Legal Specialization: A Proposal for More Accessible and Higher Quality Legal Services

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LEGAL SPECIALIZATION: A PROPOSAL FOR MORE ACCESSIBLE AND HIGHER QUALITY LEGAL SERVICES

Clarke B. Rice

I. INTRODUCTION

The growing need for concentration of law practice in specific areas of the law is a reality for both lawyers and the public. The assumption that every person licensed to practice law is qualified in all areas is no longer valid, if indeed it ever was. Few persons seriously believe all lawyers to be equally skilled, but until recently lawyers have refused to acknowledge that fact and to provide formal means of identifying specialized practitioners.

Lawyers admit the existence of de facto specialization, but have been slow to acknowledge and to attempt to resolve the difficult problems associated with formal specialization. Is specialization desirable? What is specialization? What are the goals of specialization? Which method or methods should be used to identify specialists? Should specialists be regulated? How much regulation is beneficial to the profession and the public? Lawyers need to address these issues and to guide the course of their profession regarding information about legal services. Failure to do so may result in public distrust of the present information process and possible government regulation.

The purpose of this comment is to identify the important issues of legal specialization, to attempt to define its goals, and to propose a workable plan for Montana lawyers. This comment will explore the status of specialization in three states where specialization plans have been adopted and examine in detail the recommendations of the American Bar Association's Standing Committee on Specialization. The author hopes that this comment will help Montana lawyers understand the benefits and the problems of a specialization plan.

4. Burger, supra note 2, at 159. See also FTC To HEAR AN APPEAL ON AMA AD RESTRAINTS, 65 A.B.A.J. 171, 172 (1979) (FTC investigation of alleged anticompetitive practices by the organized bar).
I. WHAT IS LEGAL SPECIALIZATION

The word "specialization" has a very general meaning. One commentator uses the word to identify the concentration on or limitation of law practice to a few areas of the law. Others define specialization as a system of certification of expertise. Specialization has many diverse meanings, and this confusion has caused a very slow development of the concept. Different definitions of specialization relate to different goals and purposes of a program. Any successful specialization program must be founded upon valid and clearly understood goals and priorities. Clear definitions of legal categories and clear standards of quality are needed to enable the general public to find lawyers skilled in handling particular problems. The efficient delivery of legal services to the public is the primary purpose for specialization.

B. Goals of Specialization

The American Bar Association's Standing Committee on Specialization considers three primary goals of specialization to be:

1. increasing access by the public to legal assistance (accessibility);
2. improving the quality of legal services (competence); and
3. decreasing the unit cost of legal services to the consumer (cost).

The first two goals are not new to the legal profession. They are an integral part of the Code of Professional Responsibility, adopted by the American Bar Association in 1969, and the Canons of Professional Ethics, adopted by the Montana Supreme Court in 1973. Lawyers' ethics impose duties of making legal counsel available to the public and representing a client competently. These goals are strongly emphasized by the ABA Standing Committee; specializa-

8. Id.
10. Brink, supra note 7, at 191.
11. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS, 1, 2, and 6 (1969).
tion is seen as a step toward more efficient access to the courts and more competent representation. Approved labels and definitions of law practice categories available in a structured specialization program will provide the public with information that will enable them to make more intelligent consumer choices.

Plans proposed by various states recognize accessibility and competency as primary goals, but emphasize the cost goal very little. Cost reduction for legal services is an economic factor. It is difficult to predict if the higher-paid specialist working less time will provide a lower cost work product than the lower-paid general practitioner working longer. It may be reasoned that the specialist, even though more highly paid, will produce a quality work product at a lower total cost than the general practitioner, and thus reduced cost to the public. The cost of specialized legal services is difficult to control and will depend greatly upon economic principles.

One critic of specialization labels the plans as self-serving and an eventual bar to practice in the designated categories without certification. He fears regulation of specialization may move from designation to certification, then to eventual licensing, thus barring all persons not licensed from practicing in the specialized area. This change in specialization may move from de jure certification to de facto licensing.

Specialty certification in law may be compared to specialty certification in the professions of medicine and accounting. Generalizations from the histories of medicine and accounting may not be applied directly to the legal profession, but knowledge of those experiences may help lawyers avoid unanticipated consequences which have occurred in both fields, namely, exclusivity in certain work areas limited to board-certified doctors and certified public accountants. The evolution of professional specialty certification is succinctly described by Marvin W. Mindes in the January 1975 issue of the American Bar Association Journal. Mr. Mindes states:

First, we must recognize that the formal certification of a group of specialists is a process of professionalization—the formal

15. Brink, supra note 7, at 191.
16. Id.
17. Id.
18. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id., at 43-44.
recognition of a group as having a special body of information and skill, with regard to which others are unable to judge . . . .

Certification constitutes a "license" that brings with it a "mandate" for self-governance and for making society's decisions regarding the field. The professionals take responsibility for continuing improvement, setting admission standards, and determining what tasks and methods meet professional standards. The inherent exclusivity of this arrangement and the self-reinforcing process by which a group develops and expands its special mission become increasingly entrenched. Within the group's claimed purview are, inevitably, criteria of entry, organization, and performance that are unrelated to client or social needs. None of these aspects is changed significantly when a new professional group is carved from an existing licensed profession, such as medicine or law.

