

January 1991

## Attorney Advertising in Montana: The Peel Decision and the Growing Need for a State Certification Program

Kevin S. Jones

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

---

### Recommended Citation

Kevin S. Jones, *Attorney Advertising in Montana: The Peel Decision and the Growing Need for a State Certification Program*, 52 Mont. L. Rev. (1991).

Available at: <https://scholarworks.umt.edu/mlr/vol52/iss1/6>

This Note is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

# NOTE

## ATTORNEY ADVERTISING IN MONTANA: THE *PEEL* DECISION AND THE GROWING NEED FOR A STATE CERTIFICATION PROGRAM

Kevin S. Jones\*

### I. INTRODUCTION

The United States Supreme Court extended first amendment protection to attorney advertising in 1977, holding that it is a form of commercial speech subject to very limited state regulation.<sup>1</sup> Subsequent decisions have continued to limit the circumstances that justify state regulation of attorney advertising. As a result, state rules on attorney advertising have changed constantly. This trend likely will continue. In 1990, the Court further limited state authority to place blanket restrictions on attorney advertising methods in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*.<sup>2</sup>

The *Peel* decision will force several states to rewrite their rules on attorney advertising to bring them in line with the decision's limits on state regulations that prohibit or restrict advertising of specialties and certifications.<sup>3</sup> Other states, including Montana, should consider a state program to certify legal specialties, or at least a program to approve certifying organizations.<sup>4</sup> This note will discuss the history of attorney advertising and the *Peel* decision. It

---

\* The author wishes to thank University of Montana School of Law Professors David J. Patterson and Larry M. Elison for their comments on this note. Any errors or omissions, however, are the author's alone.

1. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

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

3. At the time *Peel* was decided, twenty-eight states and the District of Columbia placed an absolute ban on the advertising of lawyer certifications, except the traditionally exempted areas of patent, trademark and admiralty law. Gibbons, *The Right to Specialize*, A.B.A. J., May 1990, at 57, 59.

4. At the time *Peel* was decided, Montana was one of just seven states with no ban on the advertising of lawyer certifications. Fifteen states had programs to certify or approve lawyer certifications. Gibbons, *supra* note 3, at 59.

will also discuss *Peel's* ramifications on the Montana Model Rules of Professional Conduct relating to attorney advertising, and the growing need for a state program to certify attorney specialties or approve certifications.

## II. HISTORY OF ATTORNEY ADVERTISING

### A. *Attorney Advertising Prohibited*

The notion that attorney advertising was somehow unprofessional originated in England in the early years of the bar.<sup>5</sup> The young men who studied and practiced law in England were generally sons of wealthy parents and did not have to worry about earning income.<sup>6</sup> They regarded the practice of law as a form of public service rather than an occupation, and looked down on all forms of trade.<sup>7</sup> This sense of dignity was carried to America by young attorneys who studied abroad.<sup>8</sup>

Until the twentieth century, however, attorneys in most states could advertise their services and solicit clients. Although some states began to prohibit attorney advertising late in the nineteenth century,<sup>9</sup> a nationwide restriction was not adopted until the American Bar Association (ABA) published its Canons of Ethics (Canons) in 1908. Canon 27, pertaining to attorney advertising, stated that "solicitation of business by circulars or advertisement, or by personal communications, or interviews, not warranted by personal relations, is unprofessional."<sup>10</sup>

The ABA issued its first formal opinion on attorney advertising in 1924.<sup>11</sup> That opinion provided in part: "Any conduct that tends to commercialize or bring 'bargain counter' methods into the practice of law, lowers the profession in public confidence and lessens its ability to render efficiently that high character of service to which the members of the profession are called."<sup>12</sup> Canon 27 was eventually amended to allow attorneys to list themselves in telephone and legal directories.<sup>13</sup> Even the amended Canon 27, however, prohibited attorneys from using listings that were

---

5. H. DRINKER, *LEGAL ETHICS* 210 (1953).

6. *Id.*

7. *Id.*

8. *Id.*

9. See DRINKER, *supra* note 5, at 210, and C. WOLFRAM, *MODERN LEGAL ETHICS* 776-78 (1986) for a look at early state moves to prohibit attorney advertising.

10. CANONS OF ETHICS Canon 27 (1908).

11. ABA Comm. on Professional Ethics and Grievances, Formal Op. 1 (1924).

12. *Id.*

13. ABA Comm. on Professional Ethics and Grievances, Formal Op. 284 (1951).

“distinctive.”<sup>14</sup>

The Supreme Court upheld state authority to prohibit or restrict advertising in a series of early cases.<sup>15</sup> According to the Court, states could regulate advertising without violating the first amendment because advertising was economically, not politically, motivated.<sup>16</sup> The ABA adopted the Model Code of Professional Responsibility (Code) in 1969. Canon 2 of the Code included most of Canon 27’s prohibitions on attorney advertising, giving states almost complete authority to prohibit advertising.<sup>17</sup>

### B. *Erosion of the Prohibition on Advertising*

The Court invited challenges to state prohibitions on attorney advertising in a series of cases in the mid-1970s. In 1975, the Court decided *Goldfarb v. Virginia State Bar*,<sup>18</sup> a case involving bar association restraints on commercial practices. The Court held that the Virginia State Bar violated the Sherman Act’s prohibition on price-fixing when it permitted the use of minimal fee schedules for its members.<sup>19</sup> The Court attempted to limit the effects of its holding by specifically noting that the decision was not intended to weaken state authority. The Court stated:

The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been “officers of the courts.” In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no dim-

14. *Id.*

15. *See, e.g.,* *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935).

