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SPECIALTY CERTIFICATION, DESIGNATION, OR IDENTIFICATION FOR THE PRACTICING LAWYER — A LOOK AT MIDSTREAM†

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INTRODUCTION

When the School of Law of St. John's University opened its doors in September 1925 to admit its first class of law students, there were approximately 125,000 licensed attorneys in the United States. Now, some 50 years later, there are approximately 400,000 attorneys licensed in the United States, with over 55,000 in New York State alone.¹ Indeed, as a result of continued full enrollment at law schools throughout the country, it is estimated that each year 30,000 new graduates will be joining the ranks of those licensed to practice law in this country, and, at this rate, there may well be 500,000 lawyers licensed by 1980.

Obviously, the practice of law in 1925 was significantly less complicated and less specialized than it is today. The day of the tax counsel, labor lawyer, and workmen's compensation practitioner, to mention but a few, had not yet arrived. The possibility of attorneys someday devoting all or most of their time in such fields as securities regulation, environmental law, or civil rights, and participating in storefront public interest law firms would have been inconceivable to the general practitioner of the 1920's.

As society becomes more complex and the practicing lawyer is called upon to analyze, treat, and solve problems in a host of legal areas nonexistent in the 1920's, the fact of specialization, if not its formalization, has become recognized in diverse areas of the law. Few practitioners today can hope, claim, or even pretend to be masters of every field of the law. That lawyers have become specialists in certain areas of the law has been obvious for some time, and such narrowing of the focus of practicing attorneys has

† The views expressed in this Article are those of the authors and do not reflect the opinions or views of the New York State Bar Association or its Special Committee on Specialization.

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¹ See N.Y. Times, Nov. 17, 1974, § 4 (Week in Review), at 11, col. 3.

accelerated with the intensifying regulation of life in general and the demands of industry in particular. The day of the true general practitioner who handles every matter himself without referring to or consulting with others who have more particularized knowledge and experience is a thing of the past.

THE STUDY OF SPECIALIZATION

Faced with the fact of specialization, bar associations throughout the country have, over the course of the last decade, turned their attention to dealing with all of the aspects of specialization in the practice of law.² Threshold consideration, delimited by the various jurisdictions' understandable concern for self-sovereignty,³ has been given to the complex issues of encouraging, creating, and regulating specialization. This thoughtful attention and planning with respect to lawyer specialization is a relatively recent phenomenon following by more than half a century analogous regulation of specialization in the medical profession.⁴ Planning for specialization has progressed carefully and slowly, with a great deal of hard thought, analysis, and study on a state-by-state basis.⁵ Indeed, the rationale for control and regulation of the lawyer specialist has not yet been convincingly stated, either by the would-be regulators or by the persons to be regulated. Certainly it has not been spelled out by or for the public for whose benefit such regulation ostensibly would be undertaken. Moreover, in the development of specialization plans and studies, it is clear that there has been no marching to the same drummer.

Those who have been in the vanguard of the proposals for the regulation of specialization come from within the legal profession itself and assert as arguments in support of their plans benefits both to the bar and to clients. Three goals sought to be ac-

² See R. ZEHNLE, *SPECIALIZATION IN THE LEGAL PROFESSION: AN ANALYSIS OF CURRENT PROPOSALS* (American Bar Foundation 1975) [hereinafter cited as ZEHNLE]. Prepared at the request of the American Bar Association (ABA) Special Committee on Specialization, this study outlines and analyzes the existing specialization programs and is a provocative and invaluable preliminary treatment of the subject.

³ See generally Special Comm. on Specialization, *Recommendation and Report*, 94 A.B.A. REP. 248, 251-52 (1969).

⁴ See Joiner, *Specialization in the Law? The Medical Profession Shows the Way*, 39 A.B.A.J. 539 (1953). Medical specialization originated with local specialty boards, which developed certification programs, and the American Medical Association, which approved various graduate medical schools. These organizations merged, and, in 1933, the American Medical Association established a council charged with recognizing areas of specialty and approving an examining board to oversee each area. *Id.* at 540-42.

⁵ Although the various bar association studies on specialization are a relatively recent phenomena, the number of hours expended and the mass of written materials produced are truly astonishing. See ZEHNLE, *supra* note 2, at 45-48 (selected bibliography).

complished by institutionalized and regulated specialization are commonly advanced:⁶

1. Specialization-certification plans will encourage better education and training of lawyers in major specialty fields, will provide incentive for true professionalism in the practice of specialties, and will generally increase competence among lawyers.

