Certification of Specialization: Another Limit on Attorney Advertising is *Peeled* Away

Specialization is a way of life in our highly complex society. Individuals from carpenters to medical professionals specialize and communicate their fields of expertise to the public. The legal profession, however, has been slow to formally acknowledge its members as "specialists." In fact, the American Bar Association (ABA) Model Rule of Professional Conduct 7.4, which has been adopted by over half the states, specifically forbids attorneys from holding themselves out as "specialists."[1] This prohibition stems from the fear that this type of advertising may potentially mislead consumers by implying superior quality services or formal recognition. These fears, however, could be minimized by formally certifying lawyers as specialists and providing for the effective use of specialty advertising to better inform the public of the availability of legal services.

The United States Supreme Court decision in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*[2] marks a significant point of intersection between two lines of developing trends in the legal profession: attorney advertising and certification of specialization. At issue in the *Peel* case was whether the Supreme Court of Illinois acted consistently with the first amendment[3] when it censured an attorney for stating on his professional letterhead that he was certified as a civil trial specialist by the National Board of Trial Advocacy (NBTA).[4] In a five to four decision, the Court concluded that "a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise

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1. Model Rules of Professional Conduct Rule 7.4 (1989) reads:

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(b) a lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation; and

(c) (provisions on designation of specialization of the particular state).

2. 110 S. Ct. 2281 (1990).

3. "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." U.S. CONST. amend. I.

4. The letterhead actually appeared as follows:

Gary E. Peel
Certified Civil Trial Specialist
By the National Board of Trial Advocacy Licensed: Illinois, Missouri, Arizona

his or her certification as a trial specialist by NBTA."[5] In the deciding vote, however, Justice Marshall insisted that this did not preclude regulation and that each state could choose for itself, within first amendment constraints, the best regulatory method to protect against potentially misleading claims.[6]

The *Peel* decision recognizes the significance of the NBTA as a private certification group, removes another limitation on attorney advertising, and makes it incumbent upon each state to reevaluate its current regulatory scheme to ensure that it does not run afoul of the first amendment. The *Peel* decision also has important implications for attorneys and consumers. *Peel* recognizes an attorney's right to specialize and to communicate that specialty to the community. From the perspective of the consumer, the *Peel* decision means that the public will be entrusted with more information about lawyers and their expertise from which to make informed decisions. The quantity and quality of this new information will depend largely upon which method of regulation a state adopts.

This Note examines the impact of the *Peel* decision on states that place an absolute ban on attorney communication of certified specialties and suggests alternatives that may be used to regulate advertising of certification of specialization. Part I reviews the development of specialty certification within the legal profession and the development of the line of cases extending the rights of lawyers to advertise. Part II analyzes the *Peel* decision and its implications for states that have adopted ABA Model Rule 7.4 which flatly bans the communication of specialties. Part III evaluates a continuum of alternatives for regulating the advertisement of certification of specialization. Part IV concludes that state adoption of the ABA Model Plan of Specialization[7] will provide consumers with access to legal services, prevent misleading advertising, and promote competence in the profession within first amendment constraints.

I. Development

A. Certification of Specialization

Quite distinct from the English system of solicitors and barristers, American law took the renaissance approach of one lawyer capable of performing all legal tasks. However, as the law became increasingly complex, public demand for expertise on the part of the lawyer brought

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5. *Peel*, 110 S. Ct. at 2287-93.
6. *Id.* at 2296 (Marshall, J., concurring).
7. *See* ABA Model Plan of Specialization (1979) (reprinted in the Appendix).

about de facto specialization within the legal profession.[8] Throughout this century, specialization among lawyers has expanded at an increasing rate. More than eighty years ago, the ABA, in the Canons of Professional Ethics, recognized and allowed communication of certain "branches of the profession."[9] Throughout the 1950's, the ABA debated the issue of recognition and regulation of specialties and concluded that the issue should be handled at the state level, rather than on a national level.[10] The basis for advocating state regulation is that each jurisdiction is in the best position to regulate its own bar.[11] De facto specialization continued to proliferate without formal recognition or regulation on state and national levels.

In 1973, Chief Justice Warren E. Burger advanced the proposition that "specialized training and certification of trial advocates is essential to the American system of justice."[12] The address warned that "lawyers, like people in other professions, cannot be equally competent for all tasks in our increasingly complex society and increasingly complex legal system in particular."[13] In response to this call, proponents of specialization founded the NBTA in 1977.[14] The NBTA developed a rigorous set of standards and procedures to ensure that certified members possess the skills and experience necessary to vigorously advocate in the courtroom.[15] Other certification programs developed as lawyers began to

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8. N. ROSEN, LAWYER SPECIALIZATION 2 (1990) (quoting 79 ABA REP. 582, 584 (1954)).

9. *Id.* at 1-2. Canon 27 provided that lawyers could advertise and include a "law list" of the "branches of the profession" in which they practiced. Canon 32 allowed lawyers to be included in a law list if it was not deceptive. Canon 46 provided that lawyers could notify other lawyers of their availability to act as associates in a particular branch of the law. *Id.*

10. *Id.* at 2.

11. ABA STANDING COMMITTEE ON SPECIALIZATION, HANDBOOK ON SPECIALIZATION 28 (1983) [hereinafter ABA HANDBOOK].

12. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 229 (1973) (recording the fourth annual John F. Sonnet Memorial Lecture delivered on November 26, 1973).

13. *Id.*

14. The groups sponsoring NBTA include the National District Attorneys Association, the Association of Trial Lawyers of America, the International Academy of Trial Lawyers, the International Society of Barristers, the National Association of Criminal Defense Lawyers, the National Association of Women Lawyers, and the American Board of Professional Liability Attorneys. Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281, 2284 n.3 (1990).

15. Brief for National Board of Trial Advocacy as Amicus Curiae at 9-13, Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281 (1990).

The current NBTA requirements are that an applicant: (1) be a bar member in

confine their practices and expertise to specialized areas of law.[16]

By 1978, four states began experiments in state certification programs.[17] These programs were voluntary, and the attorneys were not restricted to practice only in the area of specialization. Florida and New Mexico took the self-designation approach.[18] These plans permitted lawyers to designate areas in which they practice, but did not guarantee the expertise of the lawyer.[19] In Florida, this consisted of each attorney claiming his own specialty, substantiated by three years of practice in the specialty area, thirty hours of Continuing Legal Education (CLE), and statements of reference confirming involvement.[20] The Florida plan approved twenty-six fields of practice and allowed an attorney to advertise up to three areas of practice upon designation.[21] The emphasis in the Florida and New Mexico self-designation plans was to inform the public of attorneys' specialties, rather than to confirm competence.

California and Texas undertook pilot state operated certification programs designed to assure a certain level of competence through comprehensive evaluation of qualifications prior to certification. Unlike self-designation, these plans established state operated specialization pro-

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good standing; (2) disclose any misconduct including criminal convictions or professional discipline; (3) show at least five years of actual practice in civil trial law during the period immediately preceding application for certification; (4) show substantial involvement in trial practice, including 30% of professional time in civil trial litigation during each of the five years preceding application; (5) demonstrate experience by appearing as lead counsel in at least 15 complete trials of civil matters to verdict or judgment, including at least 45 days of trial and 5 jury trials, and by appearing as lead counsel in 40 additional contested matters involving the taking of testimony; (6) participate in 45 hours of continuing legal education in civil trial practice in the 3 years preceding application; (7) be confidentially reviewed by six attorneys, including two against or with whom the applicant has tried a civil matter, and a judge before whom the applicant has appeared within the preceding two years; (8) provide a substantial trial court memorandum or brief that was submitted to a court in the preceding three years; and (9) pass a day-long written examination testing both procedural and substantive law in various areas of civil trial practice.

