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CHANGE IS ALWAYS A SHOCK: IS THERE  
SOME OTHER REASON YOU RESIST  
CONTROLLING SPECIALIZATION?

LEONARD H. BUCKLIN\*

Today's lawyer cannot be highly skilled in every field of law. A few exceptional lawyers may be able to expertly draft an oil lease, defend an NLRB labor law charge, draft a corporate resolution of indemnity to directors, and also cross-examine a police officer in a motion to suppress alleged evidence at a criminal trial. Yet even if these lawyers are *proficient* in all of these areas, they certainly could not be *efficient* in all of them.

Many lawyers could draft an oil lease. But for them to do so in the proper manner requires a substantial amount of research into oil and gas law, tax law and the general real property law of the state. They should also know the actual practices of the industry and what is likely to occur given a particular factual situation in oil drilling and development in the area. Most clients simply cannot afford to pay a lawyer for the research necessary to draft the lawyer's first oil lease. The same is true of many other tasks the lawyer is asked to do: the client simply cannot pay the lawyer for his learning time. Only when a lawyer concentrates his practice in particular areas can he charge a fair fee for doing an expert job. A lawyer simply cannot charge most clients for the time spent learning what has to be done.

Only when a lawyer concentrates his practice in particular areas does he make an effective and efficient use of his skills and knowledge. For example, only when he narrows his practice can he have a current knowledge of the developing principles in a particular field. If you are not doing NLRB work, you cannot spend the time (nor the money) to read the weekly changes to a looseleaf labor law reporting service. And if you don't read them

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you are unaware of the latest "devices" to put into labor contracts, and do not know whether you are advising the client properly when the labor investigator comes.

If doctors had not specialized many years ago, we probably still would not have routine kidney transplants, or improved ways of controlling acne. Only when the doctor concentrates his practice can he have the time to read current literature and know the newest techniques in the area in which he is a certified specialist. Certainly many surgeons could take out an appendix and repair the spinal cord nerves. Yet you would be shocked and discouraged if a neurosurgeon spent hours reading to discover the latest and best techniques of handling appendicitis, or if the chest surgeon spent hours finding out how to operate because it involved the repair of the spinal cord nerves. Lawyers, however, continue to muddle through and insist that given enough time they can do every job well. Would you be willing to pay a doctor to muddle through specialist's jobs as a part of a general practice, or pay the doctor for "reading up" instead of referring you to a specialist?

When lawyers undertake to perform legal services they cannot perform well, people have a right to criticize them. The public will not tolerate the continued rise in the cost of legal services. They may rightly complain when lawyers are inefficient and simply pass along the cost of their inefficiencies to their customers in the form of increased charges for professional services. Concentration of experience enables lawyers to provide better legal services in their specialty in less time with consequent savings to their clients.

To a certain extent lawyers know which of their brothers are specially competent in particular types of matters. They say: "Jones knows abstracts; Smith does drunk driving defenses; the Brown firm does a lot of securities work." But they don't know the specialties of lawyers outside of their own home town.

It is illuminating to watch a lawyer find an attorney in another state to handle a matter. Invariably the lawyer picks the largest firms in the town where the work is to be done. The rationale is that someone from a large firm must know more about the particular type of matter and field of law than the general practitioner. In short, lawyers recognize specialists. Although they don't know where to find them in a large firm.

Why don't lawyers intelligently inform themselves and the public about the identities of those certain lawyers who are specially competent?

The general public, and lawyers themselves, know that all attorneys are not equally skilled in every field of law. Lawyers

should properly discharge their professional responsibilities to the public and, to themselves, by telling people which members of their profession have special expertise in particular fields of law.

Specialization is a fact. Many lawyers have not looked at an abstract for quite some time. An equal number of lawyers handle felony defenses only infrequently. If we are to retain the trust of the public, and provide quality legal services, we must develop and control specialization.

There are anticipated obstacles, fears and objections to specialization that cannot be casually brushed aside. On the other hand, these problems should not prevent us from doing something. We have waited too long.