The specialists are then in a position to garner a greater and greater portion of the profitable business in their field, and as this happens outsiders lose their economic stake in decisions affecting the specialty. Resistance weakens to the growing body of laws, regulations, institutional arrangements, and practices, which strengthen and broaden the monopoly.25

Banks and corporations insist that audits and financial statements be prepared by certified public accountants. Large C.P.A. firms expand and consume smaller offices nationally. By 1972, the big eight firms generated about 40 percent of the domestic C.P.A. revenue.26 Similar results have occurred in medicine. Hospitals, government agencies, universities, physicians, and malpractice insurance carriers rely upon board certification in deciding appointments, referrals, and insurance rates.27 The preferred status of certification has adversely affected the general practitioner in that he or she is unable to gain access to certain hospital facilities. He or she must surrender the patient to a staff specialist. Additionally, the noncertified doctor may pay disproportionately high insurance rates in practice areas where board certification is recognized.28

The primary goals of providing accessible and competent legal services to the public at a reasonable price must be paramount in any legal specialization plan. Any program achieving those three things will prove to be beneficial to the public and an improvement in the legal profession. One important and distinguishing fact that may save the legal profession from the pitfalls of professional specialization in medicine and accounting is the direct control of the

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25. Id. at 42.
26. Id. at 44.
27. Id. at 42-43.
28. Id. at 43.
practice of law by state supreme courts. Courts are conscious of the interests of both the public and lawyers, and it is improbable that they will permit the creation of a monopoly through a plan designed to provide increased access to the courts but which in effect results in access only through a specially licensed group of lawyers.

C. Safeguards for Successful Specialization

Safeguards in any specialization plan help ensure the success of the defined goals. The specific safeguards depend upon the type of plan in operation. Plans certifying the competence of the legal specialist require stringent safeguards such as written examinations, years of practice or substantial involvement in a specific area, and peer review. Designation plans that permit public advertisement of a specialty or limitation of practice are less strict and may require only continued legal education in the designated area, years of practice or substantial involvement, and verification by affidavit of such filed with the clerk of the state supreme court.

All specialization plans must give reasonable assurance that lawyers are providing what the client thinks he is getting. Labels and categories must be clear and the client must understand the standard of performance that he can expect. Clients receive different legal services from a board-certified specialist than from an attorney who is allowed to limit his practice to a designated area. Public notices by the certification or designation board in telephone directories and bar association law lists as well as personal explanation by the lawyer will improve greatly the client's understanding of the plan.

D. The Role of Specialization Plans in Lawyer Advertising

The United States Supreme Court decision in Bates v. State Bar of Arizona had a profound effect upon the advertising of information about legal services. In Bates, the Court held that lawyers have a First Amendment right to advertise the cost of routine legal services. This move toward advertising by lawyers clearly shows a growing desire of lawyers to give the public more information about

29. RULES AND REGULATIONS OF THE CALIFORNIA BOARD OF LEGAL SPECIALIZATION, §§ 3, 4, and 5.

30. STATE OF NEW MEXICO CODE OF PROFESSIONAL RESPONSIBILITY CANONS AND DISCIPLINARY RULES, Rule 2-105(b)(1)(2)(C)(1); INTEGRATION RULE OF THE FLORIDA BAR, art. XVII §§ 3 and 5.

31. Brink, supra note 7, at 194.

32. Id.


34. Id. at 384.
legal services. 35

Following Bates, the American Bar Association revised the disciplinary rules of the Code of Professional Responsibility to allow printed advertising. 36 In 1978, a further revision permitted television advertisement. 37 These changes give the public more information about the cost of routine legal services, but do not give sufficient information regarding a lawyer’s skill in specific areas of the law. 38 Without a workable plan that informs the public of a lawyer’s experience and interest in specific areas of the law, the public will not be provided with true access to the best possible legal services.

A recent survey of legal needs 39 indicates that the way a person chooses a lawyer is an inhibiting factor in lawyer use. 40 Eighty-three percent of the respondents to the survey agreed that the present means of identifying the right lawyer for the job inhibited other people from turning to lawyers to help solve their problems. 41 The 83 percent response may very well demonstrate the respondents’ uneasiness in the lawyer selection process.

Inevitably, advertising standards will broaden 42 and more information will be available to the public. Information about lawyers’ expertise and experience must be communicated to the consumer. Formal specialization plans provide that information. These plans incorporate safeguards to protect the public interest and ensure accurate dissemination of information about lawyers’ experience and interest in the law. The consumer is entitled to know what kind of legal services he can expect. A well-designed specialization plan with clear standards and identifiable categories will provide that information.