Peel, 110 S. Ct. at 2285 n.4.

16. The NBTA, in addition to certification for civil trial specialists, developed certification for the criminal trial specialist. However, certification by other private groups has not occurred, leaving the NBTA as the only private national group which offers certification to its members.

17. These states are: California (1971), Florida (1975), New Mexico (1973), and Texas (1974). Zehnle, *Specialization in the Legal Profession: An Analysis of Current Proposals,* in LEGAL SPECIALIZATION 22-25 (1976).

18. ABA HANDBOOK, *supra* note 11, at 12.

19. *Id.*

20. ABA Standing Committee on Specialization, *Specialization in Florida*, 3 SPECIALIZATION UPDATE 1, 2 (Feb. 1990).

21. ABA HANDBOOK, *supra* note 11, at 12.

grams and limited certification exclusively to those specialties.[22] The Texas plan required that the attorney have at least five years of full-time practice, spend at least twenty-five percent of his or her practice time in the specialty area, provide favorable statements of reference from attorneys and judges, demonstrate satisfactory participation in CLE, and pass a comprehensive six hour examination prior to certification.[23] Additionally, these state certification plans required recertification every five years to assure on-going competence. These plans recognized that de facto specialization already existed within the legal profession and that a centralized method of evaluation before certification would not only assist the public in choosing qualified attorneys, but would also increase professional competence.

Certification programs proliferated in response to the profession's need to guarantee competence in specialized areas of law and the public's need for accurate information for decisionmaking. The ABA established the Standing Committee on Specialization and developed the ABA Model Plan of Specialization to assist states in establishing certification programs.[24] By 1986, two states recognized the designation of "Certified Civil Trial Specialist" by the NBTA and developed procedures for approving plans from other private certification groups.[25] Gradually, other states developed or adopted certification programs to protect the public and promote legal proficiency.[26] Florida and New Mexico recognized the importance of centralized methods to confirm competence prior to certification and instituted state operated programs to gradually replace the earlier efforts in self-designation programs.[27]

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22. California began certification in the following three areas: (1) criminal law; (2) workman's compensation; and (3) taxation. Zehnle, *supra* note 17, at 22. Texas began certification in three areas: (1) criminal law; (2) family law; and (3) labor law. McNeil, *Specialization in Texas*, 1 SPECIALIZATION UPDATE 1, 2 (Mar. 1989). Since that time, California has expanded its plan to include family law, immigration and nationality law, probate, estate planning, and trust law. Texas has expanded its plan to include 13 areas of certification: administrative law, civil appellate law, civil trial law, consumer bankruptcy law, criminal law, estate planning and probate law, family law, immigration and nationality law, labor law, oil, gas and mineral law, personal injury, trial law, tax law, and real estate law. ABA Standing Committee on Specialization, Status Report on State Specialization Plans (Apr. 1991) [hereinafter Status Report] (available from the ABA Standing Committee on Specialization).

23. McNeil, *supra*, note 22, at 2.

24. ABA HANDBOOK, *supra* note 11, at 16.

25. *Ex parte* Howell, 487 So. 2d 848, 851 (Ala. 1986); *In re* Johnson, 341 N.W.2d 282, 283 (Minn. 1983).

26. These states are: Arkansas (1982), California (1971), Connecticut (1981), Florida (1974), Louisiana (1983), New Jersey (1980), New Mexico (1973), North Carolina (1982), South Carolina (1981), and Texas (1975). Status Report, *supra* note 22, at 1-9.

27. Certification programs were adopted in Florida in 1982 and in New Mexico in 1987. *Id.* at 2-7.

Today, certification programs have evolved into two types: state approval of outside agency certification plans, such as the NBTA, and state operated certification plans. Four states recognize private certification groups and have procedures for approval.[28] Eleven states have their own certification programs,[29] five of which have adopted plans based on the ABA Model Plan of Specialization.[30] The remaining states have no established certification process. Irrespective of formal certification plans, the fact remains that specialization is a way of life in the legal profession. Currently, 206 fields of law, from administrative to zoning, are recognized and published in a national directory of lawyers who hold themselves out as specializing or concentrating in specific areas of practice.[31] The time is ripe to recognize specialization and to plan intelligently for its regulation and use in attorney advertising.

B. Attorney Advertising

Attorney advertising has its point of origin in *Bates v. State Bar of Arizona,*[32] which opened the door to allow first amendment protection of truthful legal advertising. *Bates* involved two attorneys who truthfully advertised in a newspaper the availability and terms of routine legal services. The Supreme Court, relying on an earlier decision, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*[33] determined that blanket suppression of attorney advertising "serves to inhibit the free flow of commercial information and to keep the public in ignorance."[34] The Court held that this total ban was violative of the

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28. These states are: Alabama, Connecticut, Georgia, and Minnesota. *Id.* at 1-5.

29. These states are: Arizona, Arkansas, California, Florida, Louisiana, New Jersey, New Mexico, North Carolina, South Carolina, Texas, and Utah. *Id.* at 1-10.

30. These states are: Arkansas, New Jersey, New Mexico, North Carolina, and Utah. *Id.* at 1-11.

31. LAWYER'S REGISTER PUBLISHING CO., LAWYER'S REGISTER BY SPECIALTIES AND FIELDS OF LAW 2 (9th ed. 1988).

32. 433 U.S. 350 (1977).

33. 425 U.S. 748 (1976). Prior to this case, "the commercial speech doctrine" excepted professional advertising from protection under the first amendment. Valentine v. Chrestensen, 316 U.S. 52 (1942). *Virginia State Board of Pharmacy* dealt with the issue of whether a pharmacist's advertisement of prices on prescription drugs falls within the protection of the first amendment. The court determined that commercial speech which is not misleading is entitled to at least limited protection under the first amendment. This signaled the beginning of free commercial speech and the demise of the "commercial speech doctrine." *See* Note, *The Demise of the Commercial Speech Doctrine and the Regulation of Professional's Advertising: The Virginia Pharmacy Case*, 34 WASH. & LEE L. REV. 245 (1977).

34. *Bates*, 433 U.S. at 365.

first amendment, but carefully pointed out that this did not preclude other regulation.[35]

Bates established a two-part framework for evaluating attorney advertising cases. First, the Court scrutinized the advertisement itself to determine whether the claims were misleading. "Advertising that is false, deceptive, or misleading of course is subject to restraint."[36] The *Bates* Court determined that truthful printed advertising of the price and terms of routine legal services is not misleading on its face, and thus, is not subject to blanket suppression.[37] The Court, however, declined to address claims of quality, noting that such claims were "not susceptible of precise measurement or verification and . . . might well be deceptive or misleading to the public."[38] The second part of the analysis balanced the state's interests in restricting advertising against the right to the free flow of commercial speech.[39] This balancing test runs throughout the attorney advertising cases. In *Bates*, the Court upheld the right of the public to the free flow of information based on first amendment considerations of commercial speech and recognized that attorney advertising serves a vital societal interest in providing information for informed decisionmaking.[40] The expansive approach taken by the *Bates* Court in applying first amendment protection to attorney advertising began a line of cases cutting back limits on restricting attorney advertising.