2. Certification will allow clients and those who refer clients to select attorneys in a more knowledgeable and informed manner. Put in another way, consumer access to lawyer specialists will be increased in that a properly managed system of certification may greatly strengthen lawyer reference services in such bread-and-butter fields of everyday legal involvement as matrimonials, landlord-tenant, and automobile negligence.

3. Theoretically, unit costs of specialized legal services should be decreased.

Other commentators have criticized the specialization bandwagon as a self-protective product of the established bar and have indicated that there is no justification for institutionalizing ad hoc specialization, either on a certification, or a designation, or a self-identification basis.⁷ Nevertheless, regulation of legal specialists, even if only on an experimental basis, has arrived.

THE PILOT PROGRAMS

Since 1967 the American Bar Association (ABA) has had a specialization committee which has examined the specialization issue and has sought to monitor and observe the operation of various state specialization plans. The ABA Special Committee on Specialization (Committee) has repeatedly taken the position that "it neither approves nor objects to the concept of formal recognition of lawyer specialists."⁸ At its inception, the Committee encouraged experimental specialization programs. Although it proposed that three states initiate such projects, which it would then evaluate,

⁶ See Special Comm. on Specialization, *Report*, 1975 A.B.A. REP. No. 258, at 4. Although it has been suggested that the specialist will realize increased income as a result of a more efficient handling of cases, this reason has been deemed subordinate to the primary purpose of benefiting the public. See Cantrall, *A Country Lawyer Looks at "Specialization,"* 48 A.B.A.J. 1117, 1119 (1962); Special Comm. on Recognition and Regulation of Specialization in Law Practice, *Recommendation and Report*, 87 A.B.A. REP. 800, 804 (1962).

⁷ See Derrick, *Specialization—Where Do We Go from Here?*, 33 TEX. B.J. 255, 258-59 (1970).

⁸ Special Comm. on Specialization, *Report*, 1974 A.B.A. REP. No. 238, at 2.

there was no rush to join the pioneer efforts, and many states specifically rejected specialization plans.

Commencing with California in 1973, however, a number of other states have taken action to develop and implement programs of specialization. The proliferation of suggested pilot programs became an avalanche that engulfed the Committee to the point that it now has recommended that no further specialization programs be undertaken until there has been an opportunity to evaluate the proposed or existing experimental plans.⁹

ABA Guidelines

In promulgating guidelines for the states drafting plans for specialization, the Committee set forth the following as representing the principal recommendations of the Committee majority:

1. Participation . . . [by attorneys in any specialization pilot program] should be on a completely voluntary basis.
2. A certified specialist should not retain the referred client upon completion of the referred matter. He should not again represent the client without the consent of the client's lawyers.
3. Certified legal specialists should be permitted to give appropriate and dignified notice that they are certified legal specialists, designating the particular fields of law in which they are so certified.
4. Any lawyer, alone or in association with any other lawyer, should have the right to practice in any field of the law even though he is not certified therein; any lawyer, alone or in association with any other lawyer, should also have the right to practice in all fields of law, even though he is certified in a particular field of law.
5. A lawyer may be certified in more than one field of the law if he meets the standards established therefor.
6. All responsibilities and privileges derived from the certification as a specialist should be individual and may not be attributed to or fulfilled by a law firm.
7. Any lawyer may publish in reputable law lists and legal directories a statement that his practice is confined to one or more fields of law, whether or not he is certified as a specialist therein.
8. Appropriate safeguards to insure continued proficiency as a specialist should be provided.
9. Adequate financing to cover the cost of administration should be derived from those who are certified as specialists.¹⁰

⁹ *Id.* at 1. In 1975, the Committee acknowledged the fact that many states had not heeded the request to postpone specialization programs. Special Comm. on Specialization, *Report*, 1975 *id.* No. 258, at 3.

¹⁰ Special Comm. on Specialization, *Recommendation and Report*, 94 A.B.A. REP. 248, 252 (1969) (footnote omitted).

