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LAWYER ADVERTISING AND SPECIALIZATION IN MONTANA: AN ALTERNATIVE APPROACH

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I. INTRODUCTION

Montana Supreme Court Justice Fred Weber recently warned State Bar of Montana convention delegates that many advertisements by Montana lawyers violate disciplinary rules found in the Canons of Professional Ethics.[1] In particular, he pointed out that the rules forbid advertisement of legal specialization.[2] The justice's remarks coincide with a proposal, now before the State Bar Board of Trustees, for monitoring advertising by Montana lawyers and for enforcing relevant disciplinary rules. The proposal contemplates referring lawyer advertisements collected by the State Bar's "clipping service," already in operation, to the State Bar Ethics Committee, which would then contact the offending lawyer.[3] Ultimately, the infraction might warrant the filing of a complaint with the Commission on Practice.[4]

Although no lawyer has been disciplined yet for violation of advertising disciplinary rules,[5] Justice Weber's remarks and the proposal before the Board of Trustees suggest that lawyers who advertise will soon be held accountable to those disciplinary rules. This comment will examine those rules. It will argue that they are overly restrictive and that they impede the flow of useful information to legal consumers. As guidelines for liberalizing advertising rules, a proposal now before the American Bar Association (ABA) and programs in other states will be examined. Finally, this comment will propose an alternative, based on warranty theory, to state bar regulation of lawyer advertising and specialization.

II. HISTORICAL BACKGROUND

A. *The Origins of the Restrictions*

During most of the nineteenth century, lawyers were free to advertise their services.[6] For instance, Abraham Lincoln ran the

1. Great Falls Tribune, June 26, 1981, at 7-A, col. 2.
2. *Id.*
3. Letter from Justice Fred Weber to David J. Patterson, Chairman, State Bar Ethics Committee (September 30, 1981).
4. *Id.*
5. Telephone conversation with Arnold Huppert, Jr., Secretary, Montana Supreme Court Commission on Practice (December 18, 1981).
6. This absence of restriction arose from a general hostility by the public towards spe-

following newspaper advertisement in 1838:

> STUART & LINCOLN, Attorneys and Counsellors at Law, will practice, conjointly, in the Courts of this Judicial Circuit—Office No. 4 Hoffman's Row, upstairs. Springfield.[7]

In the late nineteenth century, however, various bar organizations began forming across America and adopting codes of ethics. Although these early codes generally permitted advertising, pressure was building to ban it.[8] Finally, in 1908 the American Bar Association, stating that advertising by lawyers was "unprofessional," formally banned the practice by the adoption of the Canons of Professional Ethics.[9] The ban was viewed by various bar leaders at the time as a means of both maintaining the profession's traditional dignity and elevating the practice of law above such activities as advertising and overt competition found in the marketplace.[10]

This ban on lawyer advertising was largely codified in Canon 2 of the Code of Professional Responsibility, adopted by the ABA in 1969.[11] According to the Code, the justification for the ban

> is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers.[12]

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cial privileges granted by government. Professions, particularly bar associations, were viewed as undemocratic and unamerican. As a result, state legislatures favored minimal restrictions on the practice of law. H. DRINKER, LEGAL ETHICS 19 (1953) [hereinafter cited as DRINKER]; *See also* R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 223-42 (1953).

7. L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 1 (rev. ed. 1981) [hereinafter cited as ANDREWS].

8. DRINKER, *supra* note 6, at 23, 356.

9. *Id.* at 215.

10. Drinker traces the origin of this "cherished tradition" to the English Inns of Court, where law students primarily came from wealthy families. With no need for outside income, they looked upon law as a form of public service, not as a livelihood. This notion that the practice of law stands above such marketplace activities as advertising and competition was brought to the United States by American students who had studied at the Inns. *Id.* at 210-11.

11. Smith, *Canon 2: A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available*, 48 TEX. L. REV. 285, 290 (1970).

12. ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 2-9 (1969). These justifications, which in effect say that legal advertising is inherently deceptive and that broad restrictions further the public interest, were criticised by a three-judge Virginia district court:

> The foundations of the position are disturbing. It assumes either or both of the following two hypotheses. First, it assumes that lawyers will be "extravagant, artful, self-laudatory, and brash" if released from the bonds of the advertising prohi-

The ban was not the object of much attention until the last decade. With the rise of the consumers' movement in the late 1960s,[13] attention began to focus on the needs of consumers of legal services. In the early 1970s the ABA, in collaboration with the American Bar Foundation, conducted a survey in 33 states to determine the public's perception of lawyers and the legal system.[14] Of particular importance, the survey disclosed that 83 percent of the people polled agreed with the statement, "A lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem."[15] This discovery of widespread consumer ignorance about the legal profession worked to undermine the ABA's rationale that the public interest required banning lawyer advertising.

Advocates of legal advertising began attacking the ban from several directions. Articles began surfacing in legal journals arguing for a removal of the ban.[16] Legal consumers in Virginia turned to federal court where they successfully overturned state bar restrictions placed on what information they could publish about an individual lawyer's practice.[17] Within the ABA itself, a committee pro-

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bition. If accurate, it is indeed a sad commentary on a profession, which to a large extent, is responsible for and necessary to the functioning of our legal system. Fortunately, however, there is no evidence to suggest that lawyers will behave in an irresponsible manner if the advertising restrictions are removed . . . . Second, and perhaps even more disheartening, is the assumption that if any lawyer advertising is permitted, the public will not be able to accurately evaluate its content, for either they are intellectually incapable of understanding the complexities of legal services or they will fall prey to every huckster with a promise, law license and a law book . . . . The hypothesis, fortunately in the view of this Court, is so baseless as to warrant little concern . . . . Additionally, if consumer judgments prove to be inadequate, it is indeed an argument for providing them with more information, not preempting their judgment.