16. In *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), the Court differentiated between protected first amendment speech and “purely commercial speech,” upholding a New York sanitary code prohibiting distribution of commercial and business advertising materials in the city streets. In *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 612 (1935), the Court held valid a state regulation preventing dentists from advertising their professional superiority, prices, and guaranteed work. According to the Court, states had the authority to protect the community from deceptive advertising and advertisements that tended to lower the standards of a profession.

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1969). See Note, *Lawyer Advertising and Specialization in Montana: An Alternative Approach*, 43 MONT. L. REV. 131 (1982) (authored by Duncan Scott) for a look at the Montana rules on advertising under the Code.

18. 421 U.S. 773 (1975).

19. *Id.* at 792. The petitioners tried unsuccessfully to find an attorney who would examine a property title for less than the fee prescribed in a minimum fee schedule published by the county bar association and enforced by the Virginia State Bar. The petitioners alleged that enforcement of the minimum fee schedule constituted price-fixing in violation of section 1 of the Sherman Act. *Id.* at 775-8.

inution of the authority of the State to regulate its professions.<sup>20</sup>

The decision in *Goldfarb* nonetheless raised questions about the organized bar's authority to prohibit attorney advertising. In response to *Goldfarb*, the ABA made minor amendments to the Code provisions relating to advertising.<sup>21</sup>

Later in 1975, the Court's decision in *Bigelow v. Virginia*<sup>22</sup> modified the commercial speech doctrine and changed the course of attorney advertising. In *Bigelow*, the Court classified advertisements that conveyed information or stated an opinion as constitutionally protected communications.<sup>23</sup>

The fact that the particular advertisement . . . had commercial aspects or reflected the advertiser's commercial interest did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or "solicitations," . . . or because appellant's motive or the motive of the advertiser may have involved financial gain. The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."<sup>24</sup>

In 1976, the Court expanded *Bigelow* in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>25</sup> holding that a state must have a compelling interest in regulating a profession's advertising before it can do so without violating the first amendment.<sup>26</sup> The Court went on to clarify state authority in this area.

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible . . . .

---

20. *Id.* at 792-93 (citations omitted).

21. WOLFRAM, *supra* note 10, at 777-78. In August, 1976, the ABA amended the Model Code to allow advertising of additional information in approved law lists.

22. 421 U.S. 809 (1975).

23. *Id.* at 819. In *Bigelow*, the editor of a weekly newspaper was convicted of violating a Virginia statute making it a misdemeanor to encourage the processing of an abortion by the sale or circulation of a publication. The editor had published an organization's advertisement announcing low-cost placements for women with unwanted pregnancies in accredited hospitals and clinics in New York, where abortions were legal and there were no residency requirements. *Id.* at 811-12.

24. *Id.* at 818 (citations omitted).

25. 425 U.S. 748 (1976). Consumers of prescription drugs brought suit against the Virginia State Board of Pharmacy and its members challenging a Virginia statute that declared the advertising of prices for prescription drugs by licensed pharmacists "unprofessional conduct." *Id.* at 748.

26. *Id.* at 770-71.

... provided they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.<sup>27</sup>

The Court's analysis in *Virginia State Board of Pharmacy* formed the modern commercial speech doctrine and encouraged challenges to the Code's still highly prohibitive restrictions on attorney advertising.

### C. *Bates and its Progeny*

The Court ultimately rejected the bar association's argument that attorney advertising should not be included under the new commercial speech doctrine.<sup>28</sup> In *Bates v. State Bar of Arizona*, the bar association advanced six justifications for the state's ban on attorney advertising.<sup>29</sup> The Court was not persuaded by the bar's position and refused to accept these justifications.<sup>30</sup> The Court also noted that "the ban on attorney advertising originated as a rule of etiquette and not as a rule of ethics."<sup>31</sup> The Court refused to uphold the ban, stating that "habit and tradition are not themselves an adequate answer to a constitutional challenge."<sup>32</sup>

The *Bates* decision clearly marked the end of blanket prohibitions on attorney advertising. States did, however, retain authority to employ regulations consistent with the commercial speech doctrine.<sup>33</sup> States could prohibit advertising that was false, deceptive, or misleading.<sup>34</sup> The time, place, and manner of the advertisements could be regulated if the restrictions were reasonable.<sup>35</sup>

The Court further defined the parameters of state regulation of attorney advertising in a pair of 1978 cases. In *In re Primus*,<sup>36</sup> the Court distinguished speech that solely proposed a commercial

27. *Id.*

28. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

29. *Id.* at 368-79. The bar association's justifications for the ban on attorney advertising included: (1) the adverse effects on professionalism; (2) the inherently misleading nature of attorney advertising; (3) the adverse effect on the administration of justice; (4) the undesirable economic effects of advertising; (5) the adverse effect of advertising on the quality of service; and (6) the difficulties of enforcement. *Id.*

30. *Id.* at 382-83. The Court stated: "In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys." *Id.* at 379.

31. *Id.* at 371.

32. *Id.*

33. *Id.* at 383.

34. *Id.*

35. *Id.* at 384.

