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THOUGHTS ON SPECIALIZATION AND THE ENGLISH EXPERIENCE

By IRVING E. FASAN*

I

Unless some strong central agency acts as the overseeing agency, development of specialization will likely become so inconsistent and factionalized that it will be beyond redemption in the future and the practice of law, as we know it today, will be lost, as well as will the possibility of ever developing the full potential of specialization.¹

Legal specialization is again a topic of high current interest among American lawyers.² Discussion concerning specialization is not new. As far back as 1954 the House of Delegates of the American Bar Association adopted the following resolution:

RESOLVED:

1. That the American Bar Association approves in principle the necessity to regulate voluntary specialization in the various fields of the practice of the law for the protection of the public and the bar; and
2. That the American Bar Association approves the principle that in order to entitle a lawyer to recognition as a specialist in a particular field, he should meet certain standards of experience and education; and
3. That the implementation, organization, and financing of a plan of recognition to carry out such prin-

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¹ A.B.A. TENTATIVE RECOMMENDATIONS & REPORT [hereinafter cited as TENT. REP.], Separate Statement of C.W. Joiner at 1. The TENT. REP. was approved by the Special Committee on Specialization of the A.B.A. on Sept. 15, 1968.

² A glance at almost any news release or bar journal shows the concern. For example, the General Practice section of the American Bar Association sponsored a panel discussion at the Association's annual meeting in Dallas, Texas in 1969 entitled, *A Specialist Looks at the Future of the General Practitioner*, 14 AM. B. NEWS 3 (May 1969). Meanwhile the Young Lawyers section of the Association has just formed a Committee on Specialization "because of the particular importance of specialization to young lawyers," 14 AM. B. NEWS 7 (Jan. 1969); the Association's Criminal Law section is currently conducting a survey on specialization, 14 AM. B. NEWS 20 (May 1969); and about 25 states are at present considering the question of specialization, 15 PRAC. LAW. 57 (Mar. 1969). Typical of the articles regularly appearing in the bar journals is a recent one by Dean Pedrick, *Collapsible Specialists*, 55 A.B.A.J. 324 (1969). The best single study of the problem is B. Christensen, *Specialization* (Special Report for American Bar Foundation, 1967) [hereinafter cited as *Specialization*] who cites the literature in the area.

ciples is delegated to the Board of Governors, subject to final approval by the House of Delegates.³

A subcommittee of the Committee on Specialization and Specialized Legal Education was then asked to study the matter and it submitted detailed recommendations for establishing and regulating legal specialties, along the lines of the medical profession.⁴ In October of 1954 there was a hearing before the Board of Governors of the American Bar Association to consider the proposed plan of specialization, and, after significant opposition, the plan was not adopted.⁵ Nevertheless, after 1954 a new committee was appointed by the American Bar Association to study specialization and this committee drew up another plan which it in turn distributed to the members of the American Bar Association's House of Delegates in February of 1962. This second [new] plan was then discussed during the annual meeting of the Association in August of 1962, and again there was so much controversy that by August of 1963 the committee reported to the House of Delegates, "that the bar of the country either does not want specialization controlled or is not prepared to accept regulation at this time."⁶ The committee then asked to be discharged without presenting any plan for specialization and the House accepted the committee's suggestion and discontinued it.⁷

Discussion about specialization, however, has continued since 1962 and specialization in fact has continued to grow among all segments of the bar.⁸ Voluntary specialty organizations have also either expanded or been founded.⁹ The organized bar's concern about specialization has not subsided either and so in August of 1967 the American Bar Association's Special Committee on the Availability of Legal Services (McAlpin Committee) recommended to the American Bar Association's House of Delegates

³ TENT. REP. 6.

⁴ Perhaps the medical profession was taken as a model because of the experience in that profession with specialization. The first American medical group which certified specialists was the American Board of Ophthalmology which was founded in 1916 by practitioners with the help of sections of the American Medical Association. By 1933 the American Medical Association had taken the leadership in the matter of medical specialization. G. GREENWOOD & R. FREDERICKSON, *SPECIALIZATION IN THE MEDICAL AND LEGAL PROFESSIONS* 16 (1964).

⁵ V. COUNTRYMAN & T. FINMAN, *THE LAWYER IN MODERN SOCIETY* 723-24 (1966).

⁶ *Id.* at 725.

⁷ *Id.*

⁸ See note 18 *infra*.

