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THE COMING OF LEGAL SPECIALIZATION

O. Randolph Rollins*

I. INTRODUCTION

A great debate rages across the ranks of the legal profession about the need to regulate claims by lawyers that they are specialists in particular fields of practice.¹ Members of our profession express outrage when another lawyer lists himself under the anti-trust or tax headings in the Yellow Pages complaining that that lawyer calls "them" when he needs anti-trust or tax advice. Lawyers profess astonishment when they see an advertisement by another attorney cataloguing a number of fields in which that attorney practices. They ask how could any person—much less a lawyer who advertises—be a "specialist" in so many fields. Having registered such objections, practitioners then demand that our disciplinary rules "do something" about lawyers who so deceive the public and bring such disrepute to our profession. In short, we ask for regulation of legal specialization. We say it is needed in order to serve the public interest.

State bar committees across the country have responded to these grass roots pleas.² Through much study and time, they have devel-

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1. See generally, Clare, *Incompetency and the Responsibility of Courts and Law Schools*, 50 ST. JOHN'S L. REV. 463 (1976); Esau, *Recent Developments in Specialization Regulation of the Legal Profession*, 11 MANITOBA L.J. 133 (1981); Mindes, *Proliferation, Specialization and Certification: The Splitting of the Bar*, 11 U. TOL. L. REV. 273 (1980); Zinober, *Legal Specialization: Its Development in Florida*, 57 FLA. B.J. 680 (1983).

2. Fourteen states have adopted some plan for legal specialization. These states include the following: Arizona, Arkansas, California, Connecticut, Florida, Georgia, Iowa, Louisiana, New Jersey, New Mexico, North Carolina, South Carolina, Texas, and Utah. Six states and the District of Columbia have plans pending before their state supreme courts. These states

oped and presented plans that would regulate legal specialization. These proposals range from simple designation plans, under which lawyers may self-designate their specialties, provided that they certify they know something about the area, to rigid certification programs, which require peer review and formal testing before the bar confers the exalted specialist label.

Yet even the mildest form of proposed regulation meets heartfelt (perhaps pocketbook-felt) objections. Legal counselors vehemently assert that the regulation of specialization of any type is but the first step down the slippery slope toward mandatory limits on the scope of a lawyer's practice, a violation of the time-honored principle that any lawyer who has passed the bar examination is competent to handle any legal problem. They contend that the public "knows" how to find lawyers, particularly in rural areas, without the benefit of formalized lists of certified specialists, so why go to the expense and hassle to create a complex and controversial regulatory apparatus.

Opponents of regulation argue, simultaneously, that the standards required for specialists are "too high" and "too low," so that those lawyers whom we all would recognize as specialists will not make the "approved list," and those who are "clearly" not qualified will. Attorneys say that specialization plans benefit particular segments of the bar, particularly large firms, and exclude others from many opportunities and economic benefits of the legal profession. Indeed, they claim the implementation of state-sponsored specialization will create a public impression that those who cannot or do not choose to be certified are the "second class citizens" of the legal profession. In short, neither the public nor the profession needs a plan to control legal specialization. Such a plan would be "re-regulation" in an era of deregulation, and may even work against the public interest.

Behind all this rhetoric, however, significant changes are occurring which are propelling the legal profession toward specialization whether lawyers like it or not. Advertising by lawyers, permitted since 1977,³ is moving into a second phase of sophistication and awareness of marketplace needs, and specialization claims are a growing part of that advertising. De facto specialization is more than a flashy trend; it is an established feature of modern law

include the following: Kansas, Missouri, Nevada, Rhode Island, Tennessee, and Virginia.

3. See *infra* notes 12-14 and accompanying text.

practice management. Charges of lawyer incompetence, including some from high levels of the judiciary, and the resulting public concern are forcing lawyers everywhere to demonstrate that they are competent to handle particular problems, and making public recognition as a specialist the badge of competency. Most importantly, as a result of price and fee competition, the explosion in the number of new lawyers, the increasing cost consciousness of clients, individual and corporate alike, and the adoption of marketing principles by lawyers, competition among lawyers has intensified. Specialization has suddenly been discovered as the "competitive edge" for success.

With forces as strong as these at work, "specialization in fact" is here to stay. Whether lawyers can or will specialize is not the question. Rather, the profession must address how specialization will be recognized and regulated, and how the public may be protected from self-proclaimed specialists.

This article explores these issues and takes a close look at the proposed plan for the certification of specialists in Virginia.⁴ This plan, like those being considered and adopted by other states, seeks to integrate the competing values which are affected by the advent of "specialization in fact" and serve both the public's and the profession's interests.