Ohralik v. Ohio State Bar Association[41] and its companion case, *In re Primus*,[42] drew a distinction between advertising and solicitation. Advertising in printed media is afforded some first amendment protection, whereas in-person solicitation for pecuniary gain is so potentially "overreaching" that it warrants prohibition by the state.[43] The Court reasoned that the consumer is adequately protected when printed material can be used or discarded at will.[44] However, when the attorney solicits in-person, the consumer is in an unequal bargaining position and requires pro-

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35. *Id.* at 383.
36. *Id.*
37. *Id.* at 382.
38. *Id.* at 366.
39. *Id.* at 368-79. The State in *Bates* set forth six major interests: the adverse effect on professionalism, the inherently misleading nature of attorney advertising, the adverse effect on the administration of justice, the undesirable economic effects of advertising, the adverse effect of advertising on the quality of service, and the difficulties of enforcement. None of these state interests persuaded the Court that an outright ban was justified.
40. *Id.* at 364.
41. 436 U.S. 447 (1978).
42. 436 U.S. 412 (1978).
43. *Id.* at 439.
44. *Id.* at 435-36.

tection.[45] The *Primus* Court concluded that solicitation by letter on behalf of a nonprofit, public interest group is not overreaching.[46] In *Ohralik*, the Court held that because the attorney's in-person solicitation of an auto accident victim in the hospital was overreaching and because there would be great difficulty in regulating in-person solicitation, the state was justified in prohibiting the conduct.[47] These cases scrutinized the advertising media and determined that "overreaching" forms of communication, such as in-person solicitation, justify a categorical prohibition by the state.

The Court in *In re R.M.J.*[48] further refined the two-part analysis of *Bates* by considering the misleading aspects of advertising fields of practice and by applying the four-part analysis set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[49] to weigh the state interest. The Court first considered whether advertising that deviates from the state's law list is misleading or deceptive.[50] It determined that use of nondeceptive terminology to describe fields of practice (*e.g.*, "property" instead of "real estate"), is not misleading.[51] The Court based this determination on the fact that the public could easily understand these terms, but cautioned that claims of quality are not so easily verifiable and may be "so likely to mislead as to warrant restriction."[52] The Court expanded on the inquiries into the state's justifiable interest in regulating the speech by asking whether the state's interest was substantial, whether the restriction advanced the state's interest, and whether less restrictive means were available to regulate the speech.[53] The *R.M.J.* Court concluded that, because deviation from

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45. *Id.*
46. *Id.* at 439.
47. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 467 (1978).
48. 455 U.S. 191 (1982).
49. 447 U.S. 557 (1980). The exact test was set out as follows:

> In commercial speech cases, then, a four part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

50. *Id.* Missouri Supreme Court Rule 4 provided a list of 23 fields of law which could be advertised, but deviation from the exact phraseology of the law list was not permitted. Mo. S. Ct. Rule 4, addendum III (1977).
51. *In re* R.M.J., 455 U.S. at 205.
52. *Id.* at 201 (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 383-84 (1977)).
53. *Id.* at 203-07.

the state law list was not misleading and no substantial interest was promoted by the restriction, the state was not justified in restricting the advertising.[54] Further, although mailings and handbills are more difficult to supervise than newspaper advertisements, this did not substantiate the state's interest in unduly restricting the flow of information.[55] This decision opened the door to lawyer listing and advertising by field of law as long as it is not misleading and added the constitutional restriction that states employ the least restrictive means to protect the public from misleading or overreaching advertising.

Zauderer v. Office of Disciplinary Counsel[56] added targeted newspaper advertising and the use of illustrations to the permissible types of advertising and recognized the dangers associated with use of disclosures in regulating commercial speech. *Zauderer* involved the use of an illustration depicting the dangers of the Dalkon Shield in a newspaper advertisement to target those injured by the device. The *Zauderer* Court determined that targeting persons with specific legal needs (*e.g.*, users of the Dalkon Shield), is not overreaching when accomplished by newspaper and the use of truthful illustrations is not misleading.[57] Such advice serves a useful public service in reaching and informing persons who may otherwise remain ignorant of their legal rights and of the health hazards associated with the device.[58] The Court's focus then shifted to the means of restricting the advertising. The Court analyzed the use of disclosures as a means of regulation and warned that unduly burdensome requirements may have a chilling effect on protected commercial speech.[59] The Court reasoned that requiring the disclosures to be "reasonably related to the State's interest" is sufficient to protect against overregulation.[60] In allowing truthful targeted newspaper advertising, *Zauderer* paved the way for targeted direct mail.

Shapero v. Kentucky Bar Association[61] directly addressed the use of targeted direct mail and invalidated the distinction between advertising and printed solicitation. Targeted direct mail was classified as solicitation and was absolutely prohibited by Kentucky Supreme Court Rule 3.135(5)(b)(i).[62] The Court determined that there was nothing misleading

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54. *Id.* at 205.
55. *Id.* at 206.
56. 471 U.S. 626 (1985).
57. *Id.* at 647.
58. *Id.* at 634.
59. *Id.* at 662-64.
60. *Id.* at 651.
61. 486 U.S. 466 (1988).
62. Kentucky Supreme Court Rule 3.135(5)(b)(i) (1988) provided:
A written advertisement may be sent or delivered to an individual addressee

in the letters and that a printed letter, unlike in-person solicitation, could be easily cast away and was, therefore, not overreaching.[63] Because the speech was not misleading or overreaching, the distinction between solicitation and advertising was immaterial.[64] Turning to the issue of regulation, the Court determined that the state could regulate in less restrictive ways than a total prohibition. Alternatives to total prohibition include the use of disclaimers identifying the mail as an advertisement or informing the recipient how to report misleading letters. In addition, disciplinary agencies could screen letters and require verification by the attorney.[65] The Court concluded that the free flow of commercial information justifies the added burden of regulation, rather than an absolute prohibition.[66]

From this line of cases developed both factual and legal guidelines. From the factual viewpoint, truthful printed advertising of legal prices, terms, fields of practice, and illustrations whether by newspaper, flyer, or letter, is not inherently misleading. Claims of quality, however, are not easily verifiable or measurable and are potentially misleading. Targeting specific groups or persons in print is not overreaching, whereas in-person solicitation for pecuniary gain is inherently overreaching because the trained advocate and the consumer are in unequal bargaining positions. From a legal perspective, truthful attorney advertising is protected under the first amendment and cannot be subjected to absolute prohibition. However, because some forms of legal advertising are potentially

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> only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Compare the Kentucky rule with ABA Model Rule of Professional Conduct Rule 7.3 (1984):

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in-person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Both the Kentucky and ABA rules categorically prohibit targeted direct mail solicitation by lawyers for pecuniary gain. Neither requires a finding of false or misleading solicitation.

63. *Shapero*, 486 U.S. at 475-76.

64. *See* Note, *After Shapero v. Kentucky Bar Association: Much Remains Unresolved About The Allowable Limits Of Restrictions On Attorney Advertising*, 61 U. COLO. L. REV. 115, 134 (1990).

65. *Shapero*, 486 U.S. at 485-86.

66. *Id.* at 478.

misleading or overreaching, the state has a justifiable interest in regulating commercial speech, but regulation must be in furtherance of the state's interest in protecting consumers and must be accomplished with the least restrictive means.

II. The *Peel* Decision

The *Peel* decision relied on the two-part analysis set forth in earlier attorney advertising cases to examine the intersection of the attorney advertising line of cases with the specialty certification line of development. The first level of inquiry, whether the advertising is free from misleading claims to be afforded the protection of the first amendment, produced three distinct views from the Court. The plurality recognized the significance of NBTA certification and determined that Peel's "letterhead was neither actually nor inherently misleading."[67] Justice O'Connor concluded in a dissenting opinion that the letterhead was inherently misleading.[68] Justice Marshall, in his concurring opinion, and Justice White, in his dissenting opinion, provided a middle ground and determined that although the letterhead was not actually misleading, it was potentially misleading.[69] Considered as a whole, these opinions yield the conclusion that NBTA certification is to be afforded at least limited first amendment protection.

