that they already exist. The twin pillars of the unauthorized practice of law doctrine designed to protect the public—measures to ensure competency and a system to ensure ethical behavior—are already provided for in the Social Security Act and the Code of Federal Regulations. With regard to competency of non-attorney representatives, the Code of Federal Regulations and the Social Security Administration's Hearing, Appeals, and Litigation Manual (HALLEX) provisions requiring non-attorneys to be "helpful" must be re-written to use verbatim the language of the Social Security Act requiring that non-attorney

178. Swank, *supra* note 127, at 638; Swank, *supra* note 1, at 8 n.57 (citing Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J. (Mar. 22, 2011), http://online.wsj.com/article/SB10001424052748703752404576178570674769318.html.

179. Swank, *supra* note 127, at 639.

180. *Id.*

181. Swank, *supra* note 1, at 8 n.57 (citing Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J. (Mar. 22, 2011), http://online.wsj.com/article/SB1000142 4052748703752404576178570674769318.html).

182. *Id*.

183. Swank, *supra* note 1, at 8 n.57.

representatives must be "competent." Congress could have written the Social Security Act to require non-attorney representatives to be merely "helpful," but it did not do so. Instead, Congress required in the Social Security Act that non-attorney representatives possess "necessary qualifications to enable them to render such claimants valuable service" and be "otherwise competent to advise and assist such claimants in the presentation of their cases."[184] Now is the time for the Social Security Administration to follow the requirements set by Congress and rewrite 20 C.F.R. § 404.1705(b) and 20 C.F.R. § 416.1505(b) and HALLEX to use the same language as the Social Security Act.

Besides merely making language changes in its regulations and manuals, the Social Security Administration should take an actual step to ensure non-attorney representative competency. It should require *all* non-attorney representatives to meet the initial requirements of the 2004 Social Security Protection Act (having a bachelor's degree or equivalent, passing a written examination, securing professional liability insurance or the equivalent, and undergoing a criminal background check) instead of merely those non-attorney representatives who wish to be paid by fee agreements versus fee petitions. All non-attorney representatives should have to qualify by fulfilling these requirements *prior to doing the job of representing claimants in the first place and not merely as a means to get paid faster*. Having a certification process helps consumers know that their representatives meet certain minimum qualifications.[185] As the Administrative Procedure Act empowers the Commissioner of the Social Security Administration to set the requirements of non-attorney representatives and the provisions of the Social Security Protection Act are already in existence, there is no additional legislation or authorization required to effectuate this change. Other federal agencies already require their non-attorney representatives to meet competency requirements. For example, the Patent and Trademark Office,[186] the Interstate Commerce Commission,[187] and the Department of Labor[188] require their non-attorney representatives to qualify to practice. None of these agencies, however, are doling out billions of taxpayer dollars. Yet they require demonstrated levels of competency. The Social Security Administration is long overdue in taking the same step as these agencies so as to protect both the claimants who come before it and the tax-paying public in general.

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184. 42 U.S.C. § 406 (a)(1) (2006).
185. Clayton, *supra* note 10, at 138.
186. 37 C.F.R. §§ 1, 10, 11 (2011).
187. Clayton, *supra* note 10, at 138 (citation omitted).
188. 20 C.F.R. § 802.202(d)(2) (2011).

Likewise, if the Social Security Administration adjudication scheme is to have any validity at all, it must have an enforced code of ethics applicable to both attorneys and non-attorneys with penalties for those who fail to follow the ethical standards.[189] As described *supra*, the Social Security Administration's current performance in policing the ethics of the representatives who appear before it is truly farcical. Enforcement is so rare that it not only condones unethical behavior but actually encourages it.[190] No need exists for additional or different regulations; 20 C.F.R. 404.1740(c)(3)'s prohibition of the "making or participating in the making of false or misleading statements, assertions, or representations regarding a material fact or law" is sufficient. Rather, the only need is to actually follow the regulation. The statistics show that the management of the Social Security Administration has demonstrated a continual refusal to take representative behavior seriously. As management has abdicated its duty, the authority to discipline representatives must be given to the Social Security Administrative Law Judges, who are currently powerless when it comes to representative misconduct.