II. EARLY ADVERTISING AND SPECIALIZATION BY LAWYERS

Legal specialization and advertising are not recent developments. Lawyers advertised before the twentieth century, designating themselves as specialists in certain areas of the law. Abraham Lincoln advertised as a trial lawyer in the August 10, 1838 *San-gamo Journal*:

STUART & LINCOLN, Attorneys and Counsellors at Law, will practice, conjointly, in the Courts of this Judicial Circuit—Office No. 4 Hoffman's Row, upstairs. Springfield.⁵

4. The Plan for the Certification of Legal Specialists in the Commonwealth of Virginia (the Plan) was adopted by the Virginia State Bar Council by a vote of 26-25. *See Specialization: The Proposed Plan*, 32 VA. B. NEWS 9 (Apr. 1984) [hereinafter cited as *the Plan*]. The Plan is now pending before the Virginia Supreme Court and the Virginia State Bar has held public hearings around the state on the Plan.

5. *See* L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING & SOLICITATION 1 (rev. ed. 1981).

David Hoffman, a leading spokesman on legal ethics in the nineteenth century, advertised in newspapers with endorsements from the U.S. Secretary of State, the President of the Bank of the United States, and Chief Justice John Marshall.⁶

It was not until 1908 that the American Bar Association recommended that states prohibit lawyer advertising and solicitation.⁷ Although the ABA permitted professional calling cards, it felt that a lawyer should acquire legal business through reputation, and not through public advertising or personal solicitation.⁸ The organized bar also made it a punishable ethical violation to offer services at less than local minimum fee schedules allowed,⁹ the admitted purpose being to discourage the performance of legal services for inadequate compensation.

III. CHANGES IN THE LEGAL ENVIRONMENT OF LAWYERS

The legal profession has a reputation for resistance to change, particularly when it affects lawyers themselves. It is, therefore, not surprising that initial environmental changes which impelled us toward specialization were not initiated by practitioners themselves. Rather, they were forced upon the profession by the Supreme Court of the United States.

The Supreme Court's first incursion into the rules governing lawyers occurred in 1975 in *Goldfarb v. Virginia State Bar*.¹⁰ In *Goldfarb*, a government lawyer seeking to purchase a house in Northern Virginia brought an antitrust challenge against a Virginia Code of Ethics rule providing that a lawyer could be disciplined for "habitually" violating a local bar association's minimum fee schedule. Specifically, he challenged Fairfax County's minimum fee for title searches. Holding that lawyers were not exempt from the Sherman Act, the Supreme Court struck down minimum fee

6. See Hazard, Pearce & Stempel, *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1085 n.2 (1983).

7. The ABA's 1908 Code of Professional Ethics stated as follows: "[S]olicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional." See ABA REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 582 (1908).

8. *Id.*

9. Former Ethical Canon 12 provided as follows: "[I]t is proper for a lawyer to consider a schedule of minimum fees adopted by a bar association." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 12 (1908).

10. 421 U.S. 773 (1975).

schedules as "a classic illustration of price fixing."¹¹

After prohibiting price fixing among lawyers in *Goldfarb*, the Court next moved against bar-erected restrictions on public access to legal services. Relying on *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*,¹² a case which held that commercial speech was entitled to first amendment protection, the Court ruled, in *Bates v. State Bar of Arizona*,¹³ that "a fortiori" first amendment protection extended to advertising by lawyers. After reviewing all the historical and other justifications for the ban on lawyer advertising, the Court held that the first amendment permitted lawyers to advertise fees for routine legal services. According to the Court, "Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. . . . In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking."¹⁴

The *Bates* Court was careful to point out that advertising which is false or misleading in any way is not entitled to first amendment protection, commenting that "[i]ndeed the public and private benefits from commercial speech derive from confidence in its accuracy and reliability."¹⁵ Although the Court rejected the argument that attorney advertising was inherently misleading, it reserved decision on whether states could regulate advertising relating to the quality of legal services.¹⁶ An advertisement of a speciality is a quality claim.¹⁷

The next year, the Court applied its new views concerning the

11. *Id.* at 783.

12. 425 U.S. 748 (1976). The Court's rationale in *Virginia Pharmacy* was as follows:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

13. 433 U.S. 350, 368 (1977).

14. *Id.* at 364.

15. *Id.* at 383.

16. *Id.* at 383-84.