⁹ For instance, both The American College of Probate Counsel and the American Trial Lawyers Association have become stronger and larger. The American Academy of Matrimonial Lawyers has quickly grown. Some of the other voluntary specialty groups, either national or local, are: American College of Trial Lawyers, Federal Bar Association, American Patent Law Association, National Association of Claimants Counsel of America, International Association of Insurance Counsel, Illinois Defense Counsel, and the Society of Trial Lawyers of Illinois.

that the Board of Governors again seek to carry out its 1954 resolution regarding specialization.¹⁰ The House accepted this suggestion and resolved:

That the House of Delegates requests the Board of Governors to further consider the matter of recognition and regulation of voluntary specialists in the various fields of the practice of law for the benefit and protection of the public and of the Bar.¹¹

The Board of Governors in turn resolved to establish a new seven member committee to:

[A]ssemble and study information relevant to all aspects of voluntary specialization and, if such committee shall determine that the promulgation of a plan of voluntary specialization is desirable, to prepare such a plan in various fields of the practice of law for consideration of the Board of Governors and the House of Delegates.¹²

Chester H. Smith of Tampa, Florida was named chairman of the committee and it carried on extensive studies and hearings. Then on September 15, 1968 in a report entitled *Tentative Recommendations and Report*¹³ the committee concluded: "[T]hat the promulgation by the American Bar Association of a plan to regulate voluntary specialization in various fields of law on a nation-wide basis is not desirable at this time."¹⁴ This *Tentative Report* was widely distributed. The committee also conducted open hearings on December 5, 1968 and finally in January of 1969 the committee reported to the American Bar Association's House of Delegates at its mid-year meeting the same conclusion it had reached in its *Tentative Report* which was, as just stated, to do nothing at the present time on a national scale regarding the recognition and certification of legal specialties. The House of Delegates adopted this recom-

¹⁰ 106 TRUSTS & ESTATES 1004 (1967) [hereinafter cited TR. & E.].

¹¹ *Id.*

¹² 12 AM. B. NEWS 1-2 (Nov. 1967).

¹³ Note 1 *supra*.

¹⁴ TENT. REP. 1. The report did look forward to state experimentation in the recognition and certification of specialists (2-3); it suggested minimum provisions which any such plan should contain (16-17); and it noted that six states are actively considering plans for certification while at least twenty-five state bar associations have committees studying the matter (15). Dean Joiner disagreed with the conclusion stated in the *Tentative Report* and attached a separate statement suggesting that "[T]he full thrust of the findings and report of the committee calls for the immediate establishment of a body charged with over-seeing the development of specialization in law within defined standards that are sufficiently flexible to permit the kind of experimentation called for in the report." TENT. REP., Separate Statement of Charles W. Joiner 1. Minnesota is now investigating specialization as a result of a recent speech Dean Joiner gave to the Minnesota Bar. 5 TRIAL 5 (Dec.-Jan. 1968-69).

mentation.¹⁵ Thus a decision on a matter of critical importance to the organized bar has again been delayed.¹⁶

II

Certification of specialists, with its added educational, regulatory and ethical requirements, is difficult even in the best organized and disciplined profession. Is it not sobering to ask this question: If the American Bar Association is unable to eliminate substandard law schools, if state bar associations are unwilling to assure to every law school graduate a decent period of internship training, if individual lawyers in half of the

¹⁵ 12 AM. B. NEWS 1 (Feb. 1969).

¹⁶ Such a delay may be quite unwise if Dean Joiner is correct in saying that "[m]ost of what is thought of as bad in medical specialization comes from the failure of the American Medical Association to assume leadership at an earlier time." Joiner, *Specialization in the Law*, 41 A.B.A.J. 1107 (1955). Of course, the organized bar is divided on the merits of specialization, which may or may not be a good reason for the national association's refusal to act now. In 1962 the American Bar Association's section on Taxation voted to oppose certification of specialists, but now the section has no official position. 21 TAX LAW. 451 (1968). The section on Real Property, Probate & Trust Law seems to be against recognition of specialization. 106 TR. & E. 1004 (1967). Sixty per cent of 1,946 lawyers in Wisconsin who responded to a recent inquiry seem to favor some form of specialist designation, 13 AM. B. NEWS 5 (Apr. 1968) while the American Bar Association section on General Practice is very actively opposed to specialization and many other recent trends. The chairman of the latter section recently wrote:

Our readers recognized long before 1962 that a strong effort must be made to preserve the integrity and the historic freedom of the individual lawyers. Emphasis was already being placed upon combatting the unauthorized practice of the law. Encroachments after encroachments were being made, eroding the practice of law which had belonged historically to general practitioners. Efforts were being made to designate "specialists" in the law practice. The GP Section is the one group in the ABA which is dedicated to protect your specific interests as general practitioners. . . . Let me briefly outline to you the alleged (and I repeat "alleged") attempts of encroachments that have been made upon the Canons of Ethics by various persons, agencies, associations, corporations and political parties during the past twenty or thirty years:

1. Legal Aid Clinics
2. Lawyer Referral Plans
3. Federal Anti-Poverty or OEO Legal Programs
4. Unions
5. Automobile Clubs
6. Specialization of Lawyers
7. Prepaid legal expense insurance plans
8. Unauthorized practice of law by realtors, life insurance agents, abstractors, architects, "do-it-yourself wills and trust books