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Regulation of Legal Specialization: Neglect by the Organized Bar

Recent developments in the areas of legal specialization and malpractice have had a significant impact upon the legal profession. Although there has long been activity in both areas,¹ only recently have courts and the organized bar considered recognizing a separate legal malpractice standard for attorneys who specialize in a particular area of the law.² This note will, first, analyze the degree to which courts and the organized bar presently recognize specialization by attorneys, and, second, suggest steps the bar should take before the courts assume the initiative in establishing specialization standards. The assumption underlying this note is that it is preferable to formulate these standards through an organized planning procedure than to allow the courts to create them on a case by case basis.

I. Present Status of Legal Specialization

The legal profession has debated whether to formally recognize legal specialization for many years.³ Despite the intensity of this controversy, *de facto* specialization by attorneys is so common that the authors of the leading treatise on legal malpractice consider the debate "academic."⁴ Recent studies indicate the extent of *de facto* attorney specialization. For example, a 1975 survey of Illinois attorneys⁵ showed that only slightly more than one percent of the nearly two thousand respondents considered themselves general practitioners. Approximately fifty percent considered themselves general practitioners with one or more specialty areas, and forty-eight percent considered themselves to be exclusively engaged in specialized practices.⁶ Other surveys have yielded similar results.⁷ These surveys show unequivocally that specialization has become a permanent characteristic of the legal profession, despite its lack of formal

1 The first known legal malpractice action occurred in 1435, when a sergeant-at-law was held liable for malfeasance. See *Rondol v. Worsley*, 1 A.C. 191 (1961), cited in R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* § 3 (1977). Specialization, which is undoubtedly as old as the legal profession itself, originated in attorneys' refusal to handle certain types of cases. More formal specialization dates from the separation of functions between barristers and solicitors in England during the sixteenth and seventeenth centuries. *Id.* The barrister/solicitor distinction did not carry over to the United States, and recognizable specialization in this country did not begin to develop until the mid-nineteenth century. Prior to that time, advocacy, counseling, and even teaching were all commonly performed by general practitioners. See G. GREENWOOD, & R. FREDRICKSON, *SPECIALIZATION IN THE MEDICAL AND LEGAL PROFESSIONS* 49-51 (1964).

2 See note 50 *infra* and accompanying text.

3 This controversy has generated a large amount of legal writing. A bibliography of materials published on the topic appears at 34 *THE RECORD* 441 (1979).

4 MALLIN AND LEVIT, *supra* note 1, at § 114.

5 64 *ILL. B.J.* 73 (1975).

6 For purposes of this survey, an attorney was considered to be engaged in a specialized practice if he devoted at least 25% of his practice time to one area of the law. *Id.* at 102.

7 A frequently cited California survey indicated that two-thirds of the attorneys in that state considered themselves *de facto* specialists. California State Bar Committee on Specialization, Preliminary Report, 44 *CAL. ST. B.J.* 140 (1969). See also Esau, *Specialization in the Legal Profession*, 9 *MAN. L.J.* 255, 260-63 (1979). The precise extent of *de facto* specialization in the United States is difficult to determine because "specialization" has various definitions. V. COUNTRYMEN, T. FINMAN, & T. SCHNEVER, *THE LAWYER IN MODERN SOCIETY* 786 (1975).

recognition.⁸ This is hardly surprising, since in our complex legal system "lawyers . . . cannot be equally competent for all tasks"⁹

A. Recognition by the Bar

The history of the American Bar Association (ABA) in dealing with the specialization issue has been marked by hesitancy and failure. Nevertheless, the ABA has been moving inexorably, if slowly, toward recognition of some form of specialization within the legal profession.

The ABA's House of Delegates first recognized the need to regulate attorney specialization in 1954. The ABA Board of Governors appointed a subcommittee to study the problem. It recommended a plan for national specialty recognition. That plan was strongly opposed, however, and consequently no action was taken on it.¹⁰ In 1961 another ABA special committee drafted a regulatory plan similar to the 1954 proposal, but it too met strong opposition from the bar membership. In 1963 the committee was disbanded and its proposal shelved.¹¹

In 1967 the specialization issue was raised again, and the ABA Special Committee on Specialization was created. Although the Committee's initial report¹² recognized the inevitability of legal specialization,¹³ it recommended: "The American Bar Association should not promulgate a national plan to regulate voluntary specialization at this time. The determination whether to promulgate such a plan should not be made until pilot or experimental programs . . . have been conducted at the state level . . . and the experiences thus obtained have become available."¹⁴ This recommendation was accepted by the ABA House of Delegates at its 1969 mid-year meeting.¹⁵ The result was a moratorium on the ABA leadership's efforts to regulate attorney specialization; and the responsibility for developing regulations was passed to the state bar associations.