Consumers Union of United States, Inc. v. American Bar Association, 427 F. Supp. 506, 519-20 (E. Va. 1976) (3-judge panel), *vacated and remanded*, 433 U.S. 917 (1977), *original opinion reinstated and reissued*, 470 F. Supp. 1055 (E. Va. 1979) (3-judge panel), *vacated and remanded on other grounds*, 446 U.S. 719 (1980).

13. *See generally* D. RICE, CONSUMER TRANSACTIONS 2-10 (1975) (consumer movement in its historical context).

14. B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC xxvii (1977).

15. *Id.* at 228.

16. "The rationale that it is not in the public interest for lawyers to advertise does not hold up under scrutiny." Agate, *Legal Advertising and the Public Interest*, 50 L.A.B. BULL. 209, 242 (1975); "It is time to amend the code and lift the ban on advertising. It is time the legal profession entered the nation's open marketplace." Wilson, *Madison Avenue, Meet the Bar*, 61 A.B.A. J. 586, 587 (1975); "If the need for legal assistance is to be met and the profession is to further its goal of public service, the repeal of present restrictions on lawyer-press communications is essential." Comment, *Information Restrictions*, 22 U.C.L.A. L. REV. 483, 486 (1974).

17. Consumers Union of United States, Inc. v. American Bar Association, 427 F. Supp. 506 (E. Va. 1976).

posed a liberal advertising rule that would permit advertising that did not contain false or misleading statements or claims.[18] The House of Delegates, the ABA's policy-making body, refused to endorse the proposal at its 1976 meeting. Instead, it adopted a limited amendment allowing lawyers to communicate certain information, such as name, address, nature of practice, and consultation fees in legal directories, bar association directories and telephone directory yellow pages.[19] Forces outside the ABA also applied pressure to ease the advertising restrictions. The Department of Justice, apparently not satisfied with the ABA's limited amendment, initiated an antitrust suit against the ABA. The complaint alleged a conspiracy to prohibit advertising.[20]

It was against this backdrop of criticism that the Supreme Court struck down the blanket suppression of lawyer advertising in the landmark decision *Bates v. State Bar of Arizona*.[21] Because *Bates* has been analyzed at length elsewhere,[22] only a short overview is necessary for purposes of this comment.

B. *The Bates Decision*

In 1974 Arizona attorneys John Bates and Van O'Steen set up a legal clinic in Phoenix. Their aim was to provide inexpensive legal services on routine matters to people who could not qualify for government legal aid. To keep costs down they relied heavily on paralegals, automatic typing equipment and standardized forms. After operating two years they concluded their practice would not survive if they did not advertise the availability of their low cost services. Consequently, they placed an advertisement in a newspaper that stated they were offering "legal services at very reasonable fees," and listed their fees for certain services.[23]

In response, the Arizona State Bar president initiated an action against the two lawyers for violation of state disciplinary rules that prohibited advertising. Ultimately the bar's Board of Governors recommended that each attorney be suspended from the practice of law for one week. Bates and O'Steen appealed to the Arizona Supreme Court on two grounds: (1) that the disciplinary rule against advertising violated the Sherman Act because of its ten-

18. ANDREWS, *supra* note 7, at 2.
19. *Id.*
20. *Id.* at 3.
21. 433 U.S. 350 (1977).
22. *See* Meyer and Smith, *Attorney Advertising: Bates and a Beginning*, 20 ARIZ. L. REV. 427 (1978).
23. 433 U.S. at 354.

dency to limit competition, and (2) that the rule infringed upon their First Amendment rights.[24] The court rejected both claims,[25] and the lawyers sought review by the United States Supreme Court.

On the issue of antitrust, the Supreme Court unanimously agreed with the Arizona court.[26] It held that, because the Arizona Supreme Court ultimately enforced the disciplinary rules, the case fit within the state-action exemption to antitrust laws.[27] On the First Amendment issue, however, the Court split, with the majority ruling in favor of Bates and O'Steen.[28] The Arizona bar offered six justifications for the ban. These arguments and the Court's response to them are treated briefly below:

(1) *Adverse Effect on Professionalism*

The Arizona bar argued that price advertising would have an adverse effect on legal professionalism by injecting commercialism into the practice of law. The Court, referring to the origin of the ban discussed above, flatly stated that habits and traditions of the bar are not adequate constitutional defenses.[29] It also refused to view lawyers as above the trades.[30]

(2) *Attorney Advertising as Inherently Misleading*

The bar argued that advertising of legal services is inherently misleading. The Court disagreed, stating that an advertisement is not misleading as long as the attorney does the necessary work at the advertised price.[31] Furthermore, the Court noted that the justification rests on the assumptions that consumers do not understand the limits of advertising and that they are better kept in ignorance than trusted with correct but incomplete information.[32] Both assumptions were rejected by the Court.

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24. *Id.*

25. *Id.*

26. *Id.* at 363.

27. *Id.* at 359-63.

28. Justice Blackman delivered the opinion, in which Justices Brennan, White, Marshall and Stevens joined. Chief Justice Burger and Justices Powell, Stewart and Rehnquist dissented on the First Amendment issue. *Id.* at 352.

29. *Id.* at 371.

30. *Id.* at 371-72.

31. *Id.* at 372-73.

32. *Id.* at 374-75.