17. See *Zauderer v. Office of Disciplinary Counsel*, 53 U.S.L.W. 4587, 4591 n.9 (U.S. May 28, 1985).

first amendment in two other lawyer advertising cases, these involving the practice of solicitation, or in-person communications by attorneys to secure legal work. The Court's rulings in the companion cases of *Ohrlick v. Ohio State Bar Association*¹⁸ and *In Re Primus*¹⁹ can be summarized as follows: The first amendment protects in-person communication between a lawyer and another person concerning legal services so long as the communication is not misleading and, under the circumstances, there is not a substantial likelihood of undue pressure or other influence that would prevent the potential client from making an informed and dispassionate decision.²⁰

Further definition of the extent to which the states could regulate lawyer advertising came in *In re R.M.J.*,²¹ a 1982 decision involving the advertising of fields of practice. In striking down Missouri's ethical restrictions against a lawyer's advertisements using terms other than those included in an approved list to describe his fields of practice,²² the Supreme Court set forth general principles applicable to advertising for professional services:

Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly

18. 436 U.S. 447 (1978).

19. 436 U.S. 412 (1978).

20. *Ohrlick*, 436 U.S. at 465; *Primus*, 436 U.S. at 435. See also VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A), which provides:

Recommendation or Solicitation or Professional Employment.

(A) A lawyer shall not, by in-person communication, solicit employment as a private practitioner for himself, his partner, or associate or any other lawyer affiliated with him or his firm from a non-lawyer who has not sought his advice regarding employment of a lawyer if:

(1) Such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or

(2) Such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.

In-person communication means face-to-face communication and telephonic communication.

21. 455 U.S. 191 (1982).

22. *Id.* at 205. The Missouri State Bar permitted advertising of expertise in areas such as property and tort law, but not in personal injury and real estate. *Id.*

strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.²³

Although the Supreme Court has not yet ruled directly on the advertising of legal specialties, *Bates* and subsequent cases suggest that the states may not prohibit specialty advertising if such advertising is truthful.²⁴ The Court also recognizes, however, that the states have a substantial interest in narrowly regulating the use of lawyer specialty advertising to avoid public confusion over the expertise of attorneys holding themselves out as specialists.²⁵ Indeed, the Court believes that "it is the Bar's role to assure that the populace is sufficiently informed as to enable it to place advertising into proper perspective."²⁶

IV. CHANGES IN THE COMPETITIVE ENVIRONMENT OF LAWYERS

Since the beginning of the "deregulation" of the legal profession with the *Goldfarb* decision in 1975, the practice of law has become increasingly competitive. The number of lawyers almost doubled in the 1970's and it is estimated that there will be over a million lawyers in the United States by the middle of the next decade.²⁷ Lawyer growth appears to outstrip the growth in legal business. There are signs that more legal work is being performed by non-legal professionals and businesses, such as accountants, bankers and tax preparation services. Simplification of financial transactions, no-fault insurance, arbitration and similar changes are reducing the need for related lawyer services.²⁸ Legal clinics, originally organ-

23. *Id.* at 203.

24. Virginia has avoided the possibility of infringing on a lawyer's first amendment right to advertise by deleting disciplinary rule 2-105(A)(3), predecessor to 2-104(A)(2). 2-105(A)(4) reads as follows:

A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.

See, e.g., *In re Johnson*, 34 N.W.2d 282 (Minn. 1983) (striking down a Minnesota disciplinary rule prohibiting specialization advertising, finding that it had a chilling effect on a lawyer's first amendment right to advertise).

25. *Bates*, 425 U.S. at 383-84.

26. *Id.* at 375.

27. See Greene, *Lawyers versus the Marketplace*, FORBES 73, 74 (Jan. 16, 1984).

28. Some of these measures were mentioned in a recent newspaper article which discussed the recommendations of an advisory group to President Reagan on how to cut legal costs. See *Proposals to Reduce Legal Costs Are Due*, Richmond Times Dispatch, Jan. 12, 1985, at

ized to handle common legal problems on an inexpensive, mass basis, are absorbing work which would otherwise flow to private practitioners and, in some cases, are expanding beyond routine work.

Lawyer competition is also becoming more intense as lawyers take advantage of relaxed rules on advertising and solicitation. Some 5,000 law firms recently responded to an ABA survey that they had tried advertising, ranging from bold-face type for the firm name in telephone listings to elaborate television spots.²⁹ Many major law firms now publish brochures and newsletters to provide persuasive information about themselves to potential clients. In addition to the time honored golf game and luncheon date, instances of law firm partners soliciting business through cold calls on corporations are also occurring.

Consumers of legal services are beginning to take advantage of this vigorous competition, especially with respect to fees. Individuals are shopping around to find the lowest fee before engaging a lawyer. Even in sophisticated fields such as municipal finance, prospective users of legal services are requesting proposals or "bids" from lawyers before making their selection. So too, cost-conscious businesses are demanding legal counsel to estimate and justify costs at the risk of losing the client.³⁰

These changes in the competitive environment have forced the legal profession to become more sensitive to client and public needs and demands, a generally healthy consequence. Lawyers in large numbers are studying and, in many cases, implementing market research projects and engaging in marketing activities (under the guise of client education, practice development and similar euphemisms). In essence, lawyers are applying basic business principles to the legal business, a concept which was considered below the dignity of the profession as little as five years ago.³¹ The dialogue between client and lawyer concerning how the delivery of legal services can be made more efficient occurs more frequently today than ever before.