36. 436 U.S. 412 (1978).

transaction from speech that involved political expression and association.<sup>37</sup> According to the Court, states could place prophylactic prohibitions on purely commercial speech.<sup>38</sup> When the speech involves political expression or association, however, state authority to prohibit speech is significantly diminished.<sup>39</sup> In *Ohralik v. Ohio State Bar Association*,<sup>40</sup> the Court held that the bar could discipline an attorney for soliciting clients in person for monetary gain.<sup>41</sup> According to the Court, state regulations prohibiting face-to-face attorney solicitation did not violate the Constitution because states had a legitimate interest in preventing the harm caused by the solicitation.<sup>42</sup> The Court emphasized that a "State [did] not lose its power to regulate commercial activity deemed harmful to the public whenever speech [was] a component of that activity."<sup>43</sup>

In 1980, the Court set out a four-pronged test applicable to commercial speech cases in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.<sup>44</sup> The Court first noted the societal interests served by commercial speech and reiterated that the first amendment prohibited complete state suppression of commercial speech.<sup>45</sup> The Court then described the commercial speech test.

The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interest served by its regulation.

....

... At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>46</sup>

In 1982, the Court reinforced these decisions in *In re R.M.J.*,<sup>47</sup> a case involving state regulation of the language and content of

---

37. *Id.* at 437-38.

38. *Id.* at 437.

39. *Id.* at 438.

40. 436 U.S. 447 (1978).

41. *Id.* at 467.

42. *Id.* at 468.

43. *Id.* at 456.

44. 447 U.S. 557 (1980).

45. *Id.* at 561-62.

46. *Id.* at 563, 566.

47. 455 U.S. 191 (1982).

attorney advertisements. The Court summarized the modern commercial speech doctrine, holding:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent deception.<sup>48</sup>

According to the Court, prohibiting the use of legal terms describing areas of legal practice did not serve a substantial governmental purpose because the legal terms were not misleading.<sup>49</sup>

A pair of Court decisions later in the 1980s further narrowed the scope of permissive state regulation of attorney advertising. In *Zauderer v. Office of Disciplinary Counsel*,<sup>50</sup> the Court addressed the propriety of an attorney's advertisements. The Court reiterated that attorney advertising was a form of commercial speech entitled to first amendment protection, and as such could only be regulated under certain narrowly defined circumstances. Advertising that was "not false or deceptive and [did] not concern unlawful activities [could] be restricted only in the service of a substantial governmental interest, and only through means that directly advanced that interest."<sup>51</sup> In *Shapero v. Kentucky Bar Association*,<sup>52</sup> the

48. *Id.* at 203.

49. *Id.* at 206. The attorney was charged with publishing advertisements that listed areas of practice in language other than that specified in the Missouri rules. *Id.* at 191.

50. 471 U.S. 626 (1985). The attorney ran advertisements stating that his clients' "full legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING." *Id.* at 629-30. He also ran an advertisement that featured a line drawing of the Dalkon Shield Intrauterine Device and stated that the attorney was representing women who had suffered injuries resulting from use of the product and was willing to represent women with similar claims. *Id.* The Office of Disciplinary Counsel of the Supreme Court of Ohio alleged the advertisements violated a number of disciplinary rules. *Id.* at 631. The complaint alleged the drunken driving advertisement was deceptive because it appeared to propose contingent-fee representation in criminal cases. *Id.* The complaint also alleged the Dalkon Shield advertisement violated disciplinary rules prohibiting the use of illustrations in advertisements and prohibiting solicitation of legal employment. *Id.* at 631-635.

51. *Id.* at 638 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)). The Court went on to state:

[A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgement of their First Amendment rights.

*Id.* at 647-48.



Court addressed whether a state ban on attorneys' targeted direct mailings violated the first amendment. The Court held that a state may not place a blanket prohibition on targeted direct mailings, and noted that "lawyer advertising cases have never distinguished among various modes of written advertising to the general public."<sup>53</sup> The Court also held that a complete ban on the activity was not justified merely because the mailing was directed at persons known to need legal services.<sup>54</sup>

### III. THE *PEEL* DECISION

#### A. *The Facts*

In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*,<sup>55</sup> the Supreme Court addressed the first amendment limitations on the Illinois Code of Professional Responsibility rules prohibiting an attorney from including references to certifications as a legal specialist in a professional letterhead. Peel, an attorney licensed in Illinois and other states, had a "Certificate in Civil Trial Advocacy" from the National Board of Trial Advocacy (NBTA).<sup>56</sup> Since 1983, Peel's professional letterhead had included a statement referring to the NBTA certification.<sup>57</sup> In 1987, the Attorney Registration and Disciplinary Commission of Illinois (Commission) alleged that the letterhead violated Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility.<sup>58</sup> That rule provided: "A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as 'certified' or a 'specialist.'"<sup>59</sup> Rule 2-105(a) al-

---

52. 486 U.S. 466 (1988). An attorney sought approval from the Kentucky Bar Association's advertising commission for a letter he intended to send "to potential clients who have had a foreclosure suit filed against them." *Id.* at 469. Although the commission did not believe the letter false or misleading, it nonetheless declined to approve the letter. The commission based its decision on a Kentucky Supreme Court rule that prohibited the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." *Id.* at 469-70. The attorney petitioned the Committee on Legal Ethics of the Kentucky Bar Association for an advisory opinion. The committee upheld the commission's decision based on Rule 7.3 of the Model Rules. The Kentucky Supreme Court upheld Rule 7.3's ban on targeted, direct-mail solicitation by attorneys. *Id.* at 469-71.