The second level of analysis focused on balancing state interests in preventing misleading claims with the first amendment rights of the attorney and the public to the free exchange of information regarding certification of specialty. This analysis produced equally disparate views from the Court. The plurality determined that the state's interest in protecting against the possibility of deception does not "rebut the constitutional presumption favoring disclosure over concealment."[70] NBTA certification was verifiable and the attorney and the public had a right under the first amendment to free commercial speech with regard to NBTA certification.[71] The dissent concluded that states should be allowed to ban NBTA certification because requiring them to regulate certification is unduly cumbersome and is not required by the Constitution.[72] Justice Marshall solved the dilemma by insisting that because the letterhead had the potential to mislead consumers, states retained the right to regulate,

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67. Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281, 2293 (1990).
68. *Id.* at 2299 (O'Connor, J., dissenting).
69. *Id.* at 2293, 2297 (Marshall, J., concurring; White, J., dissenting).
70. *Id.* at 2293.
71. *Id.* at 2288-89.
72. *Id.* at 2301 (O'Connor J., dissenting).

but not absolutely prohibit, communication of NBTA certification.[73] Realizing that the decision in the case would have implications on advertising, certification, and state regulation, the Court carefully scrutinized the role of certification and state regulation in preventing misleading claims.

A. Advertising and Specialty Certification

The implications of the *Peel* decision are yet to be felt. Viewed from the advertising perspective, the decision extends the *Bates* line of cases by adding specialty certification to the list of permissible types of attorney advertising. The effect of the *Bates* decision on legal advertising provides a basis to conclude that the *Peel* decision will not open the floodgates of certification advertising. After *Bates*, the legal profession proceeded cautiously in its use of advertising. In fact, "3 percent of lawyers advertised in 1978, 13 percent in 1984, 24 percent in 1985, and in 1986, 32 percent."[74] Advertising of specialty certification is likely to take a similar course as attorneys test the waters to determine what each state will allow and what significance the public attaches to certification of specialized fields of practice.

From the certification viewpoint, *Peel* recognizes both the benefits and dangers associated with communication of certification. The plurality recognized the benefits of NBTA certification and the importance of encouraging specialty certification programs.[75] It noted that NBTA certification as a trial specialist requires strict adherence to "objective and demanding" standards and procedures developed and approved by leading legal authorities, including judges, scholars, and practitioners.[76] The Court noted that "a certification of specialty by NBTA would indicate a level of expertise with regard to trial advocacy in excess of the level of expertise required for admission to the bar generally."[77] The Court further acknowledged that truthful disclosure of NBTA certification "serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys."[78] In recognizing the positive values of this private certification group, the Court provided each state with a model program for ensuring professional competence and providing the public with accurate information on legal specialization.

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73. *Id.* at 2296 (Marshall J., concurring).

74. Sawaya, *Willy Loman Joins the Bar*, 76 A.B.A. J. 88 (Oct. 1990).

75. Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281, 2284-85 (1990).

76. *Id.*

77. *Id.* at 2285 (quoting *Ex parte* Howell, 487 So. 2d 848, 851 (Ala. 1986)).

78. *Id.* at 2293.

Although the plurality concluded that NBTA certification was verifiable and consumers should be free to infer for themselves the degree of quality that flows from an evaluation of NBTA requirements,[79] the Court recognized that states have an interest in protecting the public from hollow claims by bogus certification groups.[80] Both the concurring and dissenting opinions expressed concerns over the dangers of misleading the public through recognition of NBTA certification and the implied quality claims that the public may attach to such certification.[81]

Both the dissenting and concurring opinions hypothesized that without formal state recognition, advertising certification by the NBTA could be misconstrued by consumers to be certification by the government. This potentially misleading information could be derived in two ways. First, because the certification was from the "National" Board of Trial Advocacy, consumers could believe that the designation was from a federal program.[82] Second, because all states license attorneys and some states certify attorneys, the public could be misled into the belief that all certification programs are recognized by the state.[83] In response, the plurality maintained that the public knows the difference between state "licensing" and private "certification."[84] The entire Court, however, based this line of reasoning on tenuous interpretations of dictionary meanings and not empirical studies of the public's perception of the terms "national," "license," and "certification." Assuming, *arguendo*, that the public may be misled by NBTA certification, Justice Marshall correctly noted that the problem of distinguishing between government and private certification may be easily cured through the use of a disclaimer.[85]

Not so easily dispelled by mere use of a disclaimer is the concern that designation as a "specialist" might mislead consumers through implied claims of quality. Although advertising of certification as a specialist does not itself make a claim of quality, it naturally implies superior services. ABA studies, relied on by the entire Court, have shown that the public believes that the term "specialist" implies better services.[86] Because certification as a specialist implies superior skills, certifying

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79. *Id.* at 2288.

80. *Id.* at 2292.

81. *Id.* at 2293 (Marshall J., concurring); *id.* at 2297 (White J., dissenting); *id.* at 2298 (O'Connor J., dissenting).

82. *Id.* at 2294 (Marshall J., concurring).

83. *Id.* at 2300 (O'Connor J., dissenting).

84. *Id.* at 2289.

85. *Id.* at 2296 (Marshall, J., concurring).

86. ABA STANDING COMMITTEE ON SPECIALIZATION, A SURVEY ON HOW THE PUBLIC PERCEIVES A SPECIALIST, INFORMATION BULLETIN #10 (1988).

groups requiring little more than mere payment of fees present the danger of misleading the public into the belief that the specialist has achieved an adequate level of competence. Because the public perception of a specialist is one with superior expertise, it is imperative that states regulate the advertising of certified specialists in a manner that adequately informs the public of the specialized skills attained through certification.[87]

The *Peel* decision tactfully evades an outright endorsement of certification programs as a means of preventing misleading claims while remaining within first amendment confines. It does, however, recognize the benefits of NBTA certification. The Court noted that state screening of certification programs may minimize the dangers associated with specialization advertising and that many states already recognize certification programs and allow attorneys to advertise their certification to the public.[88] This recognition and the decision to allow communication of specialty certification may provide the impetus for other legal specialty organizations to develop programs to certify their members. *Peel* opens the door to formal recognition of specialty certification, adds certification to the list of advertising forms which are not inherently misleading, and suggests alternative schemes of state regulation to prevent potentially misleading claims of certification.

B. State Regulation

The *Peel* decision compels each state to reevaluate its current regulatory scheme and decide for itself the least restrictive method of regulating the advertisement of certification of specialization. The plurality favored state recognition of bona fide certification programs and suggested that this could be accomplished through screening private certification groups.[89] The dissent, however, opposed this method because it is unduly burdensome and not required by the Constitution.[90] The plurality mediated these positions by suggesting that an alternative to state sanctioning of certification programs is to require the advertising to carry a disclaimer or disclosure.[91] This latter view recognizes the states' role in regulating their own bars and the political and constitutional ramifications of requiring states to adopt certification programs. Whichever method the state chooses, it should be mindful that the Court favors disclosure over concealment.

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87. Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281, 2295-96 (1990) (Marshall, J., concurring).

88. *Id.* at 2288 & n.11.

89. *Id.* at 2293.

90. *Id.* at 2301 (O'Connor, J., dissenting).

91. *Id.* at 2292.

The policy of favoring disclosure over concealment finds support in two negative inferences. First, the converse policy of favoring concealment of information from the consumer presupposes that the public is inherently ignorant.[92] The dissent surmised that "the public lacks sophistication concerning legal services."[93] The plurality opinion chose instead to "reject the paternalistic assumption that the recipients of [the] petitioner's letterhead [were] no more discriminating than the audience for children's television."[94] This analogy by the plurality may be overly general because, in legal advertising, both the audience and the product are more sophisticated than children's television advertising. However, the plurality view correctly elevates the consumer of legal services to a level of knowledge consistent with today's informed society. Second, the plurality recognized that use of an absolute prohibition to ban communication of NBTA certification is undermined by the ad hoc approach of excepting certain specialties such as "Registered Patent Attorney" and "Proctor in Admiralty," which pose the same risk of deception.[95] If the concern is for the consumer, the policy of favoring disclosure over concealment provides more information on which to make decisions. Thus, regulation, not prohibition, best serves the public.