A perfect example of the reluctance of the legal profession to accept specialization was furnished by the ABA in 1968. The majority committee report on specialization said:

“It quickly agreed that some degree of specialization is properly an existing necessity of modern law practice. Specialization permits the lawyer to make the most efficient use of his time, skills and knowledge. . . . It also appears to us that an increase in the number of lawyers who specialize . . . would improve the overall quality of the total services rendered by lawyers to their clients, simply because those lawyers who specialize will have an opportunity to concentrate their experience and their continuing legal education.”<sup>1</sup>

After the committee had pointed out the desirability of specialization, the American Bar Association voted against a plan for regulating specialization because, among other reasons, the “problems of inexperience in regulating specialization.”<sup>2</sup> In short, specialization might be the most desirable thing in the world — but since it has never been done, lawyers won’t even try!

While we have waited, the public fumbles around trying to find the best people for its specialized problems.

While we have waited, others have taken over fields of law. The lay tax preparer, so well exemplified by the H & R Block Company, prepared tax returns because attorneys have not identified publicly those lawyers who can adroitly handle tax returns. The realtor prepared the deeds and closing papers in real estate transfers because even he has no way of knowing which lawyer can expertly do real estate work.

Long ago our medical friends recognized the need for specialization and embarked upon a program of certification and control.

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1. ADA REPORT OF COMMITTEE ON SPECIALIZATION (1968).  
2. *Id.*

The objections which lawyers now raise to certification of specialties were raised by doctors several years ago. As a result of the foresight of the medical profession, doctors' incomes have increased, the public is confident of getting specialized services, and the doctors have no fear of referring patients among themselves.

In my opinion, the reasons for taking action are two, namely: (1) today's lawyer cannot be both proficient and efficient in every field of law, and (2) the public and the general lawyer have a right to have lawyers develop and control specialization so that the specialist can be identified and used.

Numerous articles discuss specialization and the plans the organized bar should or should not have for it. Why don't we do something? What are we waiting for?

Only by planning and working is the job going to be done. Talking about specialization control in the abstract is not enough. Lawyers are accustomed to working with concrete examples, not with theory. Lawyers can accomplish the objective if they stop talking about the objective and start writing down the specific steps to be taken.

Attached as an appendix is a proposed plan to develop and control specialization in an orderly and proper manner in North Dakota. It is modeled upon the California Bar Association program. California has established specialization certification in the fields of criminal law, workmen's compensation and taxation.

The plan set out in the appendix may have defects. Nevertheless, it is at least a vehicle for discussion. Let us start now to develop and control specialization by working on the concrete plan.

Even if a plan such as noted in the appendix were adopted tomorrow, it probably would be at least a year or two before the appointed board would detail its tests and day-to-day administration of the program. Presumably, the committee forming the board of specialization would be composed of lawyers who would report any real problem they encountered in trying to set up the program.

The disciplinary rules adopted in North Dakota provide that:

"A lawyer shall not 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."<sup>3</sup>

If lawyers are to follow the mandate of that disciplinary rule, they must know who among them are especially competent in certain types of matters.

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3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 6-101 (1971).

Lawyers have a duty to assist the legal profession in fulfilling its responsibility to make legal counsel available. The statement of ethical considerations in our Code of Professional Responsibility says:

“The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laymen have difficulty in determining the competence of lawyers to render different types of legal services.”<sup>4</sup>

That is an ethical consideration that should prompt immediate action. If lawyers are to fulfill their own moral obligations, they must begin now to consciously develop and control specialization.

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4. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-7 (1971).

## APPENDIX

## PLAN FOR SPECIALIZATION IN NORTH DAKOTA

BE IT RESOLVED by the State Bar Association of North Dakota:

SECTION 1. ESTABLISHMENT AND COMPOSITION OF BOARD OF LEGAL SPECIALIZATION. The state bar association shall establish a board of legal specialization (hereinafter referred to as the "board") composed of six members. The first six members shall be appointed for terms of one to six years, so that for the first six years one member's term shall expire each year. Thereafter, the appointment of members to the board shall be by the president of the state bar with the approval of the executive committee of the state bar association. Vacancies in the board shall be filled the same way. The board shall be representative of the legal profession and shall include at least five practicing lawyers.