Although the 1969 Specialization Committee's report included general guidelines for states developing individual specialization plans, those guidelines impinged very little on the state associations' freedom to shape their own specialization policies.¹⁶ This decentralized approach had the advantage of allowing each state to adopt a plan suitable to its individual needs. However, it had the disadvantage of creating widely divergent state plans. The most signifi-

8 See also Special Committee on Specialization, *Report*, 94 A.B.A. REP. 248, 250 (1969): "Even though many lawyers still at least pay lip service to the concept that a lawyer can be a jack of all legal trades, the committee finds that in fact modern lawyers cannot be fully proficient and efficient in every field of the law, and that most lawyers now clearly accept that fact by self-imposed restrictions on their own practice."

9 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).

10 Derrick, *Specialization: Where Do We Go From Here?*, 33 TEX. B.J. 255, 256 (1970).

11 *Id.*

12 Special Committee on Specialization, *Report* 94 A.B.A. REP. 248 (1969) [hereinafter referred to as 1969 Committee Report].

13 "We believe that our ever-expanding economy will inevitably lead to an ever-increasing pattern of specialization by practicing lawyers in a limited number of the various fields of law practice." *Id.* at 250.

14 *Id.* at 248.

15 1969 Midyear Meeting of the House of Delegates, *Proceedings*, 94 A.B.A. REP. 115, 129-32 (1969).

16 State experimentation with different types of plans was encouraged by the resolution adopted by the House of Delegates. Experimentation was deemed appropriate given the lack of experience at regulating legal specialization. *Id.* at 130.

cant result of passing responsibility to the state bar associations, however, was the acquiescence of the ABA to its loss of future control over the development of legal specialization. Indeed, it may have permanently forfeited its opportunity to establish a cohesive program to regulate legal specialization on a national basis.

The legal profession's fragmented approach to specialization regulation stands in stark contrast to the scheme of national specialty recognition developed by the medical profession. While the medical specialization system is certainly not perfect, it has proven successful for that professional group.¹⁷ Although any national specialty certification program established by the ABA in 1969 might have contained flaws, it would have improved with time. The important point is that by opting out of the certification process in 1969, the ABA greatly increased the difficulty of establishing national specialization criteria at a later time.¹⁸

Shortly after the ABA abdicated the leadership role in the regulation of legal specialists, the states began to adopt individual plans.¹⁹ Nine states to date have implemented specialization plans,²⁰ and most other states are considering such plans.²¹ The state plans currently in operation share several common features.²² First, each is voluntary, and allows both specialists and non-specialists to practice in any area of the law.²³ Second, each provides for revocation of an attorney's specialist status under specified conditions.²⁴ Third, each contains a provision dealing with the ethical problem of a specialist

17 The American Board of Medical Specialties has supervisory power over the more than twenty individual specialty boards, and coordinates medical specialty certification in the United States. Joiner, *Specialization in the Law? The Medical Profession Shows the Way*, 39 A.B.A.J. 539 (1959). However, the individual medical specialty boards have primary responsibility for establishing national specialty certification standards, determining the competence of candidates, and issuing certificates to qualifying candidates. A.M.A. REQUIREMENTS FOR CERTIFICATION, DIRECTORY OF APPROVED RESIDENCIES 394 (1974-75). This system results in nationally standardized requirements for certification in each specialty area. See Note, *Medical Specialties and the Locality Rule*, 14 STAN. L. REV. 884, 888 (1962).

A major problem with the medical profession's approach is that each specialty board is largely autonomous. This factionalization should be avoided by the legal profession. 1969 Committee Report, *supra* note 12, at 251. Nonetheless, the establishment of national standards by the medical profession remains a meritorious example for the legal profession.

18 A minority report to the 1969 Committee Report advocated establishing national standards for specialty certification, stating:

"Unless some strong central agency acts as the overseeing agency, development of specialization will likely become so inconsistent and factionalized that it will be beyond redemption in the future and the practice of law, as we know it today, will be lost, as well as will the possibility of ever developing the full potential of specialization."

Joiner, *Minority Report and Separate Statement*, 94 A.B.A. REP. 255 (1969).

19 California was the first state to approve a specialization plan. Its Supreme Court approved an experimental plan in February 1971. Other states soon followed, with New Mexico approving a plan in 1973 and Florida and Texas in 1975. Zehnle, *Specialization in the Legal Profession - An Analysis of Current Proposals*, A.B.A. SPECIALIZATION MONOGRAPH No. 2, 20, 22-25 (1975).

20 These states are California, Texas, Arizona, New Jersey, Florida, Georgia, Iowa, South Carolina, and New Mexico. ABA STANDING COMMITTEE ON SPECIALIZATION, INFORMATION BULLETIN No. 7, 36-42 (1980) [hereinafter referred to as INFORMATION BULLETIN No. 7].

21 *Id.*

22 Zehnle, *supra* note 19, at 21-22. Minor differences can be seen even in the common features, however. INFORMATION BULLETIN No. 7, *supra* note 20, at 43-58.

23 The plan once considered by Kentucky is unique. Under it, an attorney certified as a specialist would be unable to practice law in areas other than those chosen as his specialty fields. Esau, *Specialization in the Legal Profession*, 9 MAN. L.J. 225, 297 (1979). While such a plan might someday be the norm, it is unlikely to gain widespread acceptance at present.