A central question in any lawyer's response to the demands of his new environment must be what makes one lawyer stand out from the lawyers with whom he competes. Not unexpectedly, the

A-11, col. 1.

29. See *Names Behind the News*, Nat'l L.J., Apr. 16, 1984, at 1.

30. See *The Blue Chip Lawyers Discover Marketing*, Bus. Wk. 89, 94 (Apr. 25, 1983).

31. *Id.*

answer is often specialization. This characteristic bears two advantages: (1) it distinguishes one lawyer from another on the basis of professional expertise, and (2) it justifies legal fees which are higher, at least on a per-hour basis, than those of the non-specialist. Specialization thus becomes a significant competitive edge, providing powerful economic, as well as professional, impetus toward more de facto specialization in the legal profession and more advertising (public and personal) which stresses specialization.

V. THE PUBLIC'S NEED FOR LEGAL SPECIALISTS

The growing emphasis by lawyers on specialization does not in itself establish that the public wants or needs more specialized legal services. Recent surveys and studies have confirmed, however, that there is a significant public demand for specialization. In 1978, the American Bar Association Special Committee to Survey Legal Needs issued a report which found that consumer access to lawyers was often impeded by a lack of information and by apprehension about approaching a lawyer.³² The ABA Report also noted that consumers wanted to hire lawyers who were experienced and competent in handling their particular types of problems. In other words, they wanted specialists to handle their legal needs. A 1982 study on lawyer advertising confirmed this, finding that consumers especially wanted information on a lawyer's qualifications, special services offered and fees charged.³³

Consumer interest in lawyer specialization meshes perfectly with the discovery by many lawyers that being known as specialists gives them a competitive edge. Exercising their new freedom to advertise, many lawyers have been quick to let the public know of their expertise and specialties. Lawyers are now listed as specialists in numerous legal directories such as *The American Lawyer Guide to Leading Law Firms*. These client-oriented directories are markedly different in scope from the traditional biographically focused directories like *Martindale-Hubbell*.³⁴ Many attorneys have begun

32. See ABA Special Comm. to Survey Legal Needs, Final Report 21 (1978).

33. Patterson & Swerdlow, *Should Lawyers Advertise? A Study of Consumer Attitudes*, 10 J. ACAD. MARKETING SCI. 322 (1982).

34. Recent publications which either expressly or impliedly list "specialists" include: AM-LAW PUBLISHING CORP., *THE AMERICAN LAWYER GUIDE TO LEADING LAW FIRMS 1983-84* (1983); ATTORNEY'S NATIONAL CLEARING HOUSE COMPANY, *THE UNITED STATES BAR DIRECTORY* (1979); ATTORNEY'S NATIONAL CLEARINGHOUSE COMPANY, *THE UNITED STATES BAR REGISTER, 1984* (1984); THE BAR REGISTER COMPANY, INC., *THE BAR REGISTER, 1984* (1984); S. NAIFEN & G. WHITE SMITH, *THE BEST LAWYERS IN AMERICA* (1983). *THE NATIONAL LAW JOUR-*

to advertise as specialists on radio and television, through newspapers and trade journals, and in telephone books.³⁵ Telephone directories with "Guides to Lawyers" sections, listing lawyers by area of local practice, are no doubt perceived by the public as lists of acknowledged specialities.³⁶ Some lawyer groups have gone a step further, developing their own certification plans for "specialists" in their particular fields of interest and publicly recognizing those who meet their standards.³⁷

The freedom to advertise has certainly opened the door to information about specialists. But the question is how reliable is that information. In the absence of a state regulatory plan, a lawyer's statement that he is a specialist is not backed by any "official seal"; it is merely a self-proclaimed declaration of expertise. There is no assurance of uniformity among lawyers who claim the same specialty, and no state-established standard exists against which deceptive claims of specialization may be judged.

In short, specialization advertising, if deceptive, impedes the public's comprehension of market conditions concerning legal services and their ability to select lawyers knowledgeably. Indeed, it may give an unfair competitive advantage to those lawyers who advertise. Given the public's lack of knowledge and sophistication about legal services, it is doubtful that the free market alone can correct abuses and prevent damages which are bound to occur. Just as rules exist protecting free and open competition generally, so too some regulation is probably necessary to assure that the marketplace in which specialized legal services are sought and pro-

NAL, LEGAL TIMES OF WASHINGTON and *Consumers Union* also have published or are in the process of publishing lawyer directories. The latest Martindale-Hubbell questionnaire asks that lawyers supply information about fields of law to which they devote considerable time.