III. DEVELOPMENT AND ANALYSIS OF BASIC SPECIALIZATION PLANS

A. Proposals of the ABA’s Committees on Specialization

1. Background

The first official study of legal specialization by the American Bar Association began in 1952. 43 The special committee making that

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35. Id. at 354.
40. Id. at 228.
41. Id.
42. END TO SOLUTION BAN TENTATIVELY OK’d BY BOARD, REPORTS (The State Bar of California, Special Issue, August 1978) 1.
43. 77 REPORTS OF AMERICAN BAR ASSOCIATION 47 (1952).
study continued into 1954, but was dissolved when opposition to formal specialization mounted. In 1961 a new committee, the Special Committee on Recognition and Regulation of Specialization in Law Practice, was organized. Information was gathered and recommendations were made, but in 1963 the proposals were again shelved due to vigorous opposition. In 1967 the Special Committee on the Availability of Legal Services reported to the House of Delegates that a specialization plan would improve public access to legal services. The committee further recommended that the House of Delegates urge the Board of Governors to recognize the need for certification of specialists. The Board of Governors supported the recommendation of the committee and the delegates and created a special committee to gather information and to prepare a plan for voluntary specialization.

In 1969 the newly created Special Committee on Specialization recommended against the formulation of a national plan and deferred further planning until pilot programs in states had developed. Finally, in 1974 the ABA Committee on Specialization conducted detailed evaluation of existing state pilot programs. The committee urged states without plans to forego implementing pilot programs until evaluation of then-existing plans could be made.

2. Current ABA Proposals for Specialization

The 1978 recommendations of the Standing Committee on Specialization set forth the most comprehensive guidelines yet issued by any ABA specialization committee. The committee recommended for adoption by the House of Delegates the following principles relating to regulation of legal specialization:

1. that the authority governing the practice of law in each state regulate the information provided to the public about lawyers’ spe-

44. Fromson, supra note 3, at 75.
45. Report of the Special Committee on Recognition and Regulation of Specialization in Law Practice, 87 REPORTS OF AMERICAN BAR ASSOCIATION 800 (1962).
46. Report of the Special Committee on Recognition and Regulation of Specialization in Law Practice, 88 REPORTS OF AMERICAN BAR ASSOCIATION 672 (1963).
47. Report on Specialization of the Special Committee on Availability of Legal Services, 92 REPORTS OF AMERICAN BAR ASSOCIATION 584, 586 (1967).
48. Id.
49. Report of the Special Committee on Specialization, 93 REPORTS OF AMERICAN BAR ASSOCIATION 261, 606 (1968).
52. Id. at 919.
cialties (within the provisions of each state’s rules of professional responsibility);
2. that such state regulation include measures to ensure truthfulness, quality, and compliance by all lawyers with the regulatory standards;
3. that such state regulation include measures to provide broader access by the public to competent legal services by means of a designation plan, a certification plan, a combination of these, or by other methods;
4. that such state regulation be accomplished with the assistance of informed and concerned laypeople; and
5. that such state regulation permit lawyers to use a variety of forums to inform the public about their areas of specialized competence, consistent with truthfulness and quality assurance standards, and consistent with each state’s rules of professional responsibility. 53

Furthermore, the committee recommended that the ABA assist states in specialization plan development by identifying suggested labels and definitions of law practice categories, preparing suggested quality standards, and gathering and exchanging information about the operation of various state programs. 54 The Special Committee’s recommended basic guidelines for state regulatory programs should incorporate the following features:

1. All lawyers in a single field of law within a state who seek recognition as specialists under any plan, whether a designation plan, a certification plan, or another plan, should meet equivalent standards specified in that plan;
2. Participation by lawyers should be voluntary;
3. No lawyer should be denied the right, alone or in association with any other lawyers, to practice in any field of law;
4. Certification or designation should be permitted in more than one field of law;
5. Certified or designated specialists to whom clients have been referred for specialized purposes from another lawyer should not take advantage of their position to enlarge the scope of their representation;
6. Safeguards to ensure the lawyer’s continuing qualification as a specialist should be developed; and
7. Financing of specialization regulation programs should be derived from its participants. 55

The 1978 report of the committee concludes that the above-stated

54. Id.
55. Id.
guidelines are only a beginning in the implementation of any specialization plan. The recommendations will not solve all of the access and quality problems related to legal services, but they are at least an attempt at providing easier access by all citizens to quality legal assistance.

Development of legal specialization plans has been very slow. Until 1978 the ABA did not encourage specialization plan development. The goals were unclear and the means of regulating the plans were confused. Information from pilot programs in California, Texas, New Mexico, and Florida has encouraged the ABA specialization committee to recommend the use of various plans provided they incorporate the basic principles outlined above.

Detailed examination of the basic pilot programs reveals that various plans can regulate specialization effectively depending on the goals to be achieved. The basic plans in operation today are either certification, self-designation, or a combination of self-designation and certification. Analysis of the plans operating in California, New Mexico, and Florida will provide information on the three basic programs.

B. Three Basic State Specialization Plans

1. The California Plan

The California plan is a voluntary certification plan. Its primary goal is to improve the quality of legal services. The California Board of Legal Specialization enforces strict rules and regulations and passes on certificates of specialization in order to help realize that goal.