One commentator has argued that all trial attorneys should be required to be certified. Note, *Legal Specialization and Certification*, 61 VA. L. REV. 434 (1975). No state has yet accepted such a plan, however.

24 The most common condition is failure to meet periodic recertification requirements. INFORMATION BULLETIN No. 7, *supra* note 20, at 43-51.

expanding his representation of clients referred to him by other attorneys.

Despite these common features, the state plans vary widely on the crucial issue of the basis for specialty designation. California's restrictive approach is at one extreme, and New Mexico's liberal approach at the other. Florida's plan represents a middle ground.²⁵ The other states largely imitated one of these three approaches.

California requires attorneys desiring specialty status to pass an examination prior to obtaining official certification by the Board of Legal Specialization unless granted certification under the state's "grandfather" provision.²⁶ To insure the attorney's continued competence in his specialty, recertification is required every five years.²⁷

Florida does not require an examination. Rather, it allows attorneys to designate areas of law in which they practice while forbidding their use of the term "specialist." Florida attorneys need only (1) attest to having a certain minimal amount of experience in an area of law, and (2) promise to enroll in continuing legal education (CLE) programs in that area. Continuing designation of attorneys' areas of practice is contingent upon their completion of 30 hours of CLE in each specialty area during the three-year designation period.²⁸

Finally, New Mexico allows attorneys to designate themselves specialists if they have devoted a minimum of 60 percent of their time to a given area of the law during the preceding five years. Like Florida, New Mexico requires CLE as a prerequisite to recertification. Also, attorneys may call themselves specialists only so long as they continue to meet the substantial involvement requirement.²⁹

The California, Florida and New Mexico plans also vary in the number of legal areas in which they permit attorneys to specialize. As might be expected, states following a rigorous certification process allow fewer areas of specialization. Thus, California initially allowed only three specialization areas, although it has since slowly expanded that number.³⁰ States adopting the self-designation approach generally allow specialization in a greater number of fields. For example, New Mexico originally listed 38 areas of specialization, and that number has expanded rapidly.³¹ Florida gave attorneys the right to list any area of practice, "so long as the designation be of a generally accepted area of legal practice . . . be phrased in a dignified and professional manner," and so long as "the prior approval of The Florida Bar [is] obtained."³² Since the in-

25 A summary of these three approaches appears at 48 FLA. B.J. 168 (1974).

26 "Grandfather" certification is possible under several plans. Although the exact requirements vary, the California "grandfather" provision is typical. It requires 10 years of law practice and "substantial involvement" in the specialty area of law for 5 years prior to certification.

"Substantial involvement" in an area of the law is also necessary for non-grandfather applicants in California. "Substantial involvement" consists of: (1) devoting a minimum amount of time to the specialty field, and (2) meeting specific involvement requirements. (For example, participation in five misdemeanor jury trials is one prerequisite to becoming a criminal law specialist.) See Esau, *supra* note 23, at 275-83.

27 *Id.*

28 *Id.* at 292.

29 *Id.* at 288.

30 *Id.* at 282-83.

31 By 1976, just three years after the plan had become effective, New Mexico recognized 62 specialty fields. Zehnle, *supra* note 19, at 24.

32 48 FLA. B.J. 178 (1974).

ception of the Florida plan, more than 23 areas of practice have been approved.³³

State specialization plans, then, vary greatly in both their scope and their substantive rules.³⁴ As evidence of the sometimes enigmatic nature of state specialization plans, Florida and New Mexico each allow designation of a "general practice" specialty. These vast differences attest to the lack of uniformity in attorney specialization caused by the ABA's abdication of its leadership role. In 1974, after several states had already adopted specialization plans, the ABA Special Committee on Specialization urged the states which had not yet adopted plans to forgo implementing pilot programs until those plans already in effect could be further evaluated.³⁵ However, the 1977 United States Supreme Court decision of *Bates v. State Bar of Arizona*,³⁶ upholding attorneys' constitutional right to advertise, increased the need for regulation of attorney specialization. Following *Bates*, the American Bar Association issued a report urging the states to begin implementing specialization plans.³⁷ The House of Delegates adopted guidelines for creation of such programs in 1978, and in 1979 formally approved a model plan of specialization for the states to follow.³⁸

The ABA's actions in the wake of *Bates* reflect its recognition of the inevitability of legal specialization plans and the urgency of establishing formal regulation. The ABA has persistently refused, however, to establish a national board to oversee the orderly development of uniform legal specialization. The ABA's shifting of this function to the states is shortsighted. It is far more difficult to achieve a consensus of fifty individual state organizations than to obtain the consent of one large organization. Indeed, it is often difficult to establish and maintain a consensus within an individual state. The California state bar's governors recently reversed its decision to make its pilot program permanent, and both Indiana and New York have recently defeated specialization proposals.³⁹ Finally, even if all fifty states approve programs, the programs will doubtless contain significant discrepancies. These discrepancies will stand in stark contrast to the uniformity of the medical profession's national specialization standards.⁴⁰

B. Recognition by the Courts

Recent judicial action has brought about a union of legal specialization

33 Esau, *supra* note 23, at 292.

34 Many other differences besides those noted in the text exist among the state plans already adopted or under consideration. These differences range from whether peer evaluation of applicants is required to whether law firms may designate areas of specialization.