53. *Id.* at 473.

54. *Id.* at 473-74.

55. 110 S. Ct. 2281 (1990).

56. *Id.* at 2285.

57. *Id.*

58. *Id.* at 2285-86.

59. *Id.* at 2286.

lowed attorneys practicing in patent, trademark and admiralty law to advertise their certifications.<sup>60</sup>

The commission also alleged that Peel's letterhead violated Rule 2-101(b), which stated: "A lawyer's public communication shall contain all information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive."<sup>61</sup> The Commission held a hearing, then recommended censure for a violation of Rule 2-105(a)(3).<sup>62</sup> The Illinois Supreme Court adopted the Commission's recommendation, holding that the first amendment did not protect Peel's letterhead because the reference to the certification was misleading.<sup>63</sup>

### B. *The Plurality Opinion*

To justify interference with an attorney's right to list certifications in a professional letterhead, the reference to the certification must be inherently misleading, or must be of such a potentially misleading character that the statements create a "state interest sufficiently substantial to justify a categorical ban on their use."<sup>64</sup> The Court, in a 5-4 decision, found that Peel's reference to the NBTA certification did not create any actual deception or misunderstanding. The plurality, in an opinion drafted by Justice Stevens, noted that neither the Commission nor the Illinois Supreme Court had censured Peel for a violation of Rule 2-101(b), the rule aimed at preventing misleading statements.<sup>65</sup> The Court relied

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court held that states retained some authority to regulate attorney advertising.

In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. . . .

Advertising that is false, deceptive, or misleading of course is subject to restraint.

*Id.* at 383. The Court has recognized this reservation of state authority in all subsequent cases. In *Peel*, the Illinois Supreme Court concluded that Peel's letterhead was misleading in three ways. First, the statements impinged on the court's exclusive authority to license attorneys because the statements did not distinguish voluntary certification from an unofficial organization like the NBTA from a license from an official organization. Second, the statements implied that Peel possessed superior legal skills, and these statements were subject to state restriction under the decision in *In re R.M.J.*, 455 U.S. 191 (1982). Third, use of the term "specialist" implied that Illinois had formally authorized Peel's certification. *Peel*, 110 S. Ct. at 2286-87.

64. *Peel*, 110 S. Ct. at 2286-87.

65. *Id.* at 2288.

heavily on its holding in *In re R.M.J.*,<sup>66</sup> declaring that states cannot place an absolute prohibition on potentially misleading communications if the communications can be presented in a way that is not misleading or deceptive.<sup>67</sup> The Court held that, because the facts stated in Peel's letterhead were true and verifiable, the reference to the NBTA certification did not create any actual deception or misunderstanding.<sup>68</sup> Accordingly, the public censure was unconstitutional.<sup>69</sup>

Recognizing that truthful statements such as "certification" or "specialist" may not be fully understood by some consumers, the Court nonetheless held that the Illinois rule restricting attorney advertising was "broader than reasonably necessary to prevent the perceived evil."<sup>70</sup> Even if the letterhead potentially was misleading to some consumers, "that potential [did] not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public."<sup>71</sup> The Court also recognized the consumer benefits provided by the advertising of bona fide certifications, noting that "[i]nformation about certification and specialties facilitates the consumer's access to legal services and thus better serves the administration of justice. . . . Disclosure of information such as that on the petitioner's letterhead both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys."<sup>72</sup>

Instead of prohibiting all references to certifications or specialties simply because they may mislead some consumers, the Court suggested that states take steps aimed at minimizing public confusion.

"If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." To the extent that potentially misleading statements of private certification or specialization could confuse consumers, a State might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty.<sup>73</sup>

---

66. 455 U.S. 191 (1982).

67. *Peel*, 110 S. Ct. at 2287.

68. *Id.* at 2288.

69. *Id.* at 2293.

70. *Id.* at 2291 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

71. *Id.* at 2292 (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

72. *Id.* at 2293.

73. *Id.* at 2292 (quoting *Bates*, 433 U.S. 350, 375 (1977); citing *In re R.M.J.*, 455 U.S.

### C. Justice Marshall's Concurring Opinion

Although a majority of the Court voted to overturn the Illinois Supreme Court's censure of Peel, the Court's decision did not endorse overwhelmingly the listing of attorney certifications in advertisements. Only four justices joined in the plurality opinion. Justice Marshall, the fifth and deciding vote, concurred only in the judgment. Unlike the plurality, Justice Marshall believed Peel's letterhead was potentially misleading.<sup>74</sup> Justice Marshall stated that he would allow states to regulate references to certifications to prevent deception or confusion, but would not permit states to completely ban that form of advertising.<sup>75</sup> Justice Marshall concluded that each state should be allowed to decide for itself how to prevent misleading claims of certification or specialty.<sup>76</sup> Following the logic in *Shapero*<sup>77</sup> and *Zauderer*,<sup>78</sup> Justice Marshall suggested that "a State could require a lawyer claiming certification . . . to provide additional information in order to prevent that claim from being misleading."<sup>79</sup>

### D. The Dissenting Opinions

Two justices wrote dissenting opinions. Justice White concluded that Peel's reference to the certification was potentially misleading.<sup>80</sup> According to Justice White, Peel should be required to eliminate the potentially misleading content of his advertisement before circulating it.<sup>81</sup> Justice White would allow states to ban advertisements like Peel's "if they are not accompanied by disclaimers appropriate to avoid the danger [of being misleading]."<sup>82</sup> Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, submitted the other dissenting opinion. Justice O'Connor argued that states could prohibit advertising like Peel's without violating the first amendment because the advertising was inherently misleading.<sup>83</sup> Justice O'Connor believed the reference to

---

191, 201-03 (1982)).