With these guidelines in mind, the Committee has commenced a study of the various forms of specialization programs implemented in the United States. In addition, the American Bar Foundation is preparing an evaluation of and report on the experimental plans now operating in California and New Mexico.¹¹ To date, the ABA guidelines have been followed, at least to the extent that the specialization programs that have been adopted are uniformly voluntary in nature. There are presently specialization programs in effect in four states,¹² and consideration is being given to starting programs in many other states. Of the 51 American jurisdictions, including the District of Columbia, the bar associations of only 10 jurisdictions¹³ had no specialization committee as of February 1975.

In essence, the programs now being "tried and errored" may be classified into three categories:

1. The certification plan, originated in California, pursuant to which attorneys who wish to receive specialist certification must qualify under a detailed set of standards that combine education and experience requisites.

2. The self-designation or identification plan, such as that which exists in New Mexico, where an attorney's qualification as a specialist is based on his own representations regarding his experience in one or more specialty fields.

3. Combination self-designation and certification plans, such as the one currently in effect in Florida.

The California Plan.

The first specialization plan, California's, was adopted on February 10, 1971,¹⁴ and in 1973 a pilot program of specialty certification, encompassing the fields of workmen's compensation, criminal law, and taxation, was put into operation.¹⁵ The plan was developed for a bar consisting of approximately 40,000 members, many of whom are located in the Los Angeles and San Francisco

¹¹ See ZEHNLÉ, *supra* note 2, at vii.

¹² Plans are now in existence in California, New Mexico, Florida, and Texas.

¹³ ZEHNLÉ, *supra* note 2, app. B. As of February 1975, only Arkansas, Hawaii, Louisiana, Mississippi, Montana, South Carolina, Virginia, Washington, D.C.; West Virginia, and Wyoming were without specialization committees.

¹⁴ See CAL. BUS. & PROF. CODE § 6076 (rule 2-106) (West Supp. 1975); *Supreme Court Approved, Pilot Program in Legal Specialization*, 46 CAL. ST. B.J. 182 (1971) [hereinafter cited as *Pilot Program*].

¹⁵ *Standards for Specialization Announced*, 48 CAL. ST. B.J. 80 (1973). The current standards are listed in *New Standards Set for Certification and Recertification of Legal Specialists*, 50 CAL. ST. B.J. 309 (1975) [hereinafter cited as *New Standards*].

metropolitan areas. The California Board of Legal Specialization, consisting of nine members,¹⁶ has been charged by the California Supreme Court with administering the plan with the assistance of advisory commissions, also consisting of nine members, for each of the three specialization areas. The California Board has established standards of education, experience, and proficiency for each area and has set forth the procedures for investigating and testing the qualifications of applicants.¹⁷

The California plan provided two avenues for specialty certification. During the initial 2-year period of the plan, lawyers with 10 years of practice who could establish that they had done substantial work in a particular field of specialization during a period of not less than 3 years immediately preceding certification were given the opportunity to qualify as specialists under a "grandfather" provision.¹⁸ In addition, California permits any attorney who has practiced law for 5 years and is able to demonstrate substantial experience and special education in a particular field to apply for certification; however, the applicant must also pass a written and, in some instances, an oral examination.¹⁹ To ensure that proficiency in the specialty will be maintained, recertification is required every 5 years. Such recertification is predicated upon a minimum of 10 years of actual practice as well as a demonstration of continued substantial involvement and educational experience in the area of specialization during the period of certification.²⁰ Should a certified specialist fail to meet these requirements for recertification, he may have to take a written examination.

As with all plans presently in existence, practice in a particular area of specialization is not limited to those who receive specialization certificates. In California, however, a certified specialist does in fact receive a "certificate,"²¹ and one's status as a certified specialist may be noted in legal directories and in the classified section of the

¹⁶ See *Pilot Program*, *supra* note 14, at 182. The nine-member California Board consists of "six . . . practicing lawyers, some of whom are in general practice and some of whom specialize; the dean of one accredited law school; the Chairman of the . . . Committee on Continuing Legal Education . . . ; and the Chairman of the Committee of Bar Examiners." *Id.*

¹⁷ See *New Standards*, *supra* note 15, at 310-14.

¹⁸ See *Pilot Program*, *supra* note 14, at 184-85. The grandfather provision is no longer applicable and has been superseded by more detailed requirements. See *New Standards*, *supra* note 15, at 310-14.