35 ABA STANDING COMMITTEE ON SPECIALIZATION, INFORMATION BULLETIN No. 6, 41 (1980) [hereinafter referred to as INFORMATION BULLETIN No. 6].

36 433 U.S. 340 (1977).

37 INFORMATION BULLETIN No. 6, *supra* note 35, at 39-42.

38 *Id.*

39 See *Lawscope*, 66 A.B.A.J. 270 (1980). However, Texas recently changed its experimental certification program to a permanent one. *Id.*

40 While the model plan of specialization, see text accompanying note 38 *supra*, does provide the basis for national standards, the extent to which it will be followed by the states is uncertain. While all states but Oregon, Maryland, and West Virginia are currently working to create their own specialty programs, or have created such programs, only ten have considered proposals based upon the ABA Model Plan. INFORMATION BULLETIN No. 7, *supra* note 20, at 36-42.

and legal malpractice. This development emphasizes the need for the organized bar to clarify its position on legal specialization.

Judicial recognition of legal specialization has focused upon the standard of care required of specialist attorneys. Most courts state an attorney's standard of care without reference to whether the attorney is a specialist.⁴¹ While the specific language used varies among jurisdictions, the normal standard of care for attorneys may be expressed as "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction."⁴² The lack of cases considering the standard of care required of legal specialists is due partly to the legal community's failure to recognize specialization and partly to prior restrictions on lawyer advertising which reduced public expectations of specialized competence.⁴³

The courts' failure to alter the standard of care required of legal specialists is inconsistent with their treatment of specialists in other professions. Medical specialists have long been held to a higher standard of care than general practitioners.⁴⁴ The courts have reasoned that because a medical specialist is hired for his higher degree of skill, "it follows that his duty to the patient cannot be measured by the average skill of general practitioners."⁴⁵ It was only a matter of time before this kind of holding was juxtaposed with the common judicial pronouncement that "attorneys are very properly held to the same rule of liability for want of professional skill and diligence . . . as are physicians, surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions . . ."⁴⁶ This juxtaposition has made courts begin to hold legal specialists to a higher standard of care than other attorneys.

The first case suggesting that specialist attorneys would be held to a higher standard of care was *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*.⁴⁷ In that

41 Judicial non recognition of specialization has at times been extreme. In *Olson v. North*, 276 Ill. App. 457 (1934), the court failed to consider the possibility of imposing a higher standard for specialists, even though the attorney charged with malpractice had held himself out as especially competent in defending criminal cases.

42 *Cook, Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 395, 438 P.2d 865, 867 (1968). Most judicial expressions of the required standard of skill and care refer to the degree of care exercised by an "ordinary" or "reasonable" attorney.

The reference in *Clausing* to the reasonable attorney "in this jurisdiction" contemplates a statewide standard of care. While there is some support for limiting the standard to the practice of attorneys within a given locality, e.g., *Cook v. Iron*, 409 S.W.2d 475 (Tex. Civ. App. 1966), this limitation is not uniformly accepted. Houser, *Legal Malpractice—An Overview*, 55 N.D. L. Rev. 185, 197-98 (1979). Given the recent abandonment of the locality rule in medical malpractice cases, it seems unlikely that attorneys' liability will continue to be premised upon the standard of a local geographical base. For comment on the medical locality rule see D. HARNEY, *MEDICAL MALPRACTICE* 95-101 (1973); Comment, *Standard of Care for Medical Specialists*, 16 ST. LOUIS U. L.J. 497 (1972).

43 See text accompanying notes 35-37 *supra*.

44 As early as 1872 American cases had intimated a higher standard of care for medical specialists. *Carpenter v. Blake*, 50 N.Y. 696 (1872). Medical specialists are now almost universally held to a higher standard of care than general practitioners in malpractice actions. HARNEY, *supra* note 42, at 116; W. PROSSER, *LAW OF TORTS* § 32 (4th ed. 1971).

45 *Baker v. Hancock*, 29 Ind. App. 456, 461, 63 N.E. 323, 325 (1902).

46 *Hughes v. Malone*, 146 Ga. App. 341, 345, 247 S.E.2d 107, 111 (1978), quoting from *Citizens' Loan Fund & Savings Ass'n v. Friedley*, 123 Ind. 143, 145, 23 N.E. 1075 (1890). Other recent cases equating the standard of care of the legal profession with that of the medical profession include *George v. Caton*, 600 P.2d 822 (N.M. App.), cert. denied, 598 P.2d 215 (1979); *Kurtenbach v. Tekippe*, 260 N.W.2d 53 (Iowa 1977).