74. *Id.* at 2293 (Marshall, J., concurring).

75. *Id.* at 2295.

76. *Id.* at 2296.

77. 486 U.S. 466 (1988).

78. 471 U.S. 626 (1985).

79. *Peel*, 110 S. Ct. at 2296.

80. *Id.* at 2297 (White, J., dissenting). Justice White agreed with Justice Marshall's conclusion that Peel's letterhead was potentially misleading because consumers could conclude that the certification was sanctioned by the state.

81. *Id.*

82. *Id.*

83. *Id.* at 2299 (O'Connor, J., dissenting).

the certification was misleading because the ordinary consumer could interpret the certification as a state sanction.<sup>84</sup> She asserted that "the public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders [attorney commercial speech] especially susceptible to abuses that the States have a legitimate interest in controlling."<sup>85</sup>

Justice O'Connor also wrote that states were in a better position to monitor the legal profession within their borders and to determine whether statements in attorney advertisements were misleading.<sup>86</sup> Accordingly, Justice O'Connor believed the plurality and concurring opinions improperly involved the Court in an area reserved to the states. She concluded that "[f]ailure to accord States considerable latitude in this area embroils this Court in the micromanagement of the State's inherent authority to police the ethical standards of the profession within its borders."<sup>87</sup>

#### IV. PEEL'S EFFECT ON MONTANA'S MODEL RULES

Montana attorneys are governed by the Montana Model Rules of Professional Conduct (Montana Model Rules).<sup>88</sup> Montana Model Rules 7.1, 7.4 and 7.5 are the only rules relevant to the *Peel* decision, and all three fall within the parameters set out by the Court regarding state restrictions on references to certifications or specialties.

Rule 7.1 (communications concerning a lawyer's services) states in pertinent part:

A lawyer shall not make a 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 . . . .<sup>89</sup>

Rule 7.4 (communication of fields of practice) states in pertinent part:

84. *Id.*

85. *Id.* at 2298 (quoting *In re R.M.J.*, 455 U.S. 191, 202 (1982)).

86. *Id.*

87. *Id.* at 2297.

88. MONTANA MODEL RULES OF PROFESSIONAL CONDUCT (1985) [hereinafter MONTANA MODEL RULES].

89. MONTANA MODEL RULES Rule 7.1 (1985).

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:

....  
 (c) A lawyer who is a specialist in a certain field of law by experience in the field, by specialized training or education in the field, or by certification by an authoritative professional entity in the field may communicate the fact of his or her specialty where such communication is not false or misleading under Rule 7.1. A lawyer may communicate that his or her practice is limited to or concentrated in a particular field of law, if such communication does not imply unwarranted expertise in the field so as to be false or misleading under Rule 7.1.<sup>90</sup>

Rule 7.5(a) (firm names and letterheads) states in pertinent part: "A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1."<sup>91</sup>

The Montana Model Rules do not violate an attorney's first amendment rights under the guidelines set out in *Peel* because they prohibit only misleading communications. Rule 7.4 allows an attorney with a certification to communicate that fact if the communication is not false or misleading. *Peel* permits states to retain some regulatory authority over attorney advertising and communications, particularly when the advertising is misleading or subject to abuse.<sup>92</sup> A state cannot, however, place an absolute prohibition on certain forms of advertising. The Montana Model Rules properly exclude only false or misleading communications.

## V. THE NEED FOR A MONTANA CERTIFICATION PROGRAM

### A. History of Montana's Rule 7.4(c)

The Montana Supreme Court added Rule 7.4(c) to the proposed ABA Model Rules of Professional Conduct<sup>93</sup> when the court adopted the Montana Model Rules in 1985.<sup>94</sup> Two factors influenced the development of Rule 7.4(c): (1) the 1979 Montana Supreme Court decision in *In re Mountain Bell Directory Advertising*;<sup>95</sup> and (2) a United States Department of Justice (Justice Department) letter submitted to the court regarding the proposed

90. MONTANA MODEL RULES Rule 7.4 (1985)(emphasis added).

91. MONTANA MODEL RULES Rule 7.5 (1985).

92. *Peel*, 110 S. Ct. at 2292-93. See also *supra* note 63.

93. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter ABA MODEL RULES].

94. Order Adopting Montana Rules of Professional Conduct, Order No. 84-303 (1985) [hereinafter Order].

95. 185 Mont. 68, 604 P.2d 760 (1979).

ABA Model Rules.<sup>96</sup> A complete understanding of the purpose of Rule 7.4(c) requires a review of these two factors.