The California Supreme Court approved the plan in 1971. The plan was instituted in 1973 by the Board of Governors of the State Bar of California and is administered by the California Board of Legal Specialization. The plan requires a five-year period of law
practice prior to application, substantial involvement in the specialty field, special educational experience, written examinations, and peer review in certain specialties for initial certification. Recertification requires continuing legal education requirements and substantial involvement in the specialty field or passing a written examination. These standards apply to applicants in each of the three specialty fields of criminal law, workers’ compensation and taxation. Before March 1, 1975, the plan contained a grandfather clause that excused applicants with ten years of law practice in the specialty field from examination and educational requirements. Grandfathering is a questionable means of ensuring competence and quality. It presumes competence from one group while demanding objective demonstration by another. The real purpose of grandfathering in a specialization plan, it is submitted, is to ensure that the leaders in the specialty field will participate. First, an attorney with twenty or thirty years experience in a specialized area of the law has little to gain from certification and no desire to take a written examination. Second, there is the practical problem of deciding who will prepare the first examination if all are required to take it. Clearly, once the program of specialization is functioning, the reason for grandfathering no longer exists and it can be discontinued.

The California plan, with a primary goal of improving the quality of legal services, has a secondary goal of getting those specialized services to the public. The plan is considered successful, and proposals provide for expansion into the areas of bankruptcy law, family law, labor law, and probate, estate and trust planning law.

Presently, the statement of certification is limited to the classified telephone directory or directories listed in Rule 2-103(A)(5) of the California Rules of Professional Conduct.

The California plan contrasts with the New Mexico plan in both method of regulation and priority of primary goals. The Florida plan is similar to both, but different enough to be a separate specialization concept.

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63. Rules and Regulations of the California Board of Legal Specialization §§ 2-4.
64. Id. at § 2.
67. Id.
68. Id.
70. Rules and Regulations of the California Board of Legal Specialization § 9(b).
(See Bates v. State Bar of Arizona, 433 U.S. 350 (1977), which may broaden the limits on advertising under the California plan.)
2. The New Mexico Plan

The New Mexico plan is a self-designation plan that took effect on September 1, 1973. Participation in the plan is voluntary. The primary goal is public access to legal services. The Specialization Board of the State Bar of New Mexico regulates the administration of the specialization and limitation of practice provisions of the disciplinary rules. The Board does not certify any lawyer as a specialist. It merely regulates a designation program. The plan provides the option of specialization or limitation of practice.

For the specialization designation, an attorney simply files an affidavit with the Specialization Board and the clerk of the Supreme Court of New Mexico certifying that he or she (1) has devoted 60 percent or more of his or her time to one specified area of practice recognized by the Specialization Board, and (2) has done so for each of the immediate past five years. Attorneys with a specialization designation may notify the public of such in print media, on letterhead stationery and by their professional cards.

Attorneys who do not devote 60 percent of their practice to one given area of law may state in print media, letterhead stationery or professional cards that they limit or primarily limit their practice to not more than three narrow areas of law recognized by the Specialization Board.

The New Mexico plan recognizes the importance of encouraging the publication of de facto specialization. It does not limit specialization only to attorneys who choose to demonstrate theoretical and technical skills on written examinations. The plan encourages the development of a specialty by permitting an attorney to limit his or her practice to specified areas of the law and in time to develop a specialty without immediate limitations on scope of practice or workload. The plan encourages specialization and provides the public with information about the special interests and skills of various lawyers.

The New Mexico plan does not ignore the necessity to provide competent legal services in specialized areas of law. Competence and proficiency of attorneys are improved through the concentration and repetition of practice in a particular area of the law. Skills

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71. Rules Governing the Specialization Board, State of New Mexico, Rules 1 and 5.
72. Id.
73. State of New Mexico Code of Professional Responsibility Canons and Disciplinary Rules, Rule 2-105(B)(1), (2).
74. See Bates v. State Bar of Arizona, 433 U.S. 350 (1977), which may broaden the limits on advertising under the New Mexico plan.
75. State of New Mexico Code of Professional Responsibility Canons and Disciplinary Rules, Rule 2-105(B)(1), (2).
improve through the sheer volume of the legal matters handled.\textsuperscript{76} Both the New Mexico and California plans focus on the goals of accessibility and competence, but in different ways.

The next section of this comment examines the Florida plan, what the author believes is the best of both the certification and the designation plans.

3. The Florida Plan

The present Florida plan is a voluntary, self-designation plan with required continuing legal education requirements. The plan was approved by the Florida Supreme Court on October 3, 1975. The dual goals of increased access and quality of legal services are integral parts of the program.