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(3) *Adverse Effect on the Administration of Justice*

The bar argued that advertising would create litigation by encouraging the assertion of legal rights. The Court rejected this argument summarily. It found nothing evil in the increased use of judicial machinery by those who have suffered a wrong.[33]

(4) *Undesirable Economic Effects of Advertising*

The Arizona bar claimed that advertising would increase legal fees to consumers because lawyers would pass along advertising costs. Also, the bar argued that the additional cost of advertising would act as a barrier to attorneys entering the profession. Noting that neither argument was relevant to the First Amendment, the Court pointed out that advertising might reduce legal costs and make it easier for new attorneys to enter the market.[34]

(5) *Adverse Effect of Advertising on the Quality of Service*

The bar argued that a lawyer who advertises a "package" of legal services at a set price would be inclined to provide the package regardless of whether it fit the particular client's needs. The Court, rejecting that claim, stated that an attorney who is inclined to cut quality will do so regardless of the rule on advertising.[35] In addition, it noted that the bar's assertion was substantially undermined by its own prepaid legal services program.[36]

(6) *Difficulties of Enforcement*

Without the ban, the bar argued that it would be impossible to adequately regulate advertising because a consumer, seeking after-the-fact action, would not know whether the services he had received met professional standards. The Court stated that if advertising were allowed most lawyers would continue to uphold the integrity of the profession, and if a few did not, the proper recourse would be to weed them out.[37]

In short, the Court held that none of the bar's time-honored justifications supported the suppression of all lawyer advertising. However, the Court noted that regulation might be proper if the advertisement referred to quality of service or if the advertisement

33. *Id.* at 376.
34. *Id.* at 378.
35. *Id.*
36. *Id.*
37. *Id.* at 379.

was false, deceptive or misleading.[38] The dissenting Justices would have upheld the Arizona restrictions. For example, Justice Powell stated that the majority holding was not required by either the First Amendment or public interest. He argued that lawyer advertising was inherently deceptive and difficult to monitor.[39] Chief Justice Burger, who also dissented, stated that the majority holding would "create problems of unmanageable proportions."[40] Finally, Justice Rehnquist argued that the First Amendment does not protect commercial speech.[41]

C. *Post-Bates*

After *Bates* the ABA amended its model Code of Professional Responsibility with a new set of advertising disciplinary rules called Proposal A. This rule specifically authorizes certain prescribed forms of lawyer advertising.[42] In addition to Proposal A, the ABA approved for circulation to the states a less restrictive alternative, Proposal B. Instead of attempting to delineate what may be advertised, Proposal B merely prohibits false, fraudulent, misleading or deceptive statements.[43] By 1981, 30 states had adopted Proposal A, 18 states and the District of Columbia had adopted Proposal B, and two states had adopted neither.[44] The Montana Supreme Court followed Proposal A when it amended the Canons of Professional Ethics in 1980 to bring them into compliance with *Bates*.[45]

III. MONTANA'S ADVERTISING DISCIPLINARY RULES

A. *Current Rules*

Montana's advertising disciplinary rules[46] prohibit any public communication that contains a "false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement or claim."[47] While ad-

38. *Id.* at 383-84.
39. *Id.* at 391.
40. *Id.* at 387.
41. *Id.* at 404.
42. TASK FORCE ON LAWYER ADVERTISING, ABA, REPORT TO THE BOARD OF GOVERNORS OF THE TASK FORCE ON LAWYER ADVERTISING, *reprinted in* ANDREWS, *supra* note 7, at 92 [hereinafter cited as REPORT].
43. *Id.* at 93.
44. ANDREWS, *supra* note 7, at 135-46.
45. *In re:* Canons of Professional Ethics Order No. 12500 of Supreme Court, ___ Mont. ___, 37 St. Rptr. 1069 (1980).
46. *See generally* STATE BAR OF MONTANA, MONTANA LAWYER'S DESK BOOK (Supp. 1980).
47. MONTANA CANONS OF PROFESSIONAL ETHICS, CANON 2, DISCIPLINARY RULES [herein-

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vertising in print media and on radio is specifically permitted, television is not, although the rules refer to television broadcast.[48] The rules provide that an advertisement may not be distributed or broadcast beyond the geographical area or areas in which the lawyer resides, or where a significant part of his clientele resides.[49] Also, the rules set out 24 items the advertisement may contain, such as name of attorney, date of birth, membership in various legal organizations and fees, as long as that information is presented in a "dignified manner."[50] If fee rates are advertised the advertisement must disclose specified information regarding methods of computation, types of cases covered and estimates of a likely fee.[51]

A lawyer may publicaly disclose that his practice is limited to one or more fields of law.[52] In describing the areas of law he practices, the lawyer may use only the designations set out in the rules.[53] The rules list 45 designations.[54] Furthermore, unless admitted to practice before the United States Patent and Trademark Office, a lawyer may not hold himself out publicaly as a specialist.[55] This prohibition will continue unless the State Bar of Montana adopts a program for certification of legal specialties with the prior approval of the Montana Supreme Court.[56]

B. *Problems with Current Rules*

The advertising disciplinary rules suffer from several defects. First, they needlessly restrict the flow of useful information to legal consumers. Second, because of their vagueness they are difficult to enforce. Third, they tend to limit competition among lawyers. These defects as they relate to various parts of the rules will be examined below.

1. *Geographical Restrictions*

The rules forbid lawyers from advertising beyond the geo-

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after cited as DR] 2-101(A) (1980).

48. Although DR 2-101(B) states that lawyers may advertise only by print media or radio, another disciplinary rule, DR 2-101(E), states that if an advertisement is communicated "to the public over radio or *television*, it shall be prerecorded, approved for broadcast, or *telecast* by the lawyer." (emphasis added).