In *In re Mountain Bell*,<sup>97</sup> the court addressed a telephone company's plan to include a lawyers guide in its yellow page directory. Under the plan, attorneys in Montana's larger cities had the option of listing themselves in the lawyers guide under thirty-three areas of legal practice.<sup>98</sup> Attorneys could list themselves under particular fields. A disclaimer would appear on each page of the guide, indicating that the attorneys listed under each area of law did not necessarily specialize in those fields.<sup>99</sup>

The court held that the telephone company's plan violated Disciplinary Rule 2-102(A)(5) of the Code, one of the rules relating to attorney advertising in effect in Montana at that time.<sup>100</sup> The court recognized that several attorneys in the state were indeed specialists,<sup>101</sup> but believed the guide would mislead the public rather than help them identify those attorneys with particular expertise. According to the court, the plan was misleading because:

[T]he highly competent lawyers in any branch of legal practice would be lumped without distinction with lawyers of perhaps lesser competence in the same category. No distinguishing factors in the proposed listings would be of any aid to shopping clients in making an intelligent selection. Instead the impression is created that each of the lawyers is of equal ability in the category noted and that each is a specialist in that field.<sup>102</sup>

In addition, the court concluded there was simply no need to identify attorneys' specialties.

[T]here is little or no need for such listings in Montana. . . . By and large our bar in the great majority is composed of general

96. Letter from J. Paul McGrath, U.S. Department of Justice Assistant Attorney General, Antitrust Division, to the Montana Supreme Court (Sept. 21, 1984) (regarding the proposed ABA Model Rules) (copy on file in the Montana Law Review Office) [hereinafter McGrath].

97. 185 Mont. at 68, 604 P.2d at 760.

98. *Id.* at 69-70, 604 P.2d at 760-61.

99. *Id.* at 70, 604 P.2d at 761.

100. *Id.* at 71, 604 P.2d at 761. The court stated:

Canon DR 2-105 . . . provides that a lawyer shall not hold himself out publicly as a specialist, or as limiting his practice, except that lawyers engaged in patent, trademark or admiralty practice may use such terms on his letterhead and office sign; a lawyer's name may be listed in lawyer referral service offices according to fields of law in which he will accept referrals; and a lawyer may distribute to other lawyers or publish in legal periodicals of his availability in a particular branch of practice, not including any representation of special competence or experience.

*Id.*

101. *Id.* at 74, 604 P.2d at 763.

102. *Id.* at 75, 604 P.2d at 763.

practitioners. . . . While some lawyers acquire a reputation for special ability in one or more fields of practice, they do not necessarily limit their practice to such fields. In this situation, a lawyer practicing in any of our cities and towns would feel compelled to list under a dozen or more of the categories proposed.

. . . There is no need for such yellow page listing anomalies since other advertising is permitted.<sup>103</sup>

When the State Bar of Montana petitioned the Montana Supreme Court for the adoption of the ABA Model Rules in 1984, the Justice Department submitted a letter to the court suggesting revisions to particular sections of the proposed rules.<sup>104</sup> Among the suggested revisions were changes in Rule 7.4.<sup>105</sup> The Justice Department argued that the rule, as proposed by the ABA, was overly restrictive.<sup>106</sup> That rule prohibited attorneys from communicating the areas of law in which they practiced.<sup>107</sup> The rule also prohibited attorneys from implying that they were specialists, except in the traditionally exempted areas of patent and admiralty law.<sup>108</sup> The Justice Department believed the ABA Model Rules should prohibit only communications that were false or misleading under Rule 7.1; arguing that:

Information that a lawyer has limited his or her areas of practice, concentrates in particular fields, or specializes in certain types of practice is likely to be extremely useful to consumers of legal services. Such information would assist consumers in deciding which lawyers they may wish to approach about providing a particular legal service and which lawyers they prefer not to consider. In general, there is no apparent reason for prohibiting dissemination of truthful information about lawyers' efforts to specialize or even claims of specialization since such communications contain useful

103. *Id.* at 77, 604 P.2d at 764.

104. McGrath, *supra* note 96.

105. *Id.*

106. *Id.*

107. *Id.* ABA Model Rule 7.4 stated:

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

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

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

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

ABA MODEL RULES Rule 7.4 (1983). The comment accompanying the rule added that "stating . . . that the lawyer's practice 'is limited to' or 'concentrated in' particular fields is not permitted. . . ."

108. ABA MODEL RULE Rule 7.4 (1983).



information and reduce search costs.<sup>109</sup>

The Justice Department's arguments persuaded the court. In justifying the revision to Rule 7.4, the court also cited its decision in *In re Mountain Bell*,<sup>110</sup> and the need for a rule that would allow attorneys to list their areas of specialty in ways that were not misleading.<sup>111</sup> The court stated:

Montana has not adopted a method of certification for specialists in various fields of law. Nonetheless, it is common for lawyers to advertise, especially in the printed media, the areas of practice in which they perform. We find it necessary to formulate a rule which would enable lawyers to specify their expertise in proper instances, in ways that are not false or misleading. Accordingly, we have incorporated in the model rules Rule 7.4(c) . . . .<sup>112</sup>

The Montana Supreme Court adopted one of the most liberal rules regarding attorney advertising of specialties and certifications with the addition of Rule 7.4(c) to the Montana Model Rules.<sup>113</sup>

#### B. *The Problems with Montana's Rule 7.4(c)*

Rule 7.4(c) allows attorneys to communicate their specialties if the communication is not false or misleading under Rule 7.1, and if the attorney: (1) has "experience in the field"; (2) has "specialized training or education in the field"; or (3) is "certifi[ed] by an authoritative professional entity."<sup>114</sup> In its current form, Rule 7.4(c) does not effectively assist consumers seeking attorneys with specialized skills because it does not distinguish legitimate specialists from other attorneys in any meaningful way.