Eligible members of the Florida bar may publicly designate the areas of their practice.\textsuperscript{77} The area of law designated by the lawyer must be approved by the Board of Governors of the Florida Bar.\textsuperscript{78} Each applicant (1) must be a member in good standing of the Florida Bar; (2) must have three years' practice or "specialized postgraduate education or concentrated specialized experience in a particular area of practice;"\textsuperscript{79} and (3) may not designate more than three areas of law.\textsuperscript{80} The application for designation requires a listing of the designated areas of law, a statement of eligibility, and a statement that the member will continue his or her legal education in the designated areas through private study or continuing legal education programs approved by the Board or the Florida Supreme Court.\textsuperscript{81} Designation may be made on letterhead stationery, business cards, office doors, in the yellow pages of a telephone directory, in approved law lists, and through any other means approved by the Board of Governors.\textsuperscript{82} Designation must be made only by naming the permitted areas of the law.\textsuperscript{83} Descriptive words such as "areas of practice" or "specializing in" may be used only as authorized by the Board for use in approved law lists.\textsuperscript{84} Renewal of the right to designate areas of practice must occur every three years and renewal will be granted only if the attorney has completed thirty hours of ap-

\textsuperscript{76} Pickering, Why I Favor the New Mexico Plan, 48 Fla. B. J. 180-81 (1974).
\textsuperscript{77} Integration Rule of the Florida Bar, art. XVII, § 1.
\textsuperscript{78} Id. at § 3(a).
\textsuperscript{79} Id. at § 4(b).
\textsuperscript{80} Id. at § 4(d).
\textsuperscript{81} Id. at § 5(a) (1), (2), and (3).
\textsuperscript{82} Id. at § 7(a). (See Bates v. State Bar of Arizona, 433 U.S. 350 (1977), which may broaden the limits on advertising under the Florida plan.)
\textsuperscript{83} Id.
\textsuperscript{84} Id.
proved continuing legal education in each of the designated areas.\textsuperscript{85}

The designation program approved by the Board of Governors of the Florida Bar does not certify expertise.\textsuperscript{86} The attorneys designating their practice simply hold themselves out to the public as having substantial experience in certain areas of legal practice. No announcement of expertise is intended, and the Florida Bar disclaims any liability for the work products of the participating attorneys.\textsuperscript{87}

Petitions to amend the by-laws of the Florida Bar\textsuperscript{88} have been submitted to the Florida Supreme Court by the bar.\textsuperscript{89} One petition by the bar requests revision of the by-laws of the integration rule (the bar ruling that establishes the designation plan) to upgrade and improve the designation plan.\textsuperscript{90} The proposed changes in the plan provide more objective criteria for participation in the program.\textsuperscript{91} The modifications would require both substantial experience and thirty hours of continuing legal education in each area during the preceding three years to be eligible to designate "general practice."\textsuperscript{92}

A second petition by the bar proposes modification of the integration rule to add a certification plan.\textsuperscript{93} The certification plan would identify attorneys with established competence and expertise in specific areas of the law.\textsuperscript{94} The proposed criteria for a certification

\textsuperscript{85.} Id. at § 9(a)(b).
\textsuperscript{86.} Id. at § 11. The integration rule states that the Florida Bar may publish the following notice where and when it deems necessary:

\begin{quote}
\textbf{NOTICE}

\textbf{FOR THE GENERAL INFORMATION OF THE PUBLIC}

\textbf{ATTORNEYS LISTING AREAS OF PRACTICE IN THE YELLOW PAGES HAVE NOT BEEN CERTIFIED BY THE FLORIDA BAR AS HAVING ANY MORE COMPETENCE IN THESE AREAS THAN ANY OTHER ATTORNEY. ALL PERSONS ARE URGED TO MAKE THEIR OWN INDEPENDENT INVESTIGATION AND EVALUATION OF ANY ATTORNEY BEING CONSIDERED.}
\end{quote}

This notice published by The Florida Bar, Telephone A.C. 904/222-5286, Tallahassee, Florida 32304.

\textsuperscript{87.} Id. at § 11.
\textsuperscript{88.} The integration rule of the Florida Bar contains article XXI, which authorizes the Florida designation plan.
\textsuperscript{89.} In re Petition to Amend the Bylaws under the Integration Rule of the Florida Bar, No. 54,081 (Florida, filed May 10, 1978); In re Petition to Amend the Bylaws under the Integration Rule of the Florida Bar, No. 54,966 (Florida, filed August 28, 1978).
\textsuperscript{90.} Letter from Rayford H. Taylor, Designation Director, the Florida Bar, to Clarke B. Rice (February 20, 1979).
\textsuperscript{91.} Brief for Petitioner at 5, In re Petition to Amend the Bylaws under the Integration Rule of the Florida Bar, No. 54,966 (Florida, filed August 28, 1978).
\textsuperscript{92.} Id.
\textsuperscript{93.} Brief for Petitioner at 1, In re Petition to Amend the Bylaws under the Integration Rule of the Florida Bar, No. 54,081 (Florida, filed May 10, 1978).
\textsuperscript{94.} Id. at 3.
of competence include: (1) experience; (2) references; (3) continuing legal education; (4) examinations, either oral or written or both; and (5) special certification under a grandfather rule.  Presently only two board certifications are proposed under the new plan—taxation and civil trial practice.