35. For example, there are 20 pages of lawyer advertisements in the yellow pages of the current Richmond telephone book. A number of advertisements there make specific claims of specialization.

36. The yellow pages of the Richmond telephone book for 1984 devotes eight pages to a Guide to Lawyers section, which is grouped by areas of practice. There is a disclaimer at the top of each page which states: "Lawyers listed are willing to accept employment in the areas shown. These listings do not imply that they have limited their practices or are certified as specialists in these fields." Notwithstanding this statement, many persons who use the Yellow Pages to search for a lawyer may believe that persons listed under "Wills, Estates and Trusts," for example, are specialists in that field. See *Zimmerman v. Office of Grievance Committees*, 79 A.D.2d 263, ___, 438 N.Y. S. 2d 400, 402 (1981) (holding that in spite of a similar disclaimer, the public may be left "the erroneous impression that some lawyers . . . are certified as specialists or that certification is available.")

37. One national group of lawyers, the National Board of Trial Advocacy, does offer a certification plan in both civil and criminal law.

vided is allowed to work properly.

VI. THE VALUE OF STATE-REGULATED SPECIALIZATION

It is clear that the Supreme Court has left room under the first amendment for state regulation of lawyer specialization. In fact, the Court has suggested that the Bar bears a special responsibility to assure "that advertising by attorneys flows both freely and cleanly."³⁸ In this writer's opinion, state regulation of legal specialization and how it is advertised can represent a significant step toward meeting this public responsibility.³⁹

A. *Establishing a Uniform Definition of "Specialist"*

The single most important contribution by a state-approved plan of specialization toward assuring that information about specialists is reliable and not deceptive or misleading, is the establishment of a uniform definition of a "specialist." Within the existing regulatory framework of the legal profession, the states, through their supreme courts and state bars, are the only effective institutions which can execute this function.

Through the agency of its integrated state bar, each state supreme court has an apparatus in place through which to develop a uniform, even-handed plan which can define "specialization." State bars are representative of the entire profession and of communities throughout the states. They have as their basic purpose the furtherance of the public interest.⁴⁰ The state bars are under the supervision of their supreme courts, which require that due process and public hearings be a part of the plan adoption process. No other interested group or agency is in a position to authorita-

38. *Bates v. State Bar*, 433 U.S. 384 (1977). See also *supra* note 23 and accompanying text.

39. The Federal Trade Commission (FTC) has proposed regulations for attorney advertising. The FTC in a 172-page report found that advertising and stiffer competition would lead to lower legal fees. See *Improving Consumer Access to Legal Services: The Case for Removing Restriction on Truthful Advertising*, FTC Staff Report, TRADE REG. REP. (CCH) No. 680, at 7 (Dec. 11, 1984). In a related development, the Justice Department recently dropped an investigation of the anti-competitive effects of the ABA's rules on reasonable fees. See *Wall St. J.*, Jan. 11, 1985, at 7, col. 2.

40. See, e.g., *Report of the Committee on Scope & Correlation of Bar Activities*, FORTY-THIRD ANNUAL REPORT OF THE VIRGINIA STATE BAR 74, 75 (1981) which reads: "Actions or statements by the Virginia State Bar shall be taken only when the activity . . . has as a substantial purpose and effect the promotion of the public interest as opposed to being solely in the interest of the Bar or some segment thereof."

tively state the requirements of a specialists.⁴¹

Virginia's proposed plan of specialization defines lawyer specialists as "lawyers who have demonstrated excellence, defined as a high level of knowledge, skill and proficiency, in a specific field of law."⁴² To give this phrase specific content, the plan then establishes minimum standards for the certification of any lawyer as a specialist. As with all specialization plans, Virginia's minimum standards involve a balancing of competing values. Obviously, the standards must be sufficiently rigorous to justify public confidence that certified specialists have in fact achieved a high level of excellence in their designated fields. Yet the plan cannot be expected to fulfill one of its principal purposes—to provide greater public access to specialized legal services—unless adequate numbers of attorneys can, and will, meet the standards and become certified.

The principal criteria for certification under the Virginia plan are as follows:

1. *Substantial practice in the specialty for five years.*⁴³ Requiring five years of experience recognizes the axiom that actual legal experience over an extended period of time is absolutely essential for a specialist. While any choice of number of years is somewhat arbitrary, the five-year benchmark is more rigorous than some plans, including the ABA's, yet not so burdensome so as to discourage applications from younger practitioners.