The subjective nature of two of the criteria poses the most obvious problems. First, attorneys can communicate that they are specialists in a given area of law if they have "experience in the field," but no criteria is given to determine the kind and amount of experience required. Are attorneys specialists if they handle one or two cases in a particular area?

Second, attorneys can refer to themselves as specialists if they have "specialized training or education in the field." Although not as subjective as the "experience" requirement, there is still no cri-

---

109. McGrath, *supra* note 96.

110. 185 Mont. 68, 604 P.2d 760 (1979).

111. Order, *supra* note 94.

112. *Id.*

113. See Gibbons, *supra* note 3, at 59. Montana was one of just seven states that placed no restrictions on the advertising of attorney certifications at the time *Peel* was decided. *Id.*

114. MONTANA MODEL RULES Rule 7.4(c) (1985).

terion to establish the kind and amount of training or education required. Are attorneys specialists if they attend one seminar or continuing legal education class in the area?

Certainly the “experience” and “specialized training or education” requirements are plausible ways of establishing whether an attorney is well-suited to handle a case involving a particular area of law. Without any guidelines for determining the specific kind and amount of the experience or training necessary to qualify as a specialist, however, the rule does little to differentiate between attorneys. Consumers cannot identify legitimate specialists. The court created the very problems it attempted to avoid in *In re Mountain Bell*<sup>115</sup> when it included these two requirements without any guidelines.

The third requirement, certification by an authoritative professional entity, is the issue the Supreme Court addressed in *Peel*. Of the three requirements in Rule 7.4(c), certification certainly is potentially the most useful to consumers. Montana, however, does not have its own program to certify specialties, or even a program to approve attorney certifications. Without either of these programs, the Montana rule fails to mitigate the potentially misleading aspects of references to certifications in attorney advertising. Until the Montana Supreme Court revises Rule 7.4(c), the rule will continue to group together attorneys with varying degrees of specialty and fail to assist consumers in their search for attorneys who are truly specialists in a particular field.

### C. *The Need for a State Certification Program*

As Justice O'Connor stated in her dissent in *Peel*, even certifications from legitimate certifying organizations may mislead some consumers.<sup>116</sup> According to Justice O'Connor, the ordinary consumer has little knowledge about legal affairs, and may have difficulty assessing the validity of claims made in attorney advertisements.<sup>117</sup> She asserted, “Merely because something is a fact does not make it readily verifiable. A statement, even if true, could be misleading.”<sup>118</sup>

Justice Stevens also noted the possibility that a certification may prove misleading to some consumers.<sup>119</sup> Justice Stevens, however, stated that this fact alone did not justify state interference

---

115. 185 Mont. 68, 604 P.2d 760 (1979).

116. 110 S. Ct. 2281, 2299 (1990) (O'Connor, J., dissenting).

117. *Id.* at 2299-300.

118. *Id.* at 2299.

119. *Id.* at 2291.

with attorneys' first amendment rights.<sup>120</sup> Justice Stevens also rejected the notion that consumers would fail to differentiate between private certification and formal state sanction.

[I]t seems unlikely that petitioner's statement about his certification as a "specialist" by an identified national organization necessarily would be confused with formal state recognition. . . .

We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television.<sup>121</sup>

Accordingly, Justice Stevens proposed that states screen certifying organizations or require a disclaimer about the standards of the specialty to minimize the potentially misleading aspects of the advertising of certifications.<sup>122</sup> Montana's Model Rule 7.4(c), the rule dealing with attorney certifications, does not include any certification criteria.<sup>123</sup>

A 1985 State Bar of Montana survey indicated that more than half of the attorneys responding to the survey believed the Bar should develop a program to certify attorney specialties.<sup>124</sup> In response to the survey results and the inclusion of Rule 7.4(c) in the newly adopted Montana Model Rules, the Bar's Board of Trustees appointed the Specialization Certification Committee to study the impact of Rule 7.4(c) and the need for a state certification program.<sup>125</sup> The committee developed a comprehensive plan for the certification of attorney specialties. Under the plan, attorneys must meet certain minimum standards before they could classify themselves as specialists in particular areas of law. An applicant would be required to: (1) pay a fee used to finance the program; (2) be licensed to practice law; (3) be in good standing; (4) have substantial involvement in the specialty amounting to at least twenty-five percent of the attorney's total full-time practice during the three years preceding application; (5) have a minimum of ten hours of credit for continuing legal education in the specialty area in each of the three years preceding application; and (6) have the satisfac-

---

120. *Id.* at 2291-92.

121. *Id.* at 2290 (citation omitted). Justice Stevens added: "We prefer to assume that the average consumer, with or without knowledge of the legal profession, can understand a statement that certification by a national organization is not certification by the State, and can decide what, if any, value to accord this information." *Id.* at 2290 n.13.

122. *Id.* at 2292.