The two-tier specialization plan (designation and certification) in Florida may prove very successful. The designation plan permits all attorneys the opportunity to move toward specific areas of the law and upgrade their practices. Designation also advises the public about a lawyer's general interest and experience. Thus, designation achieves the tandem goals of accessibility and improved quality of legal services. The certification plan permits the public to rely on an attorney's certified skill and affords the attorney the benefit of a board certification of expertise.

Whether the designation plan and the certification plan can operate in conjunction is unknown. Experience may indicate that the two are incompatible, and the Florida Bar may have to opt for one or the other. Nevertheless, specialization in Florida indicates that (1) specialization is popular and successful whether in a designation plan or a certification plan, and (2) no perfect plan can be initially implemented—local needs and goals must be reassessed frequently and the plans changed as needed.

C. The Proposed Federal Practice Rule

A proposed federal practice rule for admission to the federal bar has been drafted by the Judicial Conference's Committee to Consider Standards for Admission to Practice in Federal Courts. The proposed practice rule establishes minimum and uniform standards of competency for lawyers practicing in federal district courts. The rule, like the designation and certification plans discussed above, is a specialization plan, but unlike those programs, it is exclusionary. Proposed admission to federal district court bars will be based on a written examination in federal practice subjects. Proposed admis-

95. Id. at Appendix I, p. 6.
96. Id. at Appendices II and III.
98. Id.
99. Tentative Draft of Proposed Uniform Rules Governing Admission to Practice in United States District Courts (1978) Rule 1(a). The federal practice examination will test knowledge of the following areas:
   (1) Federal Rules of Criminal Procedure;
   (2) Federal Rules of Civil Procedure;
   (3) Federal Rules of Appellate Procedure;
   (4) Federal Rules of Evidence;
sion to the federal district court trial bar requires, in addition to membership in the federal bar, a requirement of four trial experiences. A peer review committee in each district will deal with instances of inadequate trial performances. Failure to qualify by examination and participation in four trial experiences, or to respond to advice, encouragement, and consultation by the review committee would result respectively in discipline and exclusion from practice.

The federal trial admission plan was severely criticized by the ABA Young Lawyers Division after the plan was offered at the ABA Midyear Meeting February 7-13, 1979, in Atlanta. The division offered a report drafted by its Federal Practice Committee about the federal plan. The report attacked the proposed practice rule standards as unreliable, unjustified, and discriminatory. The report questioned the validity of a correlation between trial experience and trial performance as well as the assumption that knowledge of federal practice subjects is guaranteed to be applied to the trial situation. The Young Lawyers’ report cited the fact that 75 percent of the judges surveyed called competency a serious problem, but only 7.7 percent of the trial lawyers appearing before the judges were rated incompetent.

Increasing the quality of legal skills offered to clients is an important goal of the legal profession. Incompetency results in infringement on clients’ rights, but it may be that incompetency is not as great a problem as the inexperience of some lawyers. The law school experiences in trial advocacy are generally inadequate to enable new lawyers competently to prepare and present their clients’ cases. Formal recognition of specialists may encourage law schools to provide students with the election of formal education in specialty areas. Specialized legal education may better prepare students for specialty practice.

(5) the law of federal jurisdiction and venue; and
(6) the Code of Professional Responsibility.

100. PROPOSED UNIFORM RULES GOVERNING ADMISSION TO PRACTICE IN UNITED STATES DISTRICT COURTS 1(b) (Tent. Draft 1978). The four trial experiences must include at least two experiences as associate or supervised lead counsel in actual trials.
102. Id. at 64.
104. Id.
105. Id.
106. Id.
107. Id.
IV. A SPECIALIZATION PROPOSAL FOR MONTANA

A. Present Developments in Montana

No formal movement toward the recognition of specialists in Montana exists. Most lawyers readily agree that de facto specialization exists in Montana as in other parts of the United States. Numerous attorneys in practice are recognized as skilled in various fields of substantive law and practice. The problems arise when an attempt is made to define the extent of that recognition. Members of the legal profession through bar experience easily can identify those attorneys with particular interests and skills. How is the public to identify members of the bar with specialized abilities? Are consumers of legal services being treated fairly by the present legal advertisements in Montana telephone directories, for example? Many of these specific practice advertisements are deceiving. A statement of special training and experience may be inaccurate unless measured by objective and reliable legal standards. More liberal advertising standards are forthcoming on a national basis and may affect practice in Montana. The traditional approach which does not accord formal recognition of specialization in Montana may slow the advertising movement, but it certainly will not stop it. A present attempt to cope with this growing trend is certainly more appealing than future attempts to cure the abuses of unreliable advertising.

The Board of Trustees of the State Bar of Montana authorized the creation of sections of law at its December 1977 meeting. The sections presently authorized for organization are (1) probate and taxation; (2) business law; (3) litigation; (4) minerals and land use; and (5) family law and general practice.