Currently, twenty-seven states and the District of Columbia ban lawyer certification advertising and will be directly affected by the *Peel* decision.[96] Most of these states have modeled their rules dealing with advertising of certified specialty after the ABA Model Rule of Professional Conduct 7.4 which prohibits a lawyer from stating or implying that the lawyer is a specialist except for patent, trademark, or admiralty.[97] *Peel* suggests that this group of states relax the outright ban and implement alternative regulatory schemes to guard against the possibility of misleading the public into believing that the designation of certified specialist implies superior services or that the state has certified the lawyer as a specialist. The *Peel* decision requires all states with rules modeled after ABA Rule 7.4 or its predecessor DR 2-105,[98] to modify

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92. *Id.* at 2290 n.13.

93. *Id.* at 2300 (O'Connor, J., dissenting) (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977)).

94. *Id.* at 2290.

95. *Id.* at 2291.

96. These states are: Alaska, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Gibbons, *The Right to Specialize*, 76 A.B.A. J. 56, 59 (May 1990).

97. *See supra* note 1.

98. Model Code of Professional Responsibility Disciplinary Rule 2-105 (1977) pro-

their rules to regulate, rather than prohibit, advertising of certification of specialization.

The *Peel* decision indirectly affects the remaining states by forcing them to evaluate their current regulations on advertising of certification of specialization. The eleven states that maintain certification plans will need to determine whether to recognize private certification programs. Failure to recognize these programs could sound the death knell for private certifying groups by decreasing the incentive for affiliation. This is a counterproductive result because these groups supply "powerful professional and economic incentives to increase competence"[99] and provide a uniform national standard. The seven states with no ban on advertising of certification of specialization need to consider the advantages offered by certification programs in assuring minimum levels of competence of members of the bar.[100] Least affected by the decision are the four states which already have systems to approve private specialty certification programs.[101] Although the *Peel* decision affects states in varying degrees, the Court's positive recognition of NBTA certification deserves evaluation by each state.

III. Regulating Certified Specialist Advertising

A. Method of Evaluation

In contemplating which method of regulation to adopt, states should first consider the goals of regulating specialty certification advertising.

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vides:

> (A) A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of the law or as limiting his practice . . . except as follows:
>
> (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.
>
> (2) A lawyer who publicly discloses fields of law in which the lawyer . . . practices or states his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by the [agency having jurisdiction of the subject under state law].
>
> (3) 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, but only in accordance with the rules prescribed by that authority.

99. Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281, 2284 n.2 (1990) (quoting Brief for Academy of Certified Trial Lawyers of Minnesota as Amicus Curiae at 15).

100. These states are: Kansas, Michigan, Montana, North Dakota, Oklahoma, Rhode Island, and Wyoming. Gibbons, *supra* note 96, at 59.

101. *See supra* note 28 and accompanying text.

Analysis of earlier cases in attorney advertising provides three areas of concern which translate into the overall objectives of regulation. Regulation should seek to assist in the free flow of information to the public, to ensure that the information is not misleading, and to promote quality and competence in the legal profession. States should seek to integrate these objectives with the results of the following internal analysis in selecting the appropriate regulatory scheme.

Each state should perform an internal analysis to determine the current status of the legal profession within the state. This self-analysis should consider factors such as the population of the state relative to the number of lawyers available, the interest level of lawyers in participating in specialty certification programs, the fields of specialization to be implemented, ethical considerations, and the cost of developing and administering the program.

In states where the population is spread out, the practice of law is more general and the need for specialization and certification programs decreases. Conversely, states which have heavy concentrations of lawyers specializing in narrow practices should consider certification programs a high priority. States with considerable numbers of de facto specialists should find a high interest level in many certification programs. All states should consider the more prevalent ethical considerations: the duty to determine the degree of competence which will ensure that the public is not misled, the duty to provide the public with access to legal services, the duty to guarantee the general practitioner that specialization will not adversely affect the profession, and the duty not to create entry barriers for young and minority lawyers. Finally, the cost of administration in most programs may be offset through fees so that most plans are able to achieve self-sufficiency. Not every state is ripe for the regulation of specialization, and performing an internal analysis should provide each state with guidance in choosing the best method of regulation. Because each state will have a unique set of parameters to operate within, this Note necessarily focuses on analyzing each alternative in relation to the overall objectives of regulation.

B. Alternative Regulatory Schemes

A spectrum of alternatives exists for regulating attorney advertising of certification of specialization. On one extreme is the path of least resistance: the state merely requires that the advertising be truthful and allows the free market to regulate itself. On the other extreme is a national certification program such as the "Registered Patent Attorney" designation in which the federal government certifies practitioners. In between are disclaimers, disclosures, state recognition of private certification programs, state operated certification programs, the ABA Model

Plan of Specialization, and combinations of these. Each alternative has advantages and disadvantages that should be carefully considered by each state.

Free market regulation, the least restrictive option, allows attorneys to advertise their specialty and certification as long as it is not misleading.[102] The seven states that do not ban specialty advertising rely on the free market forces of supply, demand, and competition to regulate specialty advertising. Lawyers, free to communicate and specialize along any parameters they may choose, provide consumers with maximum information on the availability of legal services.[103] Consumer demand for certain expertise encourages the development of specialties and provides efficient allocation of legal resources. Competition among lawyers encourages efficiency within the profession which arguably lowers costs to the consumer.[104] This scheme increases the free flow of useful information to consumers because communication is not limited to state approved specialties. Free market regulation is the most efficient means of allocating legal resources and the absence of state regulation means that the taxpayer is not burdened with the costs of program administration.

Although the absence of a ban on advertising certification and specialization increases the free flow of information at no cost to the taxpayer, it does little to protect the consumer against potentially misleading claims or to assure attorney competence. The absence of a regulating body to screen specialty and certification claims may result in consumers receiving information that is potentially misleading. Consumers are free to employ the judicial system to redress deceptive claims, but this course is pursued after the injury and results in the judicial inefficiency of case by case review. The system does not provide any measurable way to ensure professional competence other than through competition. This regulatory alternative trades off the goals of ensuring attorney competence and protecting the consumer against potentially

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102. An example of this type of scheme is found in Michigan Bar, Formal Opinion C-232 (November 1984): "A lawyer may advertise that he or she is a 'specialist' in a specific field of practice only under certain circumstances, depending on whether use of the term is misleading. . . ."

103. L. LoPucki, The De Facto Pattern of Lawyer Specialization 11-12 (1990) (suggesting that lawyers specialize along at least eight parameters: body of knowledge, type of client, side, operation, forum, geographical area, size of the matter, and relation to team).

104. *See, e.g.*, Hazard, Pearce, & Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084 (1983); McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. Pa. L. Rev. 45 (1985).

misleading advertising for maximum flow of information and minimum administration costs.

The *Peel* Court suggested that disclaimers or disclosures could be used as an alternative method to regulate communication of specialty certification.[105] A disclaimer will inform the consumer that the certification was not by any government agency. A disclosure will also provide the consumer with the requirements for certification. Either method permits the free flow of information and attempts to prevent the presentation of misleading claims by informing the public of the nature of the certification.

The ABA modification of Rule 7.3 in response to *Shapero* illustrates a workable use of a disclaimer requiring targeted direct mail to be labeled as "Advertising Material" to inform the consumer of the nature of the letter.[106] The problem with disclaimers and disclosures is that an unduly burdensome requirement may do indirectly what the state cannot do directly: prohibit the communication of certification.[107] For example, requiring a complete list of certification requirements on a business card virtually prohibits the communication of certification by that media; therefore, states must be careful not to overburden disclaimer requirements when little guidance exists on content or length of disclosures or disclaimers.[108] A more pragmatic problem exists when the same disclaimer appears in every attorney advertisement.[109] Because the disclaimer is so common, the consumer becomes oblivious to the message and consequently it is of little or no value.