47 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971).

case a malpractice action was brought against defendant attorneys for their failure to have the summons served on the complaint they filed for the plaintiff. The attorneys raised the statute of limitations as one of their defenses. In *Neel*, the California Supreme Court adopted the "time of discovery" statute of limitations rule for attorneys, by analogizing to the medical profession.⁴⁸ The court, in a rather expansive statement, went on to announce a malpractice standard of care applicable to all professions. It stated that "the special obligation of the professional is . . . to use the skill, prudence, and diligence commonly exercised by practitioners in his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists."⁴⁹ Had this pronouncement not been dictum, it would have made specialists within the legal profession subject to the same standard as medical specialists.

The universal professional standard of care suggested in *Neel* is properly regarded as mere dictum. It was not until *Wright v. Williams*⁵⁰ that a court specifically held a legal specialist to a higher standard of skill. The plaintiff in *Wright* had been referred to the defendant, a maritime lawyer. The defendant performed a title search on a boat the plaintiff intended to purchase, but failed to inform the plaintiff that the boat could not be used in "coastwide trade." The plaintiff purchased the boat and later discovered the use limitation, which prevented his operating the boat as he had planned. The California Court of Appeals held that a higher standard of care applied to legal specialists, but ruled against the plaintiff because he failed to present expert testimony as to what was necessary to meet a specialist's standard.⁵¹

The language used by the court to define the higher standard of care was derived from language of prior California decisions setting forth the normal standard for attorneys. The prior language required attorneys to represent their clients with "such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake," compared with attorneys "in the same or a similar locality under similar circumstances. . . ."⁵² The court retained the "similar circumstances" language, but shifted the focus of the comparison. It stated that "[o]ne who holds himself out as a legal specialist performs in *similar circumstances* to other specialists but not to general practitioners of the law."⁵³ Because most state courts express the normal standard of skill and care for attorneys in language similar to that used in California, those courts are also in a

48 The time of discovery statute of limitations principle considers only the time after the injured party knows or should have known of the injury for purposes of determining the timeliness of a complaint. 6 Cal. 3d at 194, 491 P.2d at 433, 98 Cal. Rptr. at 849.

49 *Id.* at 188, 491 P.2d at 428, 98 Cal. Rptr. at 844.

50 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975).

51 47 Cal. App. 3d at 811, 121 Cal. Rptr. at 200.

52 47 Cal. App. 3d at 809, 121 Cal. Rptr. at 199.

53 47 Cal. App. 3d at 810, 121 Cal. Rptr. at 199 (emphasis added).

position to create a higher standard of care for specialists.⁵⁴ When appropriate suits arise, those jurisdictions may well adopt the *Wright* holding.

In conjunction with finding a higher standard of skill for specialists, the courts will be likely to create a "duty to consult." This duty would require general practitioners lacking the expertise to handle certain legal problems to seek the help of a legal specialist. Such a duty has long been recognized in medical malpractice jurisprudence,⁵⁵ and is at least implied by the ABA Code of Professional Responsibility.⁵⁶ Not until very recently, however, did a court hold an attorney liable for failure to fulfill such a duty.⁵⁷

*Horne v. Peckham*⁵⁸ was the first case to hold that an attorney who acknowledges that a legal problem is beyond his capabilities must refer his client to a specialist. The client in *Horne* sought to defer income from certain property he owned. The attorney recognized that the work was beyond his capabilities, but did not refer the client to a tax specialist. He instead established a trust which later proved ineffective in deferring the client's income and resulted in large tax assessments against the client. The California Court of Appeals affirmed the judgment against the attorney, holding that attorneys have a duty to consult specialists when presented with problems beyond their capabilities.⁵⁹

As other jurisdictions develop their law of legal specialists' malpractice, they will likely accept the *Horne* court's holding. Attorneys who fail to consult when under a duty to do so will be held to a specialist's standard of care.⁶⁰ If they are found not to have exercised the skill and care of a specialist, they will be liable for malpractice.⁶¹

A duty to consult does not compel general practitioners to seek the help of

⁵⁴ See, e.g., *Kurtenbach v. Tekippe*, 260 N.W.2d 53 (Iowa 1977); *George v. Caton*, 600 P.2d 822 (N.M. App.), cert. denied, 598 P.2d 215 (1979); *Dillard Smith Const. Co. v. Greene*, 337 So. 2d 841 (Fla. App. 1976).

In jurisdictions which tie the standard of care to that of ordinary or reasonable attorneys without referring to similar circumstances, the analogy made in *Wright* could not be so easily made. However, those jurisdictions could also recognize a higher standard of care for legal specialists. For example, although New York's medical malpractice standard of care makes no reference to similar circumstances, see *Hirschberg v. State*, 91 Misc. 2d 590, 398 N.Y.S.2d 470 (Ct. Cl. 1977), the New York courts have long subjected medical specialists to a higher standard than general practitioners. See *Carpenter v. Blake*, 50 N.Y. 696 (1872).

⁵⁵ See generally, Annot., 35 A.L.R.3d 349 (1971).

⁵⁶ Disciplinary Rule 6-101 states:

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

⁵⁷ Judicial adoption of a duty to consult was anticipated by several years in Comment, *Specialization: The Resulting Standard of Care and Duty to Consult*, 30 BAYLOR L. REV. 729, 737-38 (1978), and Schnidman & Salzler, *The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist*, 45 CIN. L. REV. 541, 547-48 (1976).