49. DR 2-101(B).

50. DR 2-101(B)(1) through (24).

51. DR 2-101(B)(21) through (24).

52. DR 2-105(A)(2).

53. *Id.*

54. *Id.*

55. DR 2-105(A).

56. DR 2-105(A)(3).

graphical area in which they or their clients reside.[57] This restriction places an unreasonable burden on a lawyer who wishes to limit a practice to a narrow field, like copyright law, then advertise around the state to build a sufficient clientele to support that practice. A separate problem exists because the rules do not define "geographical area." Lawyers might shun advertising altogether to avoid violating the vague standard. For instance, a literal interpretation of the rule prohibits advertising in the state's major newspapers because all those newspapers distribute nearly one-half of their papers beyond the counties in which they are published.[58] Finally, it is difficult to discern any justification for the restriction except on the grounds that it restrains competition.

2. *Television Ban*

The original justification for the ban on television advertising was the "fear that advertising by television may be apt to emphasize style over substance."[59] It is not clear why information disseminated by newspapers or radio suddenly becomes misleading when communicated by television. In addition, studies have shown that low-income groups tend to receive much of their information from television.[60] The effect of this rule is to prevent these people from receiving information about legal services.

3. *Dignified Manner Standard and Prohibition of Self-laudatory Statements*

While legal advertisements must be presented in a "dignified manner"[61] and may not contain "self-laudatory statements,"[62] neither term is defined by the rules. Critics have labeled both terms inherently subjective.[63] The effect is that Montana lawyers cannot know in advance what constitutes permissible advertising.[64]

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57. DR 2-101(B).

58. Approximately 58 percent of the Billings Gazette is distributed beyond Yellowstone County, 51 percent of the Great Falls Tribune beyond Cascade County and 48 percent of the Missoulian beyond Missoula County. Telephone conversations with respective circulation departments (October, 1981).

59. REPORT, *supra* note 39, at 94.

60. ANDREWS, *supra* note 7, at 50.

61. DR 2-101(B).

62. DR 2-101(A).

63. ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (PROPOSED FINAL DRAFT) 187-88 (1981) [hereinafter cited as Kutak draft].

64. For instance, it is unlikely, but unclear whether the following advertising campaign would be allowed. Ken Hur, a Wisconsin trial lawyer, ran an "airplane trailer" with "Call attorney Ken Hur" over a University of Wisconsin football game. He sponsored a car in a

Furthermore, the Supreme Court in *Bates* does not recognize attempts to maintain "dignity" in lawyer advertising as a legitimate basis for regulation.

4. *"Laundry List" Approach to Information*

The rules' specification of information that may be communicated "assumes that the bar can identify information that the public might think relevant."[65] Its effect is to needlessly restrict the flow of useful information to consumers. For instance, the rules set forth permissive descriptions of legal practices, many of which are not easily understood by lay people, such as "products liability" or "general negligence."[66] Also, this approach prohibits the type of informational advertising that has been allowed elsewhere with apparent success.[67]

5. *Prohibition Against Specialization*

The rules permit a lawyer to state that his practice is limited to certain fields, but the lawyer may not state that he is a specialist. Two problems exist with this restriction. First, in theory the distinction between "practice limited to" and "specialist" is that the former does not imply that the lawyer possesses a particular expertise in the area. In practice, however, it is difficult to believe that most legal consumers will understand this distinction. For example, if a consumer chooses a lawyer to handle a parent's estate, the consumer most likely would conclude that a lawyer with a practice "limited to probate" is more qualified to handle the matter than a "general practitioner." However, this consumer is not

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demolition derby that had written on its side, "Sideswiped? Call Ken Hur." On the side of a hearse he drives is written "No Frill Will $15." He also had a television advertisement campaign that showed him emerging from a lake with scuba gear on, urging the audience to consult him for bankruptcy services if they are "in over their heads." ANDREWS, *supra* note 7, 11-12.

65. Kutak draft, *supra* note 63, at 188.

66. Many Montana lawyers who advertise appear to recognize this problem. In violation of the rules they are either using more commonly understood terms or providing short elaborations after the accepted terms. *See generally* Mountain Bell Telephone Directories for Montana's larger cities. The United States Supreme Court has noted probable jurisdiction of a Missouri case involving a lawyer disciplined for using concededly non-misleading descriptions of legal areas not contained in Missouri's disciplinary rules. The lawyer used the terms "Personal injury," "Workmen's Compensation," and "Contracts." In the Matter of R.M.J., 609 S.W.2d 411 (Mo. 1980), *prob. jur. noted*, 50 U.S.L.W. 3086 (1981) (No. 80-1431).

67. A Pennsylvania law firm ran a series of 21 advertisements on such topics as "Making a Will" and "Getting a Divorce." The advertisements explained in detail what a particular legal service entails and when it might benefit the consumer to obtain such a service. ANDREWS, *supra* note 7, at 44.

protected if he relies on this apparent expertise. A second, more general problem, as recognized by nearly every commentator who has studied lawyer specialization, is that lawyers should be allowed to practice specialities openly.[68] Reasons for this conclusion include: (1) *de facto* specialization exists today, therefore, it should be formally recognized;[69] (2) recognizing specialities will enhance the competence of lawyers in the particular field;[70] (3) consumers will have access to more information by which to choose a particular lawyer;[71] (4) specialization will lead to a reduction in legal service costs;[72] and (5) failure to recognize specialties results in lawyers being held out as competent in all fields.[73]

C. *Further Limitations of the Montana Supreme Court*

In addition to the disciplinary rules regarding specialization, the Montana Supreme Court, in *In re Mountain Bell Advertising,*[74] imposed further restrictions on how lawyers may communicate their areas of practice. In *Mountain Bell,* which was decided while Proposal A was being considered for adoption by the supreme court, the telephone company submitted a proposal to list 33 categories of legal practice in the directory yellow pages of Montana's largest cities. By paying a fee, a lawyer could be listed under as many categories as he wished. On each page of the guide was to be printed a caveat stating that, while the lawyer would accept employment in the area, he was not a specialist.[75] The court, in re-

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68. "Virtually every lawyer who has ever studied the problem has concluded that *some* sort of specialization program would benefit both the public and the legal profession . . . . The problem then is essentially how—not whether—to proceed with specialization." Hadlow, *President's Page,* 48 FLA. B.J. 151 (1974).