"Substantial involvement" in the specialty is the plan's primary measure of whether the specialist has had the number and types of experiences on a regular basis needed to achieve a high level of knowledge, skill and proficiency in the field.⁴⁴ The actual measure of substantial involvement may vary from specialty to specialty. In recognition of the differences among specialties, the substantial in-

41. A bar-sponsored plan will also encourage vertical uniformity among other "certifying" organizations and thereby avoid the confusion which will result if, for example, two associations of criminal lawyers "certify" specialists under differing standards. The bar, with its broader base and its public interest obligations, is better suited to deal with this issue than other organizations advancing narrower trade-oriented interests. Other organizations which "certify" specialty practices will by necessity conform to at least the stated minimum levels of competency.

42. See *The Plan*, *supra* note 4, § 1.1, at 9. The Plan places more emphasis on excellence in a specialist than does the ABA plan. For example, it would require a lawyer to spend more of his time in his specialty and to have practiced in the specialty area for a longer period of time than does the ABA.

43. See *The Plan*, *supra* note 4, § 7.2.

44. *Id.*

volvement requirement may be met by the number or types of matters handled, by time alone or by a combination of these.⁴⁵ If it is measured by time alone, the lawyer must spend at least one-third of his total practice in the specialty.⁴⁶ This percentage is higher than the ABA recommendation, but for flexibility the time criteria may be combined with other measures. For example, a lawyer who devotes only twenty percent of his time to the specialty may meet the "substantial involvement" test if he can otherwise show that the volume or complexity of his case experience, along with time, demonstrate substantial involvement.

2. *Participation in an average of fifteen hours of continuing legal education per year over a five-year period.*⁴⁷ Regular continuing legal education in the specialty provides assurance that the specialist stays abreast of current developments in his field. Furthermore, satisfying this requirement over a five-year period is strong evidence of the lawyer's commitment to the specialty. The plan's selection of the number of hours, the period over which the average is measured, and the courses or their equivalent which count toward satisfaction reflect judgments made based on course availability, cost, and content, again on a balancing of values basis.

3. *Confirmation by others.* The Virginia plan requires that any application for specialist certification be supported by affidavits from professionals who are familiar with the work of the applicant.⁴⁸ This requirement provides independent verification that the lawyer meets standards of involvement and excellence in the specialty, and is known in the community for such expertise.

4. *Written work product.*⁴⁹ A lawyer's stock in trade is his written product—the opinion, the brief, the memorandum, the contract. Therefore, the Virginia plan requires applicants to submit a written work product substantially prepared by themselves.⁵⁰ This provides tangible evidence of whether the applicant has the level of knowledge, skill and proficiency required of a specialist.

5. *Additional standards, including examinations.* Under the Virginia plan, additional or more stringent standards for particular

45. *Id.*

46. *Id.* § 7.2(c).

47. *Id.* § 7.3.

48. *Id.* § 7.4.

49. *Id.* § 7.5.

50. *Id.*

specialities may be adopted to define or quantify the minimum requirements.⁵¹ This allows the standards to be tailored to the nature of each specialty and to reflect changing needs over time.

Virginia's plan does not include a mandatory examination requirement as a part of the minimum standards for certification. However, it permits such a requirement to be added for specialties for which it is appropriate.⁵² While it is true that an examination can significantly aid the determination of an applicant's knowledge, skill and proficiency, competency testing is difficult and expensive to administer, and may not be an appropriate measure of expertise in every field. Mandatory testing may also deter large numbers of otherwise qualified lawyers, who thought the bar exam was their last test, from seeking certification, thereby defeating other public access goals of the plan. Doubts about the fairness of test questions and grading of individual tests can also undermine the larger objectives of public confidence in those who are certified.⁵³

B. *Other Uses of the Definition of Specialist*

Once a definitional standard for specialization is established, it is possible for lawyers, the public and enforcement agencies to determine, by comparison, whether a particular specialization claim is true, or false and misleading. First, a plan of specialization, with its minimum standards, will provide needed guidance to individual lawyers who tell clients and prospective clients that they "specialize." Since most lawyers will voluntarily abide by the definition of specialist, once they are told through the plan what the definition is, they will refrain from claiming to be specialists if they have not met the plan's requirements. Alternatively, they may seek certification so as to come within the safe harbor of the plan and advertise their specialist status without fear of violating the disciplinary rules.

Second, the public itself will be better able to identify and engage lawyers who are qualified for particular tasks. It should be easy for consumers to find out which members of the bar are certified under a state plan in appropriate fields, since it is fair to as-

51. *Id.* § 9.

52. *Id.*

53. See 1983 ABA STANDING COMMITTEE ON SPECIALIZATION, HANDBOOK ON SPECIALIZATION 32 (1983).

sume that lawyers who are certified will let that fact be known in telephone directories, listings and advertisements.⁵⁴ Even in choosing a non-certified lawyer, the public will have a checklist, in the form of the minimum specialization standards, to help in the decision process.