123. See MONTANA MODEL RULES Rule 7.4(c) (1985).

124. Hansen, *Results of Specialization/Certification Survey*, MONTANA LAWYER, June 1986, at 14. The accuracy of the survey results were questionable because of the low level of survey participation. Only 164 of the more than 1,600 questionnaires were returned. *Id.*

125. *Id.*

tory recommendation of at least five judges or attorneys familiar with the applicant's competence and qualifications as a specialist.<sup>126</sup> The Bar's Board of Trustees tabled the plan and disbanded the committee at the State Bar's 1989 annual meeting.<sup>127</sup>

The Bar survey results notwithstanding, a large portion of Montana attorneys oppose plans for a state program to certify specialties.<sup>128</sup> Opponents of a certification program fear the program will adversely affect attorneys who are general practitioners, particularly those who practice in small towns near larger Montana cities likely to have attorneys who specialize.<sup>129</sup> Opponents believe consumers are more likely to travel the extra distance to consult an attorney recognized as a "specialist" rather than consulting a local general practitioner. As a result, rural lawyers and other general practitioners would be placed at a competitive disadvantage.<sup>130</sup>

This problem, however, could be minimized if the standards established for specialization were stringent enough. The program could limit the number of attorneys certified as specialists by certifying only those attorneys who devoted a significant portion of their practice to the specific area of law. As a result, attorneys who truly deserve recognition as specialists would be rewarded, and the adverse effects on general practitioners would be minimized.

For the reasons discussed above, the standards established for certification as a specialist should be straightforward, fair, and sufficiently rigid to limit the number of attorneys qualifying for such recognition. Without stringent qualifying standards, attorneys who legitimately concentrate their practice in certain areas and have attained a high degree of expertise in that area cannot distinguish themselves from attorneys who simply want to list themselves as specialists. A certification program without stringent requirements would also create unnecessary confusion among consumers. It would not alleviate the problems created by Montana Model Rule 7.4(c).

If the purpose of a certification program is to identify attor-

126. Gallagher, *Specialization certification*, MONTANA LAWYER, Sept. 1988, at 3, 5. The committee's plan was modeled after the ABA model plan for specialization and from the plan adopted by the State of New Mexico.

127. Telephone interview with Richard Gallagher, Chairman of the Specialization Certification Committee (Oct. 2, 1990). See also *1989 Annual Meeting Notes*, MONTANA LAWYER, Sept. 1989, at 4.

128. Telephone interview with Richard Gallagher, Chairman of the Specialization Certification Committee (Oct. 2, 1990). See also MONTANA LAWYER, Sept. 1988, at 3-6, for a look at two Montana attorneys' discussions of the advantages and disadvantages of a certification program.

129. See Gallagher, *supra* note 126, at 3-6.

130. *Id.*

neys who are truly specialists in a particular area of the law, the program should require a certain level of experience and competence. At a minimum, the plan should require:<sup>131</sup> (1) a specific amount of experience, both in practice in general and within the specialty area specifically;<sup>132</sup> (2) a minimum number of cases handled in the specialty area;<sup>133</sup> (3) a certain level of education or a required amount of time spent in continuing legal education, depending on the certification sought;<sup>134</sup> and (4) submission of an article or brief on the specific area of law, or a suitable score on a written examination. These requirements would effectively limit the number of attorneys qualifying for certification, thus distinguishing true specialists from attorneys less competent in those areas.

## VI. CONCLUSION

The first amendment protects attorney advertising that is not false or misleading, including the advertising of legal specialties and certifications. Although many states will have to revise their rules on attorney advertising to conform to the Supreme Court's decision in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, Montana does not need to modify its Model Rules. The Montana Model Rules only prohibit false or misleading communications, and these communications can also be prohibited by the states under *Peel* without violating constitutionally protected free speech.

Montana Model Rule 7.4(c), however, should be revised to minimize consumer confusion and establish a legitimate system of identifying attorneys who are truly specialists in particular fields of law. Although most Montana attorneys are general practitioners

---

131. No certification program will work perfectly in all situations. There would certainly be instances when the plan proposed here would fail to certify an attorney who did not satisfy one or more of the requirements, but nonetheless deserved recognition as a specialist in a particular field. The requirements proposed here would also prohibit all new attorneys from immediately obtaining certification as a specialist. This plan, however, brings together the most common requirements of state-adopted programs and voluntary certification programs. It should also be noted that many other possible requirements are simply not practical in Montana. For example, the Montana Specialization Certification Committee's proposal to require references from five judges or attorneys is not practical in a state with a small number of attorneys, and would discriminate against rural attorneys with fewer contacts.

132. For example, five years in practice with at least one-third of the attorney's practice devoted to the specialty area over the preceding three years.

133. For example, a minimum of two cases in the specialty area handled to completion in each of the three preceding years.

134. For example, an L.L.M. in the specialty area or a minimum of twenty-five hours in continuing legal education in the three preceding years.

who could not satisfy rigid time and experience requirements, stringent standards would best assist the public. Such standards would allow consumers to identify attorneys who have concentrated their practices on specific areas of the law and have attained a high level of competence in those areas. Like it or not, attorneys are free to advertise specialties and certifications. Montana should adopt a specialization program that best recognizes true specialists and allows consumers to identify them.<sup>135</sup>

---

135. Author's note: The Florida Supreme Court approved amendments to the Florida Bar's advertising regulations in December, 1990. *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So. 2d 451 (Fla. 1990). The new rules, which are among the most stringent in the country, are intended to prohibit advertising that misleads consumers. *Id.* at 455. The amendments prohibit advertisements containing dramatizations, client testimonials, and celebrity spokespersons. *Id.* at 452-53. Among other changes, the new rules also extend the ban on certain forms of personal and direct mail solicitation of clients, prohibit "self-laudatory" statements describing the quality of an attorney's services, and require attorneys to submit all advertisements to the Bar's Standing Committee on Advertising "either prior to or at the time of the first dissemination of the advertising." *Id.* at 453-54. The amended rules went into effect January 1, 1991.