⁵⁸ 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

⁵⁹ *Id.* at 415, 158 Cal. Rptr. at 720.

⁶⁰ *Id.* at 414, 158 Cal. Rptr. at 720.

⁶¹ The jury instruction in *Horne* which specified these principles was based upon California's Book of Approved Jury Instructions, Instruction No. 6.04, and was originally intended for use in medical malpractice cases. It read as follows:

It is the duty of an attorney who is a general practitioner to refer his client to a specialist or recommend the assistance of a specialist if under the circumstances a reasonably careful and skillful practitioner would do so.

If he fails to perform that duty and undertakes to perform professional services without the aid of a specialist, it is his further duty to have the knowledge and skill ordinarily possessed, and exercise the care and skill ordinarily used by specialists in good standing in the same or similar locality under the same circumstances.

A failure to perform any such duty is negligence.

a specialist in all cases. As the court pointed out in *Horne*, many legal problems within a field of law in which specialization is recognized (for example, tax) can nevertheless be handled by general practitioners.⁶² However, when the problem is one for which a reasonable general practitioner would consult a specialist, the attorney must consult or be held to the higher standard of a specialist in the area.

There exists, then, widespread judicial recognition of physicians' duty to consult,⁶³ limited judicial recognition of attorneys' duty to consult,⁶⁴ and implicit recognition of such a duty for attorneys in the ABA Code of Professional Responsibility.⁶⁵ These three circumstances indicate that all lawyers⁶⁶ will eventually be held subject to a duty to consult. A fourth circumstance also supports this conclusion. The standard of care for attorneys is typically based upon the conduct of an "ordinary" or "reasonable" attorney.⁶⁷ If a "reasonable" attorney would consider it necessary to consult a legal specialist on a particular question, failure to so consult constitutes a breach of that standard. Therefore, the duty to consult will increasingly be applied as a facet of the normal standard of care.

II. The Need for Formal Specialization Standards

While the organized bar moves slowly toward recognizing and defining legal specialization, the judiciary is beginning to shape specialization for malpractice purposes without awaiting further word from the bar. Given the potential effect of this judicial activity on the legal profession, the bar should reconsider its hesitant acceptance of specialization and act to expedite development of a uniform national specialization plan.

A. *Issues of the Debate*

The debate over whether to approve specialization plans has focused upon the effect of such plans on attorney competence, costs to the client, and the legal profession in general.

1. Attorney Competence

The effect of recognized specialization would likely be to enhance attorneys' competence to deal with specific client problems. Certification would ensure that legal specialists possess a minimum level of competence; a continuing legal education requirement for recertification would ensure that specialists maintain their competence.

It has been argued that most clients would not benefit from this increased level of competence because of their inability to recognize legal problems re-

62 *Id.* at 415, 158 Cal. Rptr. at 720.

63 *Supra* note 55.

64 *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

65 *Supra* note 56.

66 This duty would also apply to specialists when they are confronted with a problem outside their area of specialization.

67 *Supra* note 42.

quiring the attention of a specialist.⁶⁸ However, the conjunction of a higher standard of skill for specialists and a general duty to consult would increase the likelihood that clients whose legal problems require the skills of a specialist receive such assistance. A nonspecialist faced with such problems would be unlikely to risk the malpractice suits which could arise from the failure to refer clients to a specialist.

To understand the relationship between specialization and competent representation it is necessary to consider the effect of legal advertising on public perceptions. *Bates v. State Bar of Arizona*⁶⁹ affirmed the constitutional right of attorneys to advertise the fields of law in which they practice. The ABA amended its Code of Professional Responsibility following *Bates* to permit "field advertising,"⁷⁰ but continued to prohibit a lawyer's claiming special expertise where such expertise was not formally recognized under a state specialization plan.⁷¹ The effectiveness of this arrangement is questionable. As the Tennessee Supreme Court recently pointed out, field advertising is "calculated to convey to the lay public the impression that the lawyer is a specialist and, therefore, possesses particular expertise in the advertised area."⁷² A specialist recognition plan is therefore necessary to allow the public to distinguish between (1) specialist attorneys, and (2) attorneys who are not specialists but utilize field advertising. Failure to implement such a plan not only will deprive the public of the increased competence resulting from recognition of legal specialists, but also will result in continued confusion engendered by field advertising.⁷³ One unfortunate product of this continued confusion will be a decline in public confidence in the legal profession.

Clients' frequent inability to ascertain the competence of their attorneys in a given area before retaining them is an acute problem, which state regulation of specialization cannot fully solve. Specialization programs would help solve this problem, however, by helping consumers find qualified counsel before they are injured by attorney incompetence.⁷⁴

2. Cost to the Client

The effect of specialization on the cost of legal services is frequently raised by both proponents and opponents of such plans.⁷⁵ Although some studies indicate that specialist attorneys generally realize higher total incomes than nonspecialists,⁷⁶ there is a paucity of statistics showing the actual cost of specialization to individual clients. Specialists should be able to handle prob-

68 Schnidman & Salzler, *supra* note 57, at 553; Wright, *It's Time for Specialization in Law Practice: Against*, 45 FLA. B.J. 11, 16 (1971).