Third, enforcement agencies—the bars and the courts—will have a well considered standard of reference, in the form of specialization criteria, by which to judge whether a specialization advertisement is misleading. Thus, decisions to prosecute for deceptive advertising will be guided and supported by the certainty of an objective standard. It is true that an attorney could prove that he is a specialist in a particular case even though he does not meet the minimum requirements of the plan and therefore establish that his advertisement is not misleading. Nevertheless, a state standard for certification of legal specialists—developed and administered under the supervision of the bar and the courts—will in all probability be accorded great weight in establishing an essential element of a deceptive advertising charge. For instance, when a lawyer's advertisement states that he is a bankruptcy specialist, his experience and training can be matched up against the standards for bankruptcy certification. If he comes up short and does not independently demonstrate that he has the skills of or is recognized as a bankruptcy specialist, then he probably will be found to have made a false and misleading statement, in violation of the disciplinary rules. In this way, prosecution of an advertising case becomes much more fact oriented, obviating the need to prove in each case the legal standard of specialization.

C. *Regulating the Advertising of Specialization.*

A state-sponsored plan of specialization gives the states and the legal profession a renewed opportunity to prevent the public from suffering harm from false or deceptive advertising of specialties. While the United States Supreme Court has yet to define what constitutes a "misleading" statement within the context of professional advertising, the Court has furnished important guidance as

54. Increased public awareness of these standards will engender greater public confidence in and reliance on lawyers who make it known that they are Board Certified Specialists. As this happens, it can be expected that the yellow pages and other publications will replace their current guides and lists with Bar-approved specialty information. It also seems likely that a lawyer who is certified could so indicate in the current yellow page guides with initials like "B.C.S." (Board Certified Specialist) after his or her name.

to the appropriate standard with the comment in *Bates* that: "The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience. Thus, different degrees of regulation may be appropriate in different areas."⁵⁵

The Court's reference to the *Feil* case confirms that the normal practice employed by agencies such as the Federal Trade Commission—that what is "misleading" should be measured in the eye of the beholder—should be applied in lawyer advertising cases as well. In *Feil*, the United States Court of Appeals for the Ninth Circuit focused its attention on the meaning of the advertisement as it was likely to be construed by the intended audience: "[T]hese representations are not made to experts in the field, but to the laity who may not be capable of discerning their misleading character."⁵⁶ Perhaps the Supreme Court had reference to this when it stated in *Bates*, "If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."⁵⁷

Furthermore, the *Bates* Court's emphasis on "different degrees of regulation" seems especially pointed toward the public's likely reception of specialization claims. The danger inherent in unqualified claims of lawyer specialization is not merely the lack of any popular understanding of the term "specialist" as applied to the practice of law, but more specifically that the term "specialist" may create a false sense of reliability when applied to law. This perception arises from the fact that the most common experience with specialists is in the context of the medical profession. When describing medical specialists, the term implies special credentials, education and training, and in many cases testing and actual residency experience. Until specialists in law must meet similar, rigorous standards, it is manifestly false, fraudulent and a breach of the public trust to use words such as "specialist" and "expert" without substantiation.

Moreover, if a non-certified attorney is permitted to advertise that he or she is a specialist without disclosing a lack of certifica-

55. *Bates*, 433 U.S. at 383 n.37 (citations omitted).

56. 285 F.2d 879, 887 (9th Cir. 1960). The Court has placed great emphasis on the work of the FTC in determining whether an advertisement is false or misleading. See Zauderer v. Office of Disciplinary Counsel, 53 U.S.L.W. 4587, 4592-94 (U.S. May 28, 1985).

57. 433 U.S. at 375.

tion, the public will be misled. After viewing such advertising, the consumer seeking information will remain uninformed as to what he thought he was learning. What is more harmful, the consumer may actually be misinformed and may select an attorney who would not otherwise be employed.⁵⁸

The Supreme Court in *In Re R.M.J.*⁵⁹ noted the "special possibilities for deception"⁶⁰ presented by attorney advertising. However, the states were cautioned that restrictions on lawyer advertising should be no broader than reasonably necessary to prevent deception: "[T]he remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation."⁶¹

The Virginia plan, along with Virginia's "false and deceptive" disciplinary rules on advertising,⁶² implement all of these constitutional and public interest imperatives. Lawyers who are certified as specialists are permitted to advertise that they are "Board Certified Specialists" in their particular specialties, and such statement is deemed to be in compliance with the Code of Professional Responsibility.⁶³ On the other hand, lawyers who advertise that they are specialists and who have not been certified under the plan must meet two requirements to avoid challenge: (1) disclose lack of certification under the plan by stating either that he or she is not certified, or that the advertised specialty has not been designated under the plan; and (2) establish that such communication concerning the speciality is not false, fraudulent, misleading or deceptive.⁶⁴

VII. EFFECTS OF REGULATION OF LEGAL SPECIALIZATION

Specialization in fact has become a fixture in the competitive environment of lawyers. Whether the legal profession likes it or not,

58. See *Feil*, 285 F.2d at 887. See also *Mezrano v. Alabama State Bar*, 434 So.2d 732 (Ala. 1983) (upholding Alabama's disclaimer as constitutional).