¹⁹ See *Pilot Program*, *supra* note 14, at 185. The California Board has delineated specific standards of experience and education for each of the three specialty areas. See *New Standards*, *supra* note 15, at 310-14.

²⁰ *New Standards*, *supra* note 15, at 310-14.

²¹ See *Pilot Program*, *supra* note 14, at 183-84.

telephone book. There is no limit to the number of specialization certificates that a lawyer may obtain.

Proponents of the California plan urge that it has established the rigorous standards necessary to ensure excellence and quality of performance.²² They assert that the public can reasonably expect both that certification by a state board implies that the designee is particularly competent in the field and that the state bar would do everything within its power to assure such competence. As an additional safeguard, the proponents point to the recertification requirements, applicable to all specialists, "grandfathered" or otherwise, which mandate further professional training and education.²³

The New Mexico Plan

The New Mexico Bar Association's specialization program²⁴ is perhaps best described as an identification plan, for there is no effort made by the New Mexico bar to measure the competence of specialists. Adopted for a bar of approximately 1500 attorneys, the New Mexico plan is an effort to provide a practical method pursuant to which an attorney may gradually build a practice and obtain the experience necessary to specialize in a certain area of the law.²⁵

²² See, e.g., Davidson, *A Brief for the California Plan*, 48 FLA. B.J. 184 (1974).

A program modeled on California's plan has been adopted in Texas. Labor, criminal, and domestic relations law are designated as the pilot specialties. See *Legal Specialization Comes to Texas*, 38 TEX. B.J. 235 (1975); *Public Hearing Set for Proposed Revised Standards for Legal Specialization*, 38 TEX. B.J. 939 (1975). Similar plans are under consideration in Colorado (securities, taxation, and labor law); Kentucky (taxation; labor; patent, trademark, and copyright; securities; and transportation law); New Jersey (taxation, bankruptcy, matrimonial, criminal, workmen's compensation, and labor law); North Dakota (trial practice); and Oregon (immigration and naturalization, workmen's compensation, and labor law). See ZEHNLE, *supra* note 2, at 4-5; Special Comm. on Specialization, *Report*, 1974 A.B.A. REP. No. 238, at 3-4.

²³ Although the California plan is premised on the need for and desirability of ensuring competence, not all commentators believe that California's standards will foster competence. In Pickering, *Why I Favor the New Mexico Plan*, 48 FLA. B.J. 180, 182-83 (1974) [hereinafter cited as Pickering], for example, the author comments that one's experience and ability to pass an examination may not be the best criteria for determining competence. In addition, the author warns that should the number of specialties recognized by the certification program significantly expand, administrative and technical difficulties may make the plan impractical. *Id.* at 180.

²⁴ N.M. STAT. ANN. § 18-5-2 (rule 2-105) (Supp. 1975). On March 7, 1974, the New Mexico Supreme Court adopted rules to govern the administration of the program, which went into effect June 1, 1974. See *id.* §§ 18-6-1 *et seq.* See generally Pickering, *supra* note 23.

²⁵ As explained by the chairman of the New Mexico Specialization Committee, the realistic approach to specialization is the devotion of a great deal of time to a narrow area of work. Consequently, the Committee deemed the amount of time devoted to the specialty, as opposed to the successful completion of a written examination, the most accurate indicia of specialization. See Pickering, *supra* note 23, at 180-81. It should be noted, however, that the New Mexico Committee does not certify the expertise of the specialist. See *id.* at 182-83.

An attorney who has devoted a minimum of 60 percent of his time in each of the preceding 5 years to a recognized specialty and files affidavits to that effect with the New Mexico Supreme Court and specialization board may hold himself out as a specialist in one of the 62 fields of specialization recognized in New Mexico.²⁶ The self-designated specialist is then entitled to list himself as such in the yellow pages, on letterheads and business cards, and in recognized law lists. A member of the bar who does not qualify as a specialist may nevertheless advertise in certain forums, including the yellow pages and bar lists, that he is limiting his practice to one, two, or three fields by stating that his "practice is limited to" or "primarily limited to" such field or fields.²⁷ There are no continuing legal education or other recertification requirements; all an attorney need do is self-certify that he has continued to spend 60 percent of his time in the specialty of his choice.²⁸

In response to the criticism that the client public will invariably look upon the specialized lawyer as a competent expert, the New Mexico Specialization Board has specifically asserted that the self-identification of an attorney as a specialist does not in any way connote expertise or competence in that field.²⁹

The Florida Plan

Approved by the Florida Supreme Court in *In re Florida Bar*,³⁰ the Florida plan permits an attorney to designate himself as a specialist in both general practice and not more than 3 of 20 areas of specialization.³¹ With a bar of approximately 14,000 members in mind, the Board of Governors of the Florida bar has sought to blend what it considers to be the best features of California's certification plan and New Mexico's liberal self-designation plan.