Little has been accomplished by these sections beyond mere organization. They are, however, the nucleus of a strong continuing legal education plan for Montana lawyers and a first step toward recognition of specialties.

Lawyers interested in providing higher quality legal services to a more informed public need to express interest to bar officers and section chairmen requesting section participation in CLE programs and bar conventions. Moreover, the section chairmen could form a

108. TV Advertising Wins ABA Approval by Wide Margin, 64 A.B.A.J. 1341 (1978). See generally END TO SOLICITATION BAN TENTATIVELY OK'd BY BOARD, REPORTS (The State Bar of California, Special Issue, August 1978) at 1.
109. Toole, From the President, MONT. LAW., Feb., 1978, at 3.
110. Telephone interview with Kent M. Parcell, Executive Director of the State Bar of Montana (April 11, 1979).
111. Id.
committee to study specialization in Montana. Information communicated to bar members and to the Montana Supreme Court could result in a specialization plan suitable to Montana lawyers. The needs of solo practitioners as well as large firms presently specializing can be met by an appropriate specialization plan. "General practice" is a recognized specialty, and a need for general practice will continue to exist under any specialization plan. The vast numbers of people needing legal services are not sufficiently sophisticated to identify a specialized legal problem. General practitioners remain the link between the client and any specialized legal service.

B. Definition of Goals

The successful implementation of any specialization plan depends upon, first, the identification of practical goals and, second, a workable method that readily achieves those goals. Accessible, competent, and reasonably priced legal services have been identified as the primary goals of specialization. Any plan adopted in Montana should be based upon these fundamental goals. Further, the plan should be categorically broad enough to provide for the needs of clients not sufficiently sophisticated to recognize a specialized legal problem. Clear definitions of legal categories, such as bankruptcy, family law, estate planning, and workers' compensation, may at least direct people to lawyers who have demonstrated interest and experience in such areas.

Any specialization plan must have a broad base of support from the bar. Without popular support from lawyers, a program to identify competent practitioners will fail to be a reliable means of selecting a lawyer. Lack of reliability directly limits the public access to legal services. Some problems simply cannot be solved without lawyers who have particular skills.

Lawyers have a responsibility to provide the necessary information for consumers to make an intelligent choice about legal services. The serious consequences of legal rights and duties are not well-served by the present methods of finding a lawyer.

The type of plan to adopt depends upon goal priority. California and other jurisdictions chose to certify experienced attorneys,
thus opting for increased quality first and accessibility second. New
Mexico, Florida, and others\textsuperscript{115} chose to permit attorney self-
designation without the bar's sanction of expertise. These plans
emphasize greater accessibility by using a broader base of practicing
attorneys.\textsuperscript{116} A designation plan by definition results in greater bar
participation (and, consequently, greater accessibility) than a certi-
fication plan. Greater concentration in narrow areas of law through
limitation of practice results in more experience and study, thus
increased quality and competence. Quality is improved through
accessibility in a designation program.

C. A Proposal

Any specialization plan considered for adoption in Montana
must fit the needs of the Montana lawyers. The research of the ABA
Standing Committee on Specialization,\textsuperscript{117} as well as the practical
experience of various states with operating specialization plans,
should be used to formulate a plan suitable for the Montana bar.
The desire of lawyers to specialize, the cost of organizing and operat-
ing the plan, the type of plan the lawyers support, the available data
on the different types of plans, and the desired goals of specializa-
tion are a few of the factors relevant to the selection of a specializa-
tion plan.

The State Bar of Montana currently has approximately 1,480
members practicing within the state.\textsuperscript{118} Many attorneys concentrate
their practices in one or more of the areas of plaintiff personal in-
jury, insurance defense, estate planning and probate, taxation,
criminal defense, workers' compensation, oil and gas law, water law,
real estate transactions, and carriers and utility law.\textsuperscript{119} Other attor-

\textsuperscript{115} The following jurisdictions have adopted or are considering self-designation plans as of August 31, 1978: Connecticut, Delaware, Florida (two-tier plan of designation and certification), Georgia, Idaho, Massachusetts, Michigan, New Mexico, Oklahoma, Pennsylvania, and Utah. See generally Report of the Standing Committee on Specialization, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES, American Bar Association 1978.

\textsuperscript{116} Statistics from the Florida Bar indicate that as of May 31, 1978, 7,037 lawyers had designated and were participating in the Florida Designation Plan. There were 10,995 in-state practitioners eligible and potentially interested in participating in the plan as of that same date. These figures indicate that 64 percent of the eligible attorneys participated in the program as of May 31, 1978.

\textsuperscript{117} See note 56, supra.

\textsuperscript{118} Telephone interview with Kent M. Parcell, Executive Director of the State Bar of Montana (April 11, 1979).

\textsuperscript{119} Toole, supra note 108, at 3.
ney's may spend a significant amount of time in these areas. The public has a right to know which lawyers have demonstrated competence and interest in specific areas of the law, and lawyers have an ethical duty to provide that information. Would not a program recognizing a minimum level of competence and experience help fulfill that public need? Would not such a program also help fulfill the need that a lawyer has for a competent and experienced practitioner for referral or association?