59. 455 U.S. 191 (1982). See *supra* notes 21-22 and accompanying text.

60. *Id.* at 201 (quoting *Bates v. State Bar*, 433 U.S. 350, 384 (1977)).

61. *Id.* at 203. Further, the Court held that "the bar could require disclaimers or explanations to avoid false hopes." *Id.* at 200 n.11.

62. See VA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101, DR 2-103 (1983). DR 2-101 prohibits a lawyer from engaging in any public communication which is false, fraudulent, misleading or deceptive; DR 2-103 contains a similar standard for in-person communication.

63. *The Plan*, *supra* note 4, § 6.7. This method received further support in *Zauderer v. Office of Disciplinary Counsel*, 53 U.S.L.W. 4587, 4595 (U.S. May 28, 1985).

64. *Id.*

specialization is rapidly changing the practice of law. Its unguided growth, however, could well prove harmful to both the profession and the public it serves.

How the regulation by the states of legal specialization under plans such as proposed for Virginia will serve the public interest may be summarized as follows:

1. It will provide to members of the public greater access to the legal services which they need through reliable information about specialists.

2. It will diminish the danger of the public being misled or deceived by unregulated specialty advertising.

3. It will encourage lawyers to achieve higher standards of lawyer excellence as a condition to being certified and allowed to hold themselves out as specialists.

Without question, state plans of specialization will have profound effects on the legal profession. They will legitimize the concept that a specialist is somehow different from a general practitioner. They will challenge the tenet that all who pass the bar exam are equally equipped to handle all different types of legal problems. They will introduce an element of regulation to which lawyers have not in the past been accustomed.

Admittedly, a plan of specialization will create a new public distinction between lawyers who are certified as specialists and those who are not. Yet is the public not entitled to know which members of the bar have the interest to develop and have demonstrated the qualifications to be certified? Are the people not entitled to know that certification is granted by a governmental agency required to observe rules of due process and to confer specialist titles only in the public's interest?⁶⁵

In the final analysis, adoption by a state of a plan of specialization represents a public policy decision to protect and promote these important values.⁶⁶ So long as certification is not designed

65. The Board's petition for designation of a specialty, and ultimately the Court's decision on that petition, must meet high standards of public interest. *The Plan, supra* note 4, § 3.2. Factors to be taken into account include the public's need for reliable information about and access to lawyers in a specialty, the potential for devising objective standards of excellence for the specialty, and the promotion of orderly growth of specialties in the state.

66. Virginia's Plan is voluntary, permitting a lawyer to practice in a specialty area and to truthfully advertise that he or she is a specialist. *See The Plan, supra* note 4, § 6.4. Moreover, certified specialists are not limited to practice in their areas. *Id.* § 6.1. Even though a

for the benefit of any particular segment of the bar, but for the public's interest, and so long as it will allow any lawyer who dedicates himself to being expert in his field to become certified,⁶⁷ then a plan of specialization will fulfill both the first amendment principles and public interest purposes of *Bates* and *RMJ*.

The coming of specialization means change and readjustment for both the public and the legal profession. Let the profession begin to regain some of the professionalism and stature it has lost over the past decade by responding and changing with it. But let lawyers also remember that the public trust which they hold requires them to guide these changes in the direction which serves the public interest.

lawyer in a firm is a certified specialist, this standard is not attributable to the firm as a whole. *Id.* § 6.3. Also, in referral situations specialists are encouraged not to take additional work from a client. *Id.* § 6.6. These provisions seek to keep the status quo of current attorney-client relationships, while at the same time making better expert service available to the public.

67. There is only one minimum standard—that of substantial involvement in the specialty, *The Plan, supra* note 4, § 7.2—which some lawyers will not be able to meet. Some practitioners say that they are not able sufficiently to concentrate their practices so as to qualify as specialists under the Plan, and still meet the legal needs of their communities or make an adequate living. It is unfortunate that lawyers in these circumstances will not be able to seek certification but this fact does not reduce the great public need for a plan of specialization. Reduction of the minimum standard for substantial involvement so as to allow every lawyer to qualify would “devalue the coin” and make certification meaningless.