²⁶ See N.M. STAT. ANN. § 18-6-6 (rule 6, app. A) (Supp. 1975).

²⁷ *Id.* § 18-5-2 (rule 2-105(C)(1)(a), (b)). If the attorney states that he "limits" rather than "primarily limits" his practice, he must in fact limit his legal work to the fields specified. *Id.* (rule 2-105(C)(2)). Allowing attorneys to note that their practice is limited facilitates ascertaining compliance with the time requirement for specialization. See *id.* (rule 2-105(B)(4)).

²⁸ *Id.* (rule 2-105(B)(4)).

²⁹ Pickering, *supra* note 23, at 182-83. The State Bar of New Mexico prints a notice in the yellow pages explaining to the public the exact meaning of the terms "specialist," "practice limited," and "practice primarily limited." *Id.* at 182.

³⁰ 319 So. 2d 1 (Fla. 1975). For the complete text of the Florida plan see INTEGRATION R. FLA. B. art. XXI and BY-LAWS INTEGRATION R. FLA. B. art. XVII. For a discussion of the plan, see Adams, *The Florida Plan Is Best*, 48 FLA. B.J. 185 (1974).

³¹ BY-LAWS INTEGRATION R. FLA. B. art. XVII, § 4(d). The 20 areas of specialization are as follows: administrative and governmental law; admiralty; antitrust; appellate practice; bankruptcy; consumer law; corporation and business law; criminal law; estate planning and administration; environmental law; family law; international law; labor law; patent, trademark, and copyright; negligence, personal injury, and wrongful death; real property law; registered general practice; taxation; trial practice; and workmen's compensation. *Id.* schedule A.

A member of the Florida bar who has practiced for at least 3 years may designate areas in which, for the 3 years immediately preceding his application to the board of governors, he has had substantial experience.³² In applying for permission to designate, the applicant must list the areas of specialty, establish eligibility, and aver that he will continue his education in each of the designated areas.³³ Once permission to designate has been obtained, the attorney may list his designated specialties "on his letterhead, business cards, office door, in the yellow pages of the telephone directory, in approved law lists, and by other means approved by the Board."³⁴ The certificate of approval must be renewed after 3 years, at which time the renewing member is required to establish that during the 3-year designation period he has completed a minimum of 30 hours of approved continuing legal education in each area of specialization listed.³⁵ As in New Mexico, the Florida bar indicates to the public that it is not seeking to measure or connote competence by specialty designation.³⁶

NEW YORK AND SPECIALIZATION

Although there is no pilot plan in existence, or even proposed, for New York, the New York State Bar Association has been formally studying the specialization issue since April 1969 when the Special Committee on Specialization (Special Committee) was created. In June 1974 the Bar Association's Executive Committee approved the unanimous recommendation of the Special Committee that specialization is in the best interests of both the public and the bar, and the Special Committee was empowered to continue its studies in an effort to determine how, if at all, such a program can be implemented. That effort continues.

The threshold questions to be answered with respect to

³² *Id.* § 4(a). The 3-year law practice requirement may be waived if a member had specialized postgraduate education or concentrated specialized experience in a particular area of practice. *Id.* § 4(b). The requirement that the attorney have had substantial experience during the 3 years preceding application may similarly be waived on a finding that the applicant had 3 years of specialized experience or postgraduate education in an area of practice. *Id.* § 4(c).

³³ *Id.* § 5(a). The applicant may agree to continue his education through private study or approved continuing legal education courses. *Id.* Although 20 areas of designation are specifically set forth in the program, *see* note 31 *supra*, an applicant may request in his application that other specialties be approved by the Board. BY-LAWS INTEGRATION R. FLA. B. art. XVII, §§ 3(a), (c).

³⁴ BY-LAWS INTEGRATION R. FLA. B. art. XVII, § 7(a).