This disclaimer/disclosure alternative, like market regulation, misses the objective of assuring quality in the profession because it does not impose additional requirements or minimum standards of competence. "Any advertising scheme which does not provide for the quality concept will constantly be confronted with the problem of deceptive advertising and overreaching under the code of professional responsibility."[110] The disclaimer/disclosure method is, however, a minimum cost, minimum implementation program that fulfills the first amendment requirements of *Peel*. Illinois used this alternative as a band-aid response to the *Peel*

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105. Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281, 2292 (1990).

106. 83 Law Man. on Prof. Conduct (ABA/BNA) § 81:402 (1989).

107. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

108. This may well be the next area the courts will be called on to address. Stewart, *The Rights of Lawyers* 76 A.B.A. J. 34, 38 (Aug. 1990).

109. A good example is the yellow page directory of Louisville, Kentucky where each attorney advertisement carries the disclaimer, "This is an advertisement. Kentucky law does not certify specialists."

110. Staton, *Access to Legal Services Through Advertising and Specialization*, 53 IND. L.J. 247, 251 (1978).

decision while continuing to study certification of specialization alternatives.

Only specialty certification programs address quality and are capable of achieving the objective of ensuring attorney competence. These certification programs come in two varieties: state approved private certification plans and state operated certification programs. Proponents of specialization urge states to adopt either plan based on the following reasons: (1) de facto specialization exists today and should be recognized; (2) the recognition of specialists will enhance legal competence in a particular field; (3) consumers will have more access to information; (4) specialization will lead to reduced costs for legal services; and (5) failure to recognize specialties implies that lawyers are competent in all fields.[111] Opponents are concerned that: (1) certification may adversely effect noncertified lawyers; (2) voluntary programs may become mandatory; (3) certification programs may favor large established urban firms; and (4) existing programs bear little relation to the de facto pattern of specialization in the legal profession.[112] Both state approved and state operated programs guarantee adherence to standardized requirements designed to provide a recognized level of expertise. The programs are voluntary and do not prohibit noncertified attorneys from practicing in specialty areas or prevent certified specialists from practicing outside their area of expertise.[113]

State operated certification programs directly screen attorneys in order to ensure expertise. In 1971, California initiated its certification program which requires five years in the practice of law, a percentage of time in the specialty, continuing legal education, peer review, and successful completion of a written examination.[114] Currently, California recognizes six areas of specialization,[115] and eleven states operate similar programs.[116] One criticism of these plans is that communication of certification is limited to state certification. Although this protects the consumer against misleading advertising, it limits the free flow of consumer information to those specialties recognized by the state. The programs do, however, promote competence in the profession by imposing initial requirements, recertification, and continuing legal education programs. Because the

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111. Comment, *Lawyer Advertising and Specialization In Montana: An Alternative Approach*, 43 MONT. L. REV. 131, 141 (1982).

112. L. LOPUCKI, *supra* note 103, at 1-2.

113. Zehnle, *supra* note 17, at 21.

114. *Id.* at 22. *See also*, ABA HANDBOOK, *supra* note 11, at 14.

115. These areas are: criminal law, family law, immigration and nationality law, probate estate planning and trust law, taxation law, and workers' compensation law. Status Report, *supra* note 22, at 1.

116. *See supra* note 32.

state administers the program, the costs of the program are higher than other regulatory methods. Most state certification programs, however, provide for financing through fees charged to applicants.[117] State operated programs prevent misleading information and assure competence at the cost of state administered programs and limited communication of specialization.

State approval of private certification programs appears to be a viable alternative in view of the Supreme Court's recognition that NBTA certification was indeed truthful advertising. Minnesota is one of the four states that has adopted a plan for approval of certifying agencies.[118] The plan closely approximates that of the NBTA and requires, *inter alia*, a minimum of twenty-five percent of total time devoted to the specialty in the prior three years, peer evaluation, and successful completion of an objective written or oral examination.[119] Screening certifying

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117. For example, California Rules of Court, Rules and Regulations of the State Bar of California Program for Certifying Legal Specialists § II(D)(1) (1991) which provides:

> The fee to apply for certification and recertification shall be set by the board. Payment shall be required as a condition to the filing of the application. If the applicant for recertification chooses to take the written examination, the application fee shall be the same as the fee for certification.

118. MINN. RULES OF COURT, PLAN FOR MINNESOTA STATE BOARD OF LEGAL CERTIFICATION (1990).

119. Minnesota Rules of Court, Plan for Minnesota State Board of Legal Certification Rule 5 (1991) in its entirety reads:

> 5.01 The persons in a certifying agency shall include lawyers who, in the judgment of the Board, are experts in the area of the law covered by the specialty and who each have extensive practice or involvement in the specialty area.
>
> 5.02 A certifying agency's standards for certification of specialists must include, as a minimum, the standards required for certification set out in this Plan and in the rules, regulations, and standards adopted by the Board from time to time. Such standards shall not unlawfully discriminate against any lawyer properly qualified for certification as a specialist, but shall provide a reasonable basis for the determination that the lawyer possesses special competence in a particular field of law, as demonstrated by the following means:
>
> 5.021 Substantial involvement in the specialty area during the three-year period immediately preceding application to the certifying agency. "Substantial involvement" is measured by the amount of time spent practicing in the specialty area: A minimum of 25% of the practice of the lawyer must be spent in the specialty area.
>
> 5.022 Peer recommendations from attorneys or judges who are familiar with the competence of the lawyer, none of whom are related to, or engaged in legal practice with, the lawyer.
>
> 5.023 Objective evaluation of the lawyer's knowledge of the substantive and procedural law in the specialty area, to be determined by written and/or oral examination. The examination shall include a part devoted to professional responsibility and ethics as it relates to the particular specialty.

organizations ensures that certified specialists will maintain a predetermined level of competence, and by providing that only approved specialty certification may be advertised, the state protects the public from misleading certification claims. The problem with this alternative is that with the exception of the NBTA, no national specialization groups have responded to the needs of the profession for specialty certification.

The ABA Model Plan of Specialization provides a workable plan for states wishing to embark on specialization programs. This plan, once adopted, is administered by the state. Each state is free to adopt the entire plan or only applicable parts. This alternative provides more free flow of information than pure state developed and operated certification programs and serves the public in at least four ways. First, as a national organization, the ABA can respond to the need for new specialty programs more effectively and efficiently than a single state operated program. The current ABA Model Plan of Specialization recognizes twenty-four areas of specialization.[120] This is more than any one state currently offers, and each state is free to choose which specialty areas are appropriate. This provides consumers with a greater variety of information on available legal services by certifying and allowing more specialists to advertise. Second, state certification using the ABA model plan is verifiable by the consumer; therefore, advertising by state certified specialists will not be misleading. Third, adoption of the ABA model plan provides uniform levels of competency among the states adopting the plan. This facilitates multijurisdictional referrals by assuring that specialists have a

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5.03 The certifying agency shall be responsible for making appropriate investigations of peer recommendations and for the obtaining of any other data that may be required to assure the lawyer is in compliance with the legal certification program.

5.04 The certifying agency shall register all lawyers whom it certifies as specialists pursuant to the Plan and shall report to the Board those lawyers who are certified, maintaining, however, the confidentiality of information on applicants as required by law.

5.05 Each certifying agency shall annually submit to the Board a report of its activities during the previous year, including a demonstration of the measures employed to ensure compliance with the provisions of this rule.

5.06 The certifying agency shall cooperate at all times with the Board and perform such other duties as may be required by the Board so that the Plan is properly administered.