SECTION 2: DUTIES OF THE BOARD. The duties of the board shall be:

- a. To administer the program for the regulation of specialization.
- b. To make and publish standards concerning education, experience, proficiency and other relevant matters for granting certificates of special competence for lawyers in the fields of law hereinafter designated.
- c. To provide procedures for the investigation and testing of the qualifications of applicants.
- d. To issue appropriate certificates to legal specialists in the fields of law hereinafter designated.
- e. To make and publish rules and regulations to implement the authority duties of the board herein set forth.
- f. To cooperate with other agencies of the state bar in establishing and enforcing ethical standards for certified lawyers.
- g. To encourage law schools, the state bar committee on continuing legal education and local bar associations and to develop and maintain a program of legal education and continuing legal education to meet the standards required by the board.
- h. To cooperate with the special committee on specialization of the American Bar Association and with agencies in other states engaged in regulating legal specialization.

SECTION 3. LIMITATIONS ON THE POWER OF THE BOARD. The following limitations on the power of the board are established:

- a. No standard shall be approved which shall in any way limit the right of a certificate holder to practice law in all fields. Any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he is certified in a particular field of law.
- b. No lawyer shall be required to obtain a specialty certificate before he can practice law in any specialty field. Any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, even though he is not certified as a specialist in that field.
- c. All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by or attributed to the law firm of which the specialist may be a member.
- d. Participation in the plan shall be on a completely voluntary basis.
- e. The limit on the number of specialties in which a lawyer may be certified shall be determined by such practical limits as are imposed

by the requirement of substantial involvement (i.e., actual performance) and such other standards as may be established by the board as a prerequisite to certification.

**SECTION 4. ADVISORY COMMISSIONS.** Advisory commissions to the board shall be established for each field of law in which specialists are to be certified. These commissions shall advise and assist the board in carrying out its objectives and in the conduct and regulation of the program. Standards for certification of specialists shall be established by the board, but it will be advised in this by the advisory commission for each field of law. The advisory commission for each field shall be charged with actively administering the educational program in its particular field. The educational program shall be administered in cooperation with, and under the general policy guidance of, the board. Members of the advisory commissions shall be appointed by the executive committee of the state bar association on advice of the board of legal specialization.

**SECTION 5. STANDARDS FOR CERTIFICATION.** The minimum standards for certification in this program are set forth below. These are minimum standards. Each advisory commission may recommend, and the board may adopt, additional or higher standards. Lawyers who are members in good standing of the state bar of North Dakota and who meet the requirements prescribed by the board shall qualify for certification by the board. A lawyer meeting those requirements prescribed by the board shall be given a certificate by the board in a form approved by the board. The certificate shall identify the specialty practice and shall state the certifying agency, e.g., "Certified Specialist, Trial Practice — North Dakota Board of Legal Specialization."

- a. Requirements for qualifying for grandfather certification:
  - i. A minimum of ten years actual law practice in toto.
  - ii. A satisfactory showing, as determined by the board after advice from the appropriate advisory commission, of a substantial involvement (i.e., actual performance) in the particular field of law during a five year or other reasonable period, but not less than five years, immediately preceding certification. "Substantial involvement" may be measured by time spent in practice or by number and type of matters handled within a certain period, having in mind that mere limitation of practice does not, in itself, establish expertness. It is specifically suggested that substantial involvement include experience requirements measured by objective standards. The elements proving substantial involvement may vary from specialty to specialty. Substantial involvement must be defined by the board for each field with the advice of the appropriate advisory commission.
  - iii. Grandfather certification may be granted only after a period of two years after the date on which the plan of certification for a particular specialty is made effective by the board.
- b. Requirements for qualifying for certification other than by means of grandfather certification:
  - i. A minimum of five years actual law practice in toto.
  - ii. A satisfactory showing, as determined by the board after advice from the applicable advisory commission, of a substantial involvement (i.e., actual performance) in the particular field of law during a reasonable period of time immediately preceding certification as may be determined by the board after advice from the appropriate advisory commission. The discussion of the term "substantial involvement" above, under grandfather certification (5a, ii), also applies here.