³⁵ *Id.* § 9(b).

³⁶ *Id.* § 11. The Florida bar, like the New Mexico bar, prints a public notice in the yellow pages of the telephone directory to explain the Florida plan and disclaim any certification of expertise. *Id.*

specialization in New York are indeed complex and will require substantial further study. Obviously, that which is suitable for New Mexico's 1500 lawyers, for Florida's 14,000 lawyers, or for California's 40,000 lawyers, may be wholly inappropriate for a state like New York with its complex diversity of practice. Whether New York needs or should have a competency certification plan, self-designation with continuing legal education, self-designation without continuing legal education, an innovative specialty plan, or any plan at all, must be examined.³⁷ Plainly, the views of members of the New York bar will have to be solicited. Moreover, the questions raised and issues presented in the consideration by other states of how to regulate and encourage specialization will have to be thought through and answered.³⁸ These questions have been outlined and set forth with clarity as follows:

1. How are the fields of specialization to be identified? Shall certain fields be specified by state specialization boards in advance? Shall each attorney be allowed to identify his own area of specialization? Shall groups of attorneys be encouraged to define areas of specialization subject to approval of a board? How narrow or how broad a field may be specified?

2. How shall greater competence be encouraged? Shall it be measured by some form of certification? If so, by what means? By examinations, oral or written? By an evaluation of past work? Who shall do the evaluating? What weight shall be given to formal educational experiences, to other forms of training, to practical experience?

3. How can provision be made for continuing legal education? By recertification, dependent on further requirements of practice and/or education? What standards of measurement will be established? How shall further training be financed?

4. Is there any role for the general practitioner? Can a

³⁷ On April 3, 1976 the Special Committee resolved that a New York Accredited Specialization Program would be in the best interests of the public and bar of New York and would be further studied for implementation in the near future.

³⁸ The various state plans for specialization must be evaluated in terms of the goals of specialization: improved lawyer competence through better education, increased public accessibility to lawyer specialists, and decreased costs. For example, the California plan, with its detailed and demanding certification standards, is particularly well suited for satisfaction of the goal of improved lawyer competence. These standards, however, retard realization of the goal of increased accessibility, for they effectively limit the number of identified specialists. See Pickering, *supra* note 23, at 182-83. In contrast, while the New Mexico plan, by the ease with which it allows an attorney to be identified as a specialist, promotes the goal of accessibility, it fails, because of the absence of certification standards, to advance the goal of improved competence. *Id.* at 180-83. The Florida plan, in embodying many of the elements of the California and New Mexico plans, may well also adopt the inherent weaknesses of each. *Id.* at 183. See generally Brink, *Let's Take Specialization Apart*, 62 A.B.A.J. 191 (1976). Evidently, the goals of a specialization program are not perfectly harmonious, and one must be given priority over the others.

referral system be devised to work out equitable relations between generalist and specialist?

5. What ethical questions arise in the advertising of special competence and in the relationship between recommending generalist and recommended specialist?

6. Will entire firms be allowed to specialize? If so, what will be the requirements? Will there be large specialties with sub-specialties for individual members?

7. Will there be different standards for metropolitan areas and for rural areas?

8. What will be the relationship between the national bar and the various state bars? Will the national bar be merely a clearinghouse for ideas, or will some provisions be adopted on a national basis?

9. Does the size of the state bar have anything to do with the nature of the plan for specialization that should be adopted? Should all states be expected or even encouraged to have the same kind of plan?

10. How will the plan for delivering specialized legal services be implemented?³⁹

CONCLUSION

The certification of doctors as specialists is a development that started more than 60 years ago. The concept of the specialized practitioner of law, designated and regulated as such, is a relatively recent development. Clearly, the bar is not moving precipitously in the direction of, or away from, specialization. Every step that is being taken in this area has been attended by a great deal of study, analysis, and experimentation. Only time will tell whether or not New York adopts a specialization program and, if so, the kind of program adopted.

Specialization did not exist as a problem in 1925 when the School of Law of St. John's University came into being. Now, a half century later, it is a new problem being cautiously treated and handled. Clearly the solution, or more probably, the solutions, to the problem will have been reached long before the next half century has ended and St. John's celebrates its Law School's centennial.

³⁹ ZEHNLE, *supra* note 2, at 2-3.