69 433 U.S. 340 (1977).

70 ABA Model Code of Professional Responsibility, Disciplinary Rule 2-101. "Field advertising" is advertising the areas of law in which attorneys accept cases.

71 *Id.*

72 In Re Petition For Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638, 645 (Tenn. 1978). See also, Morrison, *Field Advertising—Special Competence or Ordinary Hucksterism? We Need A Specialization Rule Now!*, 66 ILL. B.J. 78 (1977).

73 As recognized by the Tennessee Supreme Court, without a specialization plan field advertising is bound to be deceptive and misleading. 564 S.W.2d at 645.

74 Note, *Legal Specialization and Certification*, 61 VA. L. REV. 434, 439 (1975).

75 See, e.g., Shields & Wright, *It's Time for Specialization in Law Practice*, 45 FLA. B.J. 10 (1971).

76 See, e.g., *Economics of Legal Services in Illinois*, 64 ILL. B.J. 73, 85-86 (1975).

lems more efficiently because of their mastery of the applicable background material. However, savings resulting from this increased efficiency might be offset by specialists' charging a higher hourly rate. The impact of specialization plans on the actual cost to clients for work done by legal specialists thus remains unclear.

3. The Legal Profession in General

Finally, specialization has been resisted because of its predicted effect on the legal profession.⁷⁷ It has been claimed that lawyers practicing in large law firms would be the primary beneficiaries of specialization. The validity of this claim is drawn into question, however, by studies showing that more than fifty percent of California's certified specialists work in firms with fewer than ten attorneys,⁷⁸ and that only twelve percent of Texas' legal specialists work in firms with more than twenty-five attorneys.⁷⁹ It has also been argued that specialization would limit the opportunities of young and minority lawyers. The ABA Standing Committee on Specialization has found, however, that "specialization plans generally permit [young and minority lawyers] to meet the objective standards of such plans and thus enable them to compete with the established large-firm *de facto* specialists. . . ."⁸⁰

It appears, then, that arguments based on fear of damaging the legal profession, like other traditional arguments against specialization plans, are not substantiated in practice. The concerns underlying these arguments do not justify the resistance to a uniform specialization plan that has slowed its enactment.

B. *Judicial Recognition of Specialists: The Bar's Call to Action*

The debate over specialization has to date given little consideration to judicially established specialization standards. As more courts begin to consider specialization in defining legal malpractice, however, the bar must begin analyzing the need for a specialization plan in light of the role of specialization in malpractice litigation. The bar's position on specialization will likely be critical to the courts' assessment of what constitutes legal malpractice.

The principles likely to be applied by courts in determining who will be held to a specialist's duty can be obtained by analogy from medical malpractice decisions. Those decisions hold that whether a doctor is a specialist is a question of fact, which is generally for the doctor's own determination,⁸¹ in that if he holds himself out as possessing the superior abilities of a specialist he will be held to a higher standard of care than is applied to a general practitioner.⁸² One

77 See, Wright, *supra* note 68, at 17; 1969 Committee Report, *supra* note 12, at 251.

78 *Lawscope*, 66 A.B.A.J. 270 (1980).

79 Nat'l L.J., Sept. 24, 1979, at 10, col. 1.

80 INFORMATION BULLETIN No. 6, *supra* note 35, at 2. See also *Lawscope*, *supra* note 78.

81 *Coleman v. Wilson*, 85 N.J.L. 203, 88 A. 1059 (1913).

82 See, e.g., *McBride v. United States*, 462 F.2d 72 (9th Cir. 1972), in which the court found Hawaii law to require that an individual hold himself out as a specialist before he would be held to a specialist's standard of care. The *McBride* court based its position upon § 299A of the RESTATEMENT OF TORTS (SECOND), which provides:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge ordinarily possessed by members of that profession or trade in good standing in similar communities.

court has carried this to an extreme, holding that even though a doctor is qualified as a specialist, he will not be held to a higher standard of care unless he holds himself out and receives patients on the basis of that specialty.⁸³ Considering the close similarity between legal and medical malpractice, these general rules will likely be applied in determining whether an attorney is a specialist.