120. These areas are: admiralty, appellate practice, bankruptcy, business and corporate, civil rights, civil trial practice, collection, commercial, criminal, estate planning and probate, family, governmental contracts and claims, immigration, insurance, international, labor and employment, military administrative, patent, trademark and copyright, personal injury and property damage, real property, securities, taxation, workers' compensation, and franchise law. ABA STANDING COMMITTEE ON SPECIALIZATION, MODEL STANDARDS FOR SPECIALTY AREAS (1990).

uniform minimum level of competency. Finally, because the preliminary study and plan development is already completed, states avoid many administrative costs, leaving more funds in the private sector to stimulate the economy. The problem with this plan is that it does not provide for recognition or screening of private certification groups such as the NTBA. In light of *Peel,* provisions need to be incorporated to regulate rather than prohibit advertising of NBTA certification. With this exception, this alternative combines the best features of free market regulation with those of private and state certification to meet the goals of regulation: to provide consumer access to legal information, to prevent misleading advertising, ensure attorney competence, and to avoid hefty administrative costs.

National certification plans, such as the "Patent Attorney" or "Proctor in Admiralty" designations approach the extreme limits of regulation. Although every state recognizes and allows these specialties to advertise, the federal government is not likely to create more areas of specialization to keep up with consumer demand. National certification does not present a viable option in view of the *Peel* decision. The Court left each state, not the federal government, to regulate its own bar with respect to attorney advertising and certification. States must evaluate the various options for regulating attorney advertising of certification of specialization with a keen awareness of first amendment rights and the overall goals of regulation.

IV. Conclusion

Specialization, whether de facto, self-designated, or certified, is a way of life in the legal profession. Certification serves a vital societal interest by recognizing specialists and confirming that they possess the required skills for the specialty. Extending the line of attorney advertising cases favoring disclosure over concealment, *Peel* recognizes an attorney's right to specialize and communicate certification as a specialist so long as it is not misleading. To prevent misleading claims of certification, each state is free to choose the most appropriate method of regulation, but absolute prohibitions on advertising of certification violate the first amendment. Examining *Peel* and the *Bates* line of cases reveals recurring concerns that may be translated into objectives for regulation of certification advertising. The goals of regulation should be to provide the consumer with access to legal information, prevent misleading advertising, and ensure professional competence while remaining within the first amendment.

Examining the alternative regulatory schemes in relation to these objectives reveals the advantages and disadvantages of each. Free market regulation offers the greatest exchange of information and the most

efficient allocation of legal resources by permitting advertising of any specialty as long as it is not misleading. Disclaimers and disclosures provide the consumer with information on the nature of certification and thereby prevent misleading advertising. These alternatives meet the objectives of providing access to legal services, but fall short of the objective of ensuring professional competence.

Only certification plans meet all the objectives set forth for regulating advertising. States that operate certification plans regulate by screening attorneys directly while states that approve private certification groups regulate by assuring that certifying agencies adequately screen members. These plans ensure professional quality by demanding adherence to predesignated levels of competence before advertising of certification is permitted. State certification plans meet the objectives of regulation, but suffer from the disadvantage of restricting specialization advertising exclusively to state developed programs. State approval of private certification groups not only meets the objectives of regulation, but provides for advertising of NBTA certification. The problem here is that private national groups have been slow to respond to consumer demand.

The ABA Model Plan of Specialization is unequivocally the most workable plan available today. It combines the best features of free market regulation and private and state operated certification programs. As a national organization, it can develop certification programs in response to a greater number of market forces. This lessens the burden on each state to anticipate new specialty certification areas and avoids hefty development costs. It does not, however, provide for recognition of private certification groups which should be addressed either by the ABA within its plan or by each state adopting the current ABA plan. Although *Peel* does not recommend any one regulatory scheme, it compels states to make provisions other than an outright ban to allow communication of specialty certification. Given the expansive trend in attorney advertising and the Court's recognition of certification programs, states would be well advised to begin planning for the use of certification programs in their regulatory schemes.

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APPENDIX

AMERICAN BAR ASSOCIATION
MODEL PLAN OF SPECIALIZATION

The following Model Plan of Specialization was proposed by the ABA Standing Committee on Specialization and was adopted by the House of Delegates on August 15, 1979.

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1. Purpose

The purpose of this Plan of Specialization ("Plan") is to assist in the delivery of legal services to the public by:

1.1 Providing greater access by the public to appropriate legal services;

1.2 Identifying and improving the quality and competence of legal services; and

1.3 Providing appropriate legal services at reasoneble cost.

2. Establishment of Board of Legal Specialization

The Supreme Court hereby establishes a Board of Legal Specialization ("Board"), which Board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers. The Board shall be composed of nine members appointed by the Supreme Court. One of the members of the Board shall be the chairperson of the Advisory Commission (described in Section 7) and all other members of the Board shall be lawyers licensed and currently in good standing to practice law in this state. The lawyer members of the Board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize. One of the lawyer members shall be designated annually by the Supreme Court as chairperson of the Board. The lawyer members of the Board shall hold office for three years, except those initially appointed who shall serve as hereinafter designated. The lawyer members shall be appointed by the Supreme Court to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; three shall serve two years after appointment; and three shall serve for three years after appointment. Appointment to a vacancy among the lawyer members shall be made by the Supreme Court for the remaining term of that lawyer member leaving the Board. Any lawyer member shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term.

Meetings of the Board shall be held at regular intervals, at such times and places and upon such notice as the Board may from time to time prescribe.

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3. Powers and Duties of the Board

The Board shall have general jurisdiction of all matters pertaining to regulation of specialization and recognition of specialists in the practice of law and shall have the power and duty:

3.1 To administer the Plan;

3.2 To designate specialties of law practice and define the scope and limits of such specialties and to provide procedures for the achievement of these purposes;

3.3 To appoint, supervise, act on the recommendations of and consult with Specialty Committees as hereinafter identified;

3.4 To consult with the Advisory Commission as hereinafter identified;

3.5 To make and publish standards for the recognition of specialists, upon the Board's own initiative or upon consideration of recommendations made by the Specialty Committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;

3.6 To recognize specialists or deny, suspend or revoke the recognition of specialists upon the Board's own initiative, upon recommendations made by the Specialty Committees or upon requests for review of recommendations made by the Specialty Committees;

3.7 To establish and publish procedures, rules, regulations and bylaws to implement this Plan;

3.8 To propose, and request the Supreme Court to make, amendments to this Plan whenever appropriate;

3.9 To cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Code of Professional Responsibility of this state to the appropriate disciplinary authority;

3.10 To evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives for the purpose of meeting the continuing legal education requirements established by the Board for the recognition of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to be given in cooperation with the authority having jurisdiction over continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, the authority having jurisdiction over continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists; and

3.11 To cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization.

4. Retained Jurisdiction of the Supreme Court

The Supreme Court retains jurisdiction with respect to the following matters:

4.1 Amending this Plan;

4.2 Hearing appeals taken from actions of the Board; and

4.3 Establishing or approving fees to be charged in connection with this Plan.

5. Privileges Conferred and Limitations Imposed

The Board in the implementation of this Plan shall not alter the following privileges and responsibilities of recognized specialists and other lawyers:

5.1 No standard shall be approved which shall in any way limit the right of a recognized specialist to practice in all fields of law. Any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is recognized as a specialist in a particular field of law;

5.2 No lawyer shall be required to be recognized as a specialist in order to practice in the field of law covered by that specialty. Any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law; even though he or she is not recognized as a specialist in that field;

5.3 All requirements for and all benefits to be derived from recognition as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member;

5.4 Participation in the program shall be on a completely voluntary basis;

5.5 A lawyer may be recognized as a specialist in more than one field of law. The limitation on the number of specialties in which a lawyer may be recogized as a specialist shall be determined only by such practical limits as are imposed by the requirement of substantial involvement and such other standards as may be established by the Board as a prerequisite to recognition as a specialist;

5.6 When a client is referred by another lawyer to a lawyer who is a recognized specialist under this Plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope of his or her representation and, consonant with any requirements of the Code of Professional Responsibility of this state, such specialist shall not enlarge the scope of representation of a referred client outside the area of the specialty field; and

5.7 Any lawyer recognized as a specialist under this Plan shall be entitled to advertise that he or she is a "Board Recognized Specialist" in his or her specialty to the extent permitted by the Code of Professional Responsibility of this state.