- iii. A satisfactory showing, as determined by the board after advice from the applicable advisory commission, of special educational experience in the particular field of law. "Special educational experience" may consist of appropriate work under the auspices of the continuing legal education section of the bar association, law school postgraduate work, attendance at symposiums, lecturing in programs presented by any of the foregoing, and apprenticeship in a specialty.
- iv. Passage of a written examination applied uniformly to all applicants prior to certification to demonstrate sufficient knowledge, proficiency, and experience in that field of law and in the various fields of law relating to the specialty as is necessary to justify the representation of special competence to the legal profession and to the public.
- v. Passage of an oral examination, as may be determined to be appropriate by the board with the advice of the applicable advisory commission.

#### SECTION 6. APPROPRIATE SAFEGUARDS TO ENSURE CONTINUED PROFICIENCY AS A SPECIALIST.

- a. Recertification shall be required at least every five years.
- b. The standards or requirements for recertification shall be along the lines set forth above in 5b, ii and iii.
- c. In the event a lawyer fails to meet the requirements for recertification, he shall be entitled to take a written examination.

SECTION 7. REVOCATION OF CERTIFICATION. A certificate of specialty may be revoked by the board if the program for certification in that field is terminated or if it is determined after a hearing on appropriate notice that:

- a. The certificate was issued contrary to the rules and regulations of the board or of the state bar, or
- b. The certificate was issued to a lawyer who was not eligible to receive a certificate or who made any material false representation, or misstatement of material fact to the board, or
- c. The certificate holder has failed to abide by all the board's rules and regulations, or
- d. The certificate holder has been disciplined by the state bar for unethical conduct, or
- e. The certificate holder has failed to pay any fee established by the board.

SECTION 8. RIGHT OF APPEAL. A lawyer who is refused certification, recertification, or whose certification is revoked by the board, shall have the right to appeal the ruling of the board in accordance with the Administrative Procedures Act of this state.

SECTION 9. PROTECTION OF REFERRING ATTORNEYS. When a client is referred to a certified specialist by another attorney, the specialist shall not take advantage of his position to enlarge the scope of his representation. He shall not represent the client in matters outside the scope of the certified specialty without first (1) notifying the client's lawyer who made the referral; and (2) specifically advising, in writing, the client that the suggested matter is outside the scope of the specialty for which the attorney is certified. Failure to do so shall be grounds for revocation of the certification as a specialist.

#### SECTION 10. RULES OF CONDUCT OF PARTICIPANTS.

- a. Each participant in the specialization program, as a part of his appli-

- cation for certification, shall agree to abide by all the board's rules and regulations covering the certification.
- b. Any lawyer holding an active certificate of qualification as a specialist shall be entitled to the following:
    - i. To state in recognized and conventional legal directories or law lists that he is certified by the board in a particular field in the following form of words: "Certified Specialist, Trial Practice — North Dakota Board of Legal Specialization."
    - ii. To add to a brief, dignified notice that he may circulate among lawyers only, that he is rendering a specialized legal service, (such notice as presently permitted by the rules of professional conduct) the fact that he is certified by the board in a particular field in the following form of words: "Certified Specialist, Trial Practice — North Dakota Board of Legal Specialization."
  - c. No statement of certification shall be permitted on professional cards, shingles, letterheads, or otherwise than as above specifically set forth.

**SECTION 12. FINANCING PROGRAM.** The Board shall charge each applicant for certification a fee for the application. Further fees shall be charged on the granting of a certificate and upon a recertification. Such fees shall be in such amount as may be necessary to defray the entire expense of administering the certification program for the specialty involved.