Other agencies' Administrative Law Judges are routinely allowed to sanction representative misconduct. For example, Administrative Law Judges with the International Trade Commission are authorized to impose monetary penalties and non-monetary sanctions for representative misconduct.[191] Federal Trade Commission and Department of Labor Administrative Law Judges can discharge representatives from cases for misconduct.[192] Federal Trade Commission, Department of Labor, and International Trade Commission Administrative Law Judges are selected and appointed from the same pool as Social Security Administrative Law Judges.[193] Yet for some reason, while these agencies allow their Administrative Law Judges to have the traditional authority, like judges everywhere, to sanction representatives who appear before them, the Social Security Administrative Law Judges are only allowed to report misconduct to agency management. Why some agencies trust its Administrative Law Judges to act as judges while another agency does not, even though they have the same qualifications and appointment, is a mystery. Even Merit Systems Protection Board and Department of Justice Immigration Administrative Judges, who are not Administrative Law Judges, have the ability to exclude representatives from cases for misconduct.[194]

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189. Clayton, *supra* note 10, at 139 (citation omitted).
190. *See generally* Swank, *supra* note 1, at 1.
191. 19 C.F.R. § 210.4(d) (2011).
192. *See, e.g.*, 16 C.F.R. § 3.42(d) (2011); 29 C.F.R. § 18.36(b) (2011).
193. 5 U.S.C. § 3105 (2006).
194. *See, e.g.*, 5 U.S.C. § 1201.31(d) (2006); 8 C.F.R. § 1292.3 (2011).

In addition to allowing its Administrative Law Judges to actually enforce ethical standards, the Social Security Administration should borrow an idea already used by some states of requiring non-attorney representatives to post security bonds with the agency. These bonds provide for potential causes of action by "any fraud, misstatement, misrepresentation, unlawful act or omission," or failure on the part of the non-attorney representative to provide contracted services.[195] Just as requiring non-attorney representatives to maintain professional liability insurance under the Social Security Protection Act, security bonds would give non-attorney representatives a pecuniary motive to ensure they conform to required competency and ethical requirements.

Fundamentally, "[o]nly those persons properly qualified under the law, technically and ethically, should be permitted to serve in a representative capacity in contested cases before administrative agencies" such as the Social Security Administration.[196] Through requiring non-attorney representatives to qualify to serve and authorizing Administrative Law Judges to sanction representative misconduct, not only would claimants before the agency benefit, but the entire Social Security Administration adjudicative system would be more credible in its mission of properly distributing billions of precious tax-dollars to those individuals who actually qualify for benefits.[197]

The Patent and Trademark Office, as shown by *Sperry v. Florida*, had already embraced the logic of the unauthorized practice of law doctrine over fifty years ago by having a program to ensure the competency and ethical behavior of all their representatives, whether attorney or non-attorney. While there will always be critics who question whether education or examination prerequisites for non-attorneys would sufficiently reduce the contemplated risks of incompetence and unethical behavior,[198] the Patent and Trademark Office enacted the best possible compromise. It allows for non-attorney representation while embracing the logic of the unauthorized practice of law doctrine by instituting competency requirements and ethical standards designed to protect the public.[199] The irony is, that while the Patent and Trademark Office requires demonstrated competency and has a system of ethics for its non-attorney representatives, the Social Security Administration—which doles out billions of dollars in taxpayer money, unlike the Patent and Trademark Office—has no

195. Kuck & Gorinshteyn, *supra* note 2, at 350 (citation omitted) (discussing California's requirement of $50,000 security bonds from non-attorney "immigration consultants" operating in the state).
196. Clayton, *supra* note 10, at 139 (citation omitted).
197. *Id.* at 140; Swank, *supra* note 127, at 638.
198. Johnstone, *supra* note 7, at 219.
199. Clayton, *supra* note 10, at 122-23 (citations omitted).

competency requirements and fails to enforce any ethical standards. If a non-attorney representative is incompetent or unethical before the Patent and Trademark Office, Merit Systems Protection Board, or most of the other federal agencies, the taxpayer is not hurt a fraction as much by the amount of money wasted by such conduct before the Social Security Administration. Given the billions of hard-earned taxpayer dollars the Social Security Administration pays each year in disability payments, it is long overdue for them to take the same steps praised by the United States Supreme Court almost fifty years ago.

But what about Bob? Ultimately, the issue is not about Bob, but rather what is best for the disabled applying for Social Security disability benefits and the taxpayers who provide those benefits. Only by registering, testing, bonding, and policing Bob and all of the other non-attorney representatives can we be assured that the disabled, the taxpayer, and the integrity of the system is protected. While on an individual basis Bob may be better than any attorney, the requirements for testing and having a working ethics program are not onerous upon him given the risk to the disabled claimant or the taxpaying public. Bob today should merely have to meet the same standards as Sperry did half a century ago.