6. Specialty Committees

The Board shall establish a separate Specialty Committee for each specialty in which specialists are to be recognized. The Specialty Committee shall be composed of seven members appointed by the Board, one of whom shall be designated annually by the Board as chairperson of the Specialty Committee. Members of the Specialty Committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the Board, are competent in the field of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the Board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the Board to a vacancy shall be for the remaining term of the member leaving the Specialty Committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term. Meetings of the Specialty Committee shall be held at regular intervals, at such times and places and upon such notice as the Specialty Committee may from time to time prescribe or upon direction of the Board.

Each Specialty Committee shall advise and assist the Board in carrying out the Board's objectives and in the implementation and regulation of this Plan in that specialty. Each Specialty Committee shall advise and make recommendations to the Board as to standards for the specialty and the recognition of individual specialists in that specialty. Each Specialty Committee shall be charged with actively administering the Plan in its specialty and, with respect to that specialty, shall:

6.1 After public hearing on due notice, recommend to the Board reasonable and nondiscriminatory standards applicable to that specialty;

6.2 Make recommendations to the Board for recognition, continued recognition, denial, suspension or revocation of recognition of specialists and for procedures with respect thereto;

6.3 Administer procedures established by the Board for applications for recognition and continued recognition as a specialist and for denial, suspension or revocation of such recognition;

6.4 Administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for recognition or continued recognition as specialists;

6.5 Make recommendations to the Board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty; and

6.6 Perform such other duties and make such other recommendations as may be requested of or delegated to the Specialty Committee by the Board.

7. Advisory Commission

The Supreme Court shall appoint an Advisory Commission composed of five nonlawyers, one of whom shall be designated annually by the Supreme Court as chairperson of the Advisory Commission. The Advisory Commission shall assist and advise the Board as to the public's legal needs and assist the Board in determining how the public can best be served through the specialization program. The members of the Advisory Commission shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the Supreme Court to staggered terms of office as follows: one shall serve for one year after appointment; two shall serve for two years after appointment; and two shall serve for three years after appointment. Appointment to a vacancy shall be made by the Supreme Court for the remaining term of the member leaving the Advisory Commission . Any member shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term. Meetings of the Advisory Commission shall be held at regular intervals at such times and places and upon such notice as the Advisory Commission shall prescribe or upon direction of the Board. Members of the Advisory Commission shall have the right to attend all meetings of the Board and the chairperson of the Advisory Commission shall be a voting member of the Board.

8. Minimum Standards for Recognition of Specialists

To qualify for recognition as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the Board with respect to the specialty knowledge of the law of this state and competence and must comply with the following minimum standards:

8.1 The applicant must be licensed and currently in good standing to practice law in this state;

8.2 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of substantial involvement in the specialty during the three years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the area of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit recognition of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence.

Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, teaching, judicial, government or corporate legal experience;

8.3 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of continuing legal education accredited by the Board for the specialty, the minimum being an average of ten hours of credit for continuing legal education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the Board, upon advice from the appropriate Specialty Committee, may prescribe or may be waived if, and to the extent, suitable continuing legal education courses have not been available during the three years immediately preceding establishment of the specialty; and

8.4 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the Board, or appropriate Specialty Committee, of all such references, the appropriate disciplinary body and other persons regarding the applicant's competence and qualification to be recognized as a specialist.

9. Minimum Standards for Continued Recognition of Specialists

The period or recognition as a specialist shall be five years. During such period the Board or appropriate Specialty Committee may require evidence from the specialist of his or her continued qualifications for recognition as a specialist and the specialist must consent to inquiry by the Board, or appropriate Specialty Committee, of lawyers and judges, the appropriate disciplinary body or others in the community regarding the specialist's continued competence and qualification to be recognized as a specialist. Application for and approval of continued recognition as a specialist shall be required prior to the end of each five-year period. To qualify for continued recognition as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the Board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards:

9.1 The specialist must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of substantial involvement (which shall be determined in accordance with the principles set forth in Section 8.2) in the specialty during the entire period of recognition as a specialist;

9.2 The specialist must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of continuing legal education accredited by the Board for the specialty during the period of recognition as a specialist, the minimum being an average of ten hours of credit for continuing legal education, or its equivalent, for each year during the entire period of recognition as a specialist; and

9.3 The specialist must comply with the requirements set forth in Sections 8.1 and 8.4, above.

10. Establishment of Additional Standards

The Specialty Committee for each specialty may recommend, and the Board may establish, additional or more stringent standards, including, but not limited to, oral or written examinations, or a combination of such examinations. If examination is required, it must be applied uniformly to all applicants; provided, however, that waiver of the requirement may be permitted if additional and substantially more stringent standards are required of those for whom waiver is permitted. The Specialty Committee may also recommend, and the Board may establish, requirements which further define or quantify with at least equal stringency the minimum standards set forth herein for recognition or continued recognition as a specialist. Additional standards or requirements established under this section need not be the same for initial recognition and continued recognition as a specialist.

11. Suspension or Revocation of Recognition as a Specialist

The Board may revoke its recognition of a lawyer as a specialist if the specialization program in the specialty is terminated or may suspend or revoke such recognition if it is determined, upon the Board's own initiative or upon recommendation of the appropriate Specialty Committee and after hearing before the Board on appropriate notice, that:

11.1 The recognition of the lawyer as a specialist was made contrary to the rules and regulations of the Board;

11.2 The lawyer recognized as a specialist made a false representation, omission or misstatement of material fact to the Board or appropriate Specialty Committee;

11.3 The lawyer recognized as a specialist has failed to abide by all rules and regulations promulgated by the Board;

11.4 The lawyer recognized as a specialist has failed to pay the fees required;

11.5 The lawyer recognized as a specialist no longer meets the standards established by the Board for the recognition of specialists; or

11.6 The lawyer recognized as a specialist has been disciplined, disbarred or suspended from practice by the Supreme Court or any other state or federal court or agency.

The lawyer recognized as a specialist has a duty to inform the Board promptly of any fact or circumstance described in Sections 11.1 through 11.6, above.

If the Board revokes its recognition of a lawyer as a specialist, the lawyer cannot again be recognized as a specialist unless he or she so qualifies upon application made as if for initial recognition as a specialist and upon such other conditions as the Board may prescribe. If the Board suspends recognition of a lawyer as a specialist, such recognition cannot be reinstated except upon the lawyer's application therefore and compliance with such conditions and requirements as the Board may prescribe.

12. Right of Hearing and Appeal to Supreme Court

A lawyer who is denied recognition or continued recognition as a specialist or whose recognition is suspended or revoked shall have the right to a hearing before the Board and, thereafter, the right to appeal the ruling made thereon by the Board to the Supreme Court under such rules and regulations as the Board and the Supreme Court may prescribe.

13. Financing the Plan

The financing of the Plan shall be derived solely from applicants and participants in the Plan. If fees are not established by the Supreme Court, the Board shall establish reasonable fees in each specialty field in such amounts as may be necessary to defray the expense of administering the Plan, which fees may be adjusted from time to time. If established or adjusted by the Board, however, the fees must be approved by the Supreme Court as provided in Section 4.3, above.

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