Although professionals are not generally held to a specialist's standard of skill and care unless they hold themselves out as specialists,⁸⁴ the courts are not bound to that rule. In *Valentine v. Kaiser Foundation Hospitals*,⁸⁵ the California Court of Appeals held a doctor to the standard of a specialist even though he had only completed one-third of the residency program leading to a specialty in obstetrics and gynecology. The court stated that "the words 'hold himself out' do not have any independent significance under the law"; instead, "the difference between the duty owed by a specialist and that owed by a general practitioner lies . . . in the amount of skill required."⁸⁶ The court declared that since the doctor had performed between 600 and 800 circumcisions he could properly be expected to have more skill than a general practitioner.⁸⁷

The fact that courts might not look to whether a professional has "held himself out," as evidenced by *Valentine*, makes it essential that the organized bar establish objective standards for determining who is to be classified as a specialist. As one authority has noted, the courts will determine who will be viewed as specialists on a case-by-case basis, and in making the determination will consider the specialist recognition or certification that exists by the ABA and other professional organizations.⁸⁸ In addition, a firm position by the organized bar will assist the courts in differentiating between attorneys who hold themselves out as specialists and those who merely use field advertising.⁸⁹

The courts need not wait for the organized bar to outline the boundaries of specialization before holding attorneys to specialist standards in malpractice actions. The courts' willingness to recognize specialization in malpractice litigation despite bar inaction was indicated by the California Court of Appeals in *Horne v. Peckham*.⁹⁰ In *Horne*, the defendant contended that he could not be held to a duty to consult a specialist because at the time he performed the work at issue California did not recognize legal specialists. The court rejected this argument on the ground that *de facto* tax specialization existed in California at the time the work was done.⁹¹ In summary, specialization criteria established by the organized bar would affect the judicial development of legal specialization in two ways. First, it would give the courts objective standards for deciding whether an attorney who does not hold himself out as a specialist can fairly be held to a specialist's standard of skill and care. Second, it would assist the

83 *Baker v. Hancock*, 64 N.E. 38 (Ind. App. 1902).

84 *Supra* note 82.

85 194 Cal. App. 2d 282, 15 Cal. Rptr. 26 (1961).

86 194 Cal. App. 2d at 294, 15 Cal. Rptr. at 33.

87 *Id.*

88 MALLEN & LEVIT, *supra* note 1, at § 114.

89 Unless such a distinction is made, an attorney might be deemed to have "held himself out" as a specialist to the uneducated public by merely utilizing field advertising.

90 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979). See prior discussion in text accompanying notes 58-61 *supra*.

91 *Id.* at 414, 158 Cal. Rptr. at 720.

courts in distinguishing between true specialists and general practitioners using field advertising.⁹²

A specialization plan can most meaningfully affect judicial definitions of what constitutes specialization in legal malpractice litigation only if it incorporates objective, verifiable standards. Plans whose standards are not objectively verifiable are of little value because of the difficulty in distinguishing between attorney specialists and attorneys using field advertising.⁹³ While objective standards could be established through either a self-designation or a certification plan,⁹⁴ a certification plan adds a degree of formality and supervision which would insure greater competence than a self-designation plan.⁹⁵ The additional regulation and supervision by the bar would also increase the plan's influence with the courts.⁹⁶

The ABA should establish a certification program with uniform national criteria for certification.⁹⁷ This would increase the likelihood of rapid national approval of the program. While most states are exploring the possibility of specialty plans, the progress is slowed by localized opposition forces.⁹⁸

III. Conclusion

There exists today in the legal profession widespread *de facto* specialization and a distinct movement toward formal specialization. The courts have begun to recognize specialization in legal malpractice litigation, but at present such recognition is limited. Because of this limited recognition, the profession is still able to set specialization standards which will serve as the framework for further judicial activity in the area. Such action by the bar should be implemented on a national level to reverse the pattern of slow progress and wide disparity in the implementation of state specialization plans.⁹⁹ Establishing a national specialization plan would bring order to the haphazard recognition of legal specialization, as well as provide valuable guidance to the courts in defining "specialist" in legal malpractice litigation.

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92 That courts will give deference to the standards set by the bar was alluded to at the text accompanying note 88 *supra*. It is further evidenced by the opinion in *Horne*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979). In that case, the court created a duty to consult. The attorney in that decision was held liable for not consulting a tax specialist, although specialists were not formally recognized when the work was performed. The court supported its ruling by the facts that a tax specialty is commonly recognized in those states with bar approved specialization plans, and was recognized as one of the first areas of legal specialization in California. 158 Cal. Rptr. at 720.

93 INFORMATION BULLETIN NO. 6, *supra* note 35, at 45.

94 *Id.* at 44-45.

95 Note, *Legal Specialization and Certification*, 61 VA. L. REV. 434, 460-64 (1975).

96 The plan must be a credible one to deter the courts from applying a higher standard of skill and care where the practitioner is not a certified specialist. See notes 85-87 *supra* and accompanying text.

Judicial acceptance of the official certification standards of the bar could also benefit practicing attorneys in other ways. For example, attorneys would be able to rely upon specialist designations in fulfilling their duty to consult. Cf. *Horne*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979) (defendant attorney thought he had consulted a tax specialist, but the court determined that he had not).

97 *Supra* note 42.

98 See, e.g., *Lawscope*, 66 A.B.A.J. 270 (1980).

99 One hindrance to a national specialization program would be the current operational status of some state plans. However, since the state plans are few in number and in some cases only experimental, a national program would not face the obstacle of overturning well-established programs in every state. Indeed, a national plan could be put into operation concurrently with the state plans. In time, the state bar associations might voluntarily phase out their specialization plans.