A survey among attorneys will indicate whether a formal specialization plan is desirable in Montana and what type of plan is most popular. Representatives of the five state bar sections as well as other knowledgeable individuals could readily formulate standards. Due to the relatively small number of lawyers in Montana, a full certification plan with oral and written examinations and peer rating may have a prohibitive cost. Any pilot specialization plan should be administered on a low budget until such time as the program becomes self-sustaining through registration fees.

A specialization plan in Montana should be regulated by the Montana Supreme Court and the State Bar. Through mutual efforts, the court and the bar association can prepare and administer labels, definitions of law categories, and standards for specialization that meet the needs of Montana lawyers and citizens.

A proposal for Montana easily could be modeled after the revised draft of the Florida designation plan and the 1978 recommendations of the ABA Standing Committee on Specialization. The designation system of indentifying specialists is very flexible. It provides for participation by nearly all lawyers and is easily implemented. Simple procedures of filing affidavits of practice experience and completion of continued legal education requirements may be sufficient for qualification.

Regulation of such a plan for truthfulness and quality will ensure that all lawyers comply with the standards and that the plan is a reliable means of identifying the concentration of law practice by individual practitioners. A simple regulatory procedure may be

121. Toole, supra note 108, at 3.
122. The history of admission to practice by motion upon graduation from the University of Montana School of Law without necessity of a bar examination and the fact that most Montana lawyers are graduates of that law school also may inhibit the success of a certification plan. Montana lawyers may not support an examination system.
123. Brief for Petitioner at Appendices I and II, In re Petition to Amend the Bylaws under the Integration Rule of the Florida Bar, No. 54,966 (Florida, filed August 28, 1978).
125. See generally INTEGRATION RULE OF THE FLORIDA BAR, art. XVII, § 5.
a random audit of the sworn statements filed by specialists with the state designation board or bar association. The affidavit should include sworn statements of experience, limitation of practice, and compliance with continuing legal education requirements. The affidavits, like tax returns, should be randomly and routinely audited for truthfulness and investigated on complaint of a bar member, a client, a judge, or the public. Failure to comply with the truthfulness requirements should result in discipline, loss of the specialization designation, or possibly, disbarment. A second safeguard for truthfulness is the identification of activities within a defined category sufficiently concise so as to assist members of the public in relating their legal need with a specialist and informing the specialist of the limits of the designated category. When both the lawyer and the client are assured of what service is offered, then the plan achieves the goals of accessibility and competence.

A specialization plan in Montana should permit lawyers to use a variety of forums to inform the public about their specialized competence. The amount of accurate information about lawyers must be increased. Truthfulness and accuracy are standards for advertisement in any forum, and no forum should be made available to a specialist that is not available to a non-specialist.

Besides safeguards and standards for the protection of the layperson, a proposed specialization plan for Montana should have standards that protect the lawyers. Each speciality area should have standards of competence for all participating lawyers without grandfather provisions. Participation in the plan should be on a voluntary basis—no lawyer should be forced to specialize. A specialization plan should not deny the right of any lawyer to practice in any field of law even though he is not designated as a specialist. Any lawyer may be designated in more than one area of law if he meets the standard of each area.

A specialization plan should require specialists who accept clients referred by a non-specialist not to take advantage of the specialist position to enlarge the scope of his representation. Referral to specialists would end if the referring lawyer feared that he would lose his client permanently.

The above proposed provisions for a Montana specialization plan are not exhaustive. Many important and fundamental provi-

126. Brink, supra note 7, at 194.
127. Id.
128. Id.
130. Id.
131. Id.
sions are not included. The research of the ABA Standing Committee on Specialization and the programs in various states are important sources of information for any proposed specialization program. Information is readily available from the ABA and the state bar associations with functioning programs.

V. CONCLUSION

Formal recognition of legal specialization makes a significant contribution to the efficient delivery of legal services. Consumers in states with operating plans readily can identify lawyers providing specialized legal services. All lawyers do not have the same types of skills. The public has a right to know through a reliable identification process the lawyers most skilled in the area of their need. Labels and definitions of specific categories of law as well as quality standards provide safeguards for the achievement of competent and accessible legal services. Modern social changes have created complex legal problems. No lawyer conceivably can stay abreast of developments in all areas of the law. Specialization contributes to the development of lawyers able to handle complex legal problems in changing areas of the law. General practitioners will not be downgraded. They will continue to serve as a link between the consumer and the specialized practice of law. General practitioners have a wide range of experience and knowledge essential to wise counseling.\textsuperscript{132} The specialist has the expertise in a particular field which no lawyer can have in all areas of law. Specialists and generalists working together would improve the quality of legal services. Generalists will have a reliable means of addressing unfamiliar complex legal problems with reduced fear of professional liability. The specialist would provide the highly skilled service needed by the generalists and the public.

The State Bar of Montana should investigate seriously the benefits of formal specialization. The needs of the public and the benefits to the bar are too great to resist the change.