69. Stephens, *Specialization: Review and Preview,* ABA STANDING COMMITTEE ON SPECIALIZATION INFORMATION BULLETIN No. 7, 2 (1980) [hereinafter cited as BULLETIN].

70. *See* Adams, *The Florida Plan is Best,* 48 FLA. B.J. 185 (1974).

71. BULLETIN, *supra* note 69, at 2.

72. Muris and McChesney, *Advertising and the Price and Quality of Legal Service: The Case for Legal Clinics,* 1979 A.B. FOUND. RESEARCH J. 179, 185 (1979).

73. Chief Justice Warren Burger, in his much publicized speech at Fordham Law School in 1973, suggested that perhaps the most significant cause of inadequate courtroom performance

> is our historic insistence that we treat every person admitted to the bar as qualified to give effective assistance on every kind of legal problem that arises in life . . . . It requires only a moment's reflection to see that this assumption is no more justified than one that postulates that every holder of an M.D. degree is competent to perform surgery on the infinite range of ailments that afflict the human animal.

Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice,* 42 FORD. L. REV. 227, 231 (1973).

74. ___ Mont. ___, 604 P.2d 760 (1979).

75. The caveat read as follows:

jecting the proposal, held that by listing themselves under the proposed categories, lawyers would be holding themselves out as specialists despite the caveat which the court said benefited only Mountain Bell and the lawyers.[76] The court further held that no need existed in Montana for this kind of listing.[77]

The court's holding is flawed in several respects. First, it essentially asserts that consumers will be misled by any guide listing and that no caveat will be effective. *Bates* expressly rejects this assertion.[78] Furthermore, the basis for the court's assertion appears to be a paternalistic attitude toward the state's legal consumers. Second, the court notes that by placing lawyers under different categories the impression is created that all lawyers under individual categories are of equal ability.[79] Ironically, the court's solution to this apparent problem is to lump all lawyers under a yellow page heading "Lawyers," thus making it appear that all lawyers are of equal ability in all categories. Third, the court acknowledges that lawyers may still place their areas of practice in block advertising in yellow pages or newspapers.[80] The court fails to explain why it is not misleading to place this information in a block advertisement without a caveat, but it is misleading when placed in the lawyer's guide with a caveat. Finally, the court cites no authority or study in concluding that little or no need exists for the guide. Nowhere in the opinion does the court address consumers' interests in the free flow of information, an important consideration in *Bates*.[81] Instead, the court focuses its attention on the disadvantages of the proposal to lawyers: (1) because of competitive pressure, lawyers would be compelled to list themselves "under a dozen or more" of the categories,[82] and (2) lawyers in small towns would generally suffer from a competitive disadvantage.[83] The court's fo-

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> The fields of law named in the listing subheadings indicate the lawyer or law firm will accept employment for matters coming within the fields of law listed in the subheadings, but do not indicate that the lawyer or law firm limits or primarily limits his, her or its practice to or specializes in the fields of law used in the subheadings, unless otherwise indicated.

Id. at ___, 604 P.2d at 761.

76. *Id.* at ___, 604 P.2d at 763.
77. *Id.*
78. *Bates*, 433 U.S. at 372-75.
79. *Mountain Bell*, ___ Mont. ___, 604 P.2d at 764.
80. *Id.* at ___, 604 P.2d at 763.
81. *Bates*, 433 U.S. at 358.
82. *Mountain Bell*, ___ Mont. ___, 604 P.2d at 764.
83. The court used curious reasoning:

> [T]he telephone directories for the larger cities also contain the directories for smaller towns around the larger cities . . . . A lawyer practicing in a smaller town listed in such a directory, along with lawyers from the larger city, would find him-

cus on lawyers rather than consumers is not surprising; although the legal profession was well represented at the hearing, no consumers were present.[84]

In sum, Montana's advertising rules are overly restrictive and prevent useful information from reaching consumers. In fact, the rules would prohibit the very advertisement at issue in *Bates*. The *Bates* advertisement lists areas of practice not contained in Montana's rules, such as divorce, adoption and change of name.[85] Second, it lists set fees for these services without including the caveat that the quoted fee is only available to clients whose matters fall within the service described as required by Montana rules.[86] Finally, the *Bates* advertisement states that legal services are available at very reasonable fees, arguably a self-laudatory statement.[87]

IV. INTERIM SOLUTIONS

Partial solutions to shortcomings in Montana's rules are found in a proposal now before the ABA and in programs in effect in other states. The following discussion will examine both the proposal and the programs. In the next section an alternative solution based on warranties will be offered.

A. *Kutak Commission's Proposed Changes*

In May, 1981, the ABA Commission on Evaluation of Professional Standards released its proposed final draft of the Model Rules of Professional Conduct (Kutak draft).[88] The Commission,

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> self unlisted as to specialties in the yellow pages while his colleagues in the larger city would have such specialty listings. It would be a competitive disadvantage for example, for a lawyer in Harlowton, Montana, with no listed specialty, to appear in the same directory with the Billings lawyers . . . .

Id. Apparently the court did not consider the fact that lawyers in small towns could list their area of practice and local address in the lawyer guide of the neighboring large city.

84. The State Bar, the Ethics Committee of the State Bar, and two lawyers *pro se* filed memoranda urging the court to refuse Mountain Bell's proposal. No consumers filed memoranda or argued orally.

This illustrates the well-known imbalance created when regulatory bodies contemplate changes in regulations. Producers, who devote a great proportion of their resources producing the particular good or service, tend to have strong common interests and to become politically concentrated. Consumers, on the other hand, generally devote far less of their time or money consuming a particular good or service. Thus, they tend to lack common interests and political power. As a result, producers lobby the regulatory body for favorable rules while consumers do not. In such an atmosphere rules are written to favor the producer. *See generally,* M. FRIEDMAN, CAPITALISM AND FREEDOM, 137-60 (1962).

85. *Bates,* 433 U.S. at 385.

86. *Id.*

87. *Id.*

88. The Commission, which is now soliciting comments on the Kutak draft, intends to

chaired by Robert J. Kutak, was created in 1977 to undertake "a comprehensive rethinking of the ethical premises and problems of the current Model Code of Professional Responsibility."[89] Both the contents and organizational structure of the Kutak draft differ profoundly from the current Code from which Montana's rules are derived.[90] However, this comment will focus only on the proposed changes regarding lawyer advertising.

1. *Proposed Rules Regarding Advertising*

The proposed rules[91] permit any communication by a lawyer as long as the communication is not false or misleading about the lawyer or his services.[92] A communication is considered false or misleading if it falls within any of the following three categories: (1) it contains a material misrepresentation, or omits a fact necessary to make the statement as a whole not materially misleading;[93] (2) it is likely to create an unjustified expectation about results that the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law,[94] or (3) it compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.[95]

The proposed rules permit advertising through all public media, including yellow pages, legal directories, newspapers and other periodicals, radio and television.[96] Furthermore, the lawyer may advertise by any written communication that does not involve personal contact.[97] The lawyer must keep a recording or copy of his advertisement or written communication for one year after its dissemination.[98] The lawyer is forbidden to give anything of value to another for recommending his services, except payment for permissible advertising or written communications.[99]

Finally, the proposed rules permit communication of the fact

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submit the question of the new format to the ABA House of Delegates in January 1982 and the contents in August 1982. Telephone conversation with staff counsel for Commission (October 1981).

89. Kutak draft, *supra* note 63, at i.
90. *See* Kutak, *Ethical Standards for the '80s and Beyond*, 67 A.B.A. J. 1116 (1981).
91. *See* Appendix (text of proposed advertising rules).
92. Kutak draft, *supra* note 63, Rule 7.1.
93. *Id.*, Rule 7.1(a).
94. *Id.*, Rule 7.1(b).
95. *Id.*, Rule 7.1(c).
96. *Id.*, Rule 7.2(a).
97. *Id.*
98. *Id.*, Rule 7.2(b).
99. *Id.*, Rule 7.2(c).

that the lawyer does or does not practice in a particular field of law.[100] The lawyer may not state or imply, however, that he is a specialist unless: (1) he is admitted to practice before the United States Patent and Trademark Office;[101] (2) he practices admiralty law,[102] or (3) he is permitted to specialize by the state in which he practices.[103]

2. *Benefits of Kutak Draft*

The advertising rules contained in the Kutak draft address many of the problems with Montana's rules. By forbidding only those advertisements that are false or misleading, the Kutak rules avoid problems created by the laundry list approach, allowing lawyers to discover and present information consumers find relevant. The proposed rules also do away with the permissible descriptions for areas of practice. A lawyer would be able to describe an area of practice in any terms appropriate as long as the terms were not false or misleading. Finally, the proposed rules drop the dignified manner standard, the geographical restriction, the television ban and the prohibition against self-laudatory statements. By abolishing these standards and prohibitions the proposed rules should increase the flow of information to consumers.

3. *Criticism of Kutak Draft*

Although the proposed rules relax restrictions on lawyer advertising, they do not go far enough. Lawyers are still prohibited from communicating information to consumers that the consumers might find useful. First, the proposed rules ban statements likely to create unjustified expectations about what the lawyer can achieve.[104] No doubt legal consumers should be protected from the few lawyers who might attempt to attract business by creating unjustified expectations through advertising. However, by banning statements *likely* to create such expectations, the prohibition goes too far. According to the drafters, the purpose for the prohibition is to prevent advertisements about "results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."[105] Although many lawyers might blanch

100. *Id.*, Rule 7.4.
101. *Id.*, Rule 7.4(a).
102. *Id.*, Rule 7.4(b).
103. *Id.*, Rule 7.4(c).
104. *Id.*, Rule 7.1(b).
105. *Id.* at 186.

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at the idea of advertising this sort of information, consumers would certainly find the information relevant when choosing a particular lawyer. A sophisticated consumer seeking a lawyer can find out the lawyer's previous successes or failures through informal channels, such as business discussions or social gatherings. Less sophisticated consumers, without access to these channels, are effectively denied this information because of the prohibition.

A second area in which the proposed rules maintain unjustified restrictions is lawyer specialization. The proposed rules prohibit lawyers from advertising unless their practice lies within narrow categories, or unless their practice lies within a state that permits open specialization.[106] As mentioned above, Montana's rules forbid a lawyer from holding himself out as a specialist. Consequently, adoption of the proposed rules in Montana would not ease specialization restrictions here.

B. *Specialization Programs in Other States*

States that have specialization programs generally follow one of three models: strict certification (California plan), self-identification (New Mexico/Florida plans), or a mixture of both (ABA Model plan).[107]

The California plan, established as a pilot program in 1973, only permits specialization in taxation, family law, worker's compensation and criminal law.[108] To become certified a lawyer must practice in the field for three years, pass an examination, receive acceptable peer ratings, attend continuing legal education and continue to concentrate in the field.[109] In contrast to California's rigorous certification requirements, New Mexico and Florida require no examination or board approval.[110] Instead, the procedure is one of self-identification. In New Mexico, a lawyer may specialize in one area by filing an affidavit stating that he devoted 60 percent of his practice to the area during the last five years,[111] or he may limit his practice to not more than three areas by publicly stating in which areas he practices.[112] Florida permits a lawyer to designate himself a specialist in not more than three of 20 permissible areas by show-

106. *Id.*, Rule 7.4.
107. As of June 1980 nine states had some program. BULLETIN, *supra* note 69, at 36-42.
108. BULLETIN, *supra* note 69, at 45.
109. *Id.*
110. *Id.* at 45, 49.
111. STATE OF NEW MEXICO CODE OF PROFESSIONAL RESPONSIBILITY CANONS AND DISCIPLINARY RULES, RULE 2-105(B).
112. *Id.*, RULE 2-105(C).

ing that he has substantial experience in the area and that he has attended a minimum amount of continuing legal education.[113] Finally, the ABA Model plan, which has been characterized as a middle course between designation and certification,[114] requires lawyers to have substantial involvement in the area, attend continuing legal education, provide references and pass a written or oral examination, if the state so chooses.[115]

These programs are welcomed efforts to permit lawyers to practice specialization openly. Commentators have explored their relative merits and disadvantages at length.[116] Seldom discussed, however, are faults common to all the programs. First, none offers protection to legal consumers who rely on that apparent expertise. Second, the programs do not allow for various gradations of legal expertise; specialization is all or nothing. Third, since the bar imposes the restrictions on itself, it has an incentive to design them so that competition within the bar is avoided.[117] Finally, bar regulation of specialization, as with other advertising restrictions, rests on the assumption that the bar knows what information consumers consider relevant when shopping for lawyers. No room is left for individual lawyers or consumer groups to explore alternatives.

V. An Alternative Approach: Warranties

Extending warranty liability to lawyers who advertise offers promising solutions to the problems presented above. This section examines the application of this warranty theory to the area of legal advertising and specialization.

Traditionally, warranty liability has not been applied to professionals, in particular lawyers, for three reasons. First, under traditional interpretations of the Uniform Commercial Code, courts have held that express and implied warranties arise only where transactions involve "goods." Since lawyers, like other pro-

113. By-law under the Integration Rule of the Florida Bar, art. XVII, § 4.

114. Bulletin, *supra* note 69, at 26.

115. ABA Model Plan of Specialization, 8.1 through -.4, 10 (1979).

116. After exploring the various programs, a Montana commentator recommended that Montana model its plan after Florida's and the Model Plan. Comment, *Legal Specialization: A Proposal for More Accessible and Higher Quality Legal Service*, 40 Mont. L. Rev. 287, 305 (1979). *See also* Pickering, *Why I Favor the New Mexico Plan*, 48 Fla. B.J. 180 (1974); Davidson, *A Brief for the California Plan*, 48 Fla. B.J. 184 (1974); Adams, *The Florida Plan Is Best*, 48 Fla. B.J. 185 (1974).

117. Huber, *Competition at the Bar and the Proposed Code of Professional Standards*, 57 N.C. L. Rev. 559 (1979) (argues that a major, but unarticulated objective of bar associations is to prevent competition both among those in the profession and from outsiders; also analyzes the anti-competitive aspects of the current code, including restrictions on advertising).

fessionals, provide "services" and not "goods," warranty liability has not been applied.[118] Second, because of the complex and unpredictable nature of law, lawyers have been held only to a duty of reasonable care in conducting their practice.[119] Third, lawyers, as professionals, did not attract clients by advertising.[120] In essence, then, it appears that warranty liability has not been applied to lawyers because lawyers traditionally have not been viewed as members of the market place.

Two commentators, Steinberg and Rosen, argue that the reasons above fail to justify exempting professionals, particularly lawyers, from warranty liability.[121] First, it must be noted that the Uniform Commercial Code does not preclude the extension of warranty liability to professional services.[122] Logic supports this extension by analogy since society's interest in protecting an individual's welfare is independent of how a certain transaction is characterized. The same harm may result whether the transaction involves goods or services.[123] Second, regardless of a transaction's label, the lawyer can better predict the merchantability or effectiveness of his services; therefore, he should stand behind those predictions if he chooses to make them.[124] Third, arguably, consumers rely more on a lawyer's expertise and reputation than on those of a merchant, and advertising by lawyers can only increase this reliance.[125] Fourth, the lawyer generally can bear the loss better than his innocent client.[126] Finally, the argument that law is unpredictable ignores the fact that many advertised services are routine and entail the use of mass-produced forms.[127]

Steinberg and Rosen argue that when a lawyer advertises and triggers consumer reliance, he should be held to have expressly or

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118. Steinberg and Rosen, *Legal Advertising and Warranty Liability: "Let the Lawyer Beware,"* 1978 WASH. U. L.Q. 443, 445 (1978) [hereinafter cited as Steinberg and Rosen].

119. *Id.* at 445-46.

120. *Id.* at 445.

121. *See generally id.* (authors examine in detail the application of warranty liability to lawyers). *See also* S. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-1 through -13 (1980) (discussion of express and implied warranties) [hereinafter cited as WHITE & SUMMERS].

122. Comment 2, U.C.C. § 2-313 (1978 version) states in part:

> [T]he warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract.

123. Steinberg and Rosen, *supra* note 118, at 458.

124. *Id.*

125. *Id.*

126. *Id.* at 458-59.

127. *Id.* at 464.

impliedly warranted his product.[128] To recover under express warranty principles, a consumer must show that the lawyer, in his advertisement, made a promise or an affirmation of fact that became a part of the bargain.[129] Thus, if a lawyer advertises that a client will receive expert, advantageous representation at low cost, then the client is entitled to receive that quality of performance at that cost. Anything short of this expectation would subject the attorney to express warranty liability.[130] To recover under implied warranty principles, a consumer must show that the lawyer's product fails to meet a standard of quality acceptable in the profession.[131] In other words, a lawyer who represents himself as a specialist in a particular area of the law must achieve a level of performance commensurate with that of other specialists in that area.[132]

Steinberg and Rosen do not examine the interplay between warranty liability and the current disciplinary rules on advertising and specialization. However, many of the problems associated with those rules would be solved if warranty liability were imposed in their stead. First, warranty liability is an improvement over the Kutak draft, since it avoids the troublesome ban of statements likely to create unjustified expectations.[133] If a lawyer's advertisement does create an expectation on which a client relies, the lawyer will be held to have warranted his work-product to that client. Consequently, lawyers would be forced to tailor advertisements to avoid the risk of creating unjustified expectations. In certain cases, a disclaimer would be necessary, but the important point is that lawyers would be free to communicate the sort of information that consumers find important.

Second, extending warranty liability to lawyers who advertise makes specialization restrictions unnecessary. If a lawyer advertises that he specializes in estate planning, he will be held to have warranted that the client will receive a commensurate level of performance. To prevent liability, lawyers would not advertise abilities they did not possess. Conversely, they could publicize whatever level of expertise they have achieved, thus avoiding the

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128. *Id.* at 466. Express and implied warranties are treated at length by numerous authorities. *See e.g.*, Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30 (1978); WHITE & SUMMERS, *supra* note 121. For the purpose of this comment, an express warranty may be said to arise when a seller creates his own standard against which his product will be judged. An implied warranty of merchantability, on the other hand, arises by reference to standards found generally in the trade.

129. U.C.C. § 2-313 (1978 version) (by analogy this section may be applied to lawyers).

130. Steinberg and Rosen, *supra* note 118, at 466.

131. U.C.C. § 2-314 (1978 version) (by analogy this section may be applied to lawyers).

132. Steinberg and Rosen, *supra* note 118, at 464.

133. *See* text accompanying notes 104-05 *supra*.

"all-or-nothing" flaw created by current specialization programs.[134]

Finally, through warranty actions, consumers themselves would monitor legal advertising and specialization, rather than third-party bar associations. This prevents bar associations from using advertising disciplinary rules to reduce competition within the bar.[135] Consumer enforcement also avoids the problem of the bar's natural reluctance to discipline its own members. Admittedly, finding one lawyer to sue another lawyer may be difficult, but the problem should not be overstated. The increasing number of legal malpractice suits in recent years suggests that lawyers are not unwilling to sue other lawyers.[136]

Warranty liability, then, provides an effective method for regulating lawyer advertising that neither impedes the flow of useful information to consumers, nor infringes on lawyers' First Amendment rights. It should be noted, however, that Montana consumers would be protected from false or misleading legal advertisements even if advertising disciplinary rules were abolished and warranty liability was not extended to lawyers. Currently, a state statute provides that a lawyer may be criminally liable if he purposely or knowingly makes a false or deceptive statement to the public for the purposes of promoting the sale of his services.[137] Also, Montana's Unfair Trade Practice and Consumer Protection Act makes unlawful any deceptive act or practice. This includes the advertising of services for sale.[138]

VI. CONCLUSION

Montana's restrictions on lawyer advertising and specialization fall within the Canon entitled, "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available."[139] Despite this laudable goal, the restrictions have the opposite effect; they needlessly restrict the flow of useful information to consumers while at the same time thwarting competition among lawyers and infringing upon First Amendment rights. Because the proposed rules contained in the Kutak draft are less restrictive, their adoption would somewhat ameliorate this effect. Nevertheless, the Kutak draft contains its own set of questionable

134. *See* text accompanying notes 116-17 *supra*.

135. *See* note 117 *supra*.

136. There were more reported appellate legal malpractice decisions in the last 15 years than in the preceding 70 years. R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 14 (1977).

137. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 45-6-317(1)(b) (1981).

138. MCA § 30-14-103 (1981).

139. MONTANA CANONS OF PROFESSIONAL ETHICS, CANON 2 (1980).

rules. The solution to problems associated with lawyer advertising and specialization does not lie in better regulation by bar associations. Instead, it lies in removing bar associations from the entire area and providing consumers with the necessary tools to protect themselves.

APPENDIX

The rules regarding advertising and specialization contained in the proposed final draft of the Model Rules of Professional Conduct (Kutak draft) read as follows:

RULE 7.1 *Communications Concerning a Lawyer's Services*

A lawyer shall not make any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

RULE 7.2 *Advertising*

(a) Subject to the requirements of Rules 7.1 and 7.3(b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact.

(b) A copy or recording of an advertisement or written communication shall be kept for one year after its dissemination.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule.

. . . .

RULE 7.4 *Communication of Fields of Practice*

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

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

(b) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a sub-

stantially similar designation; and

(c) [Provisions on designation of specialization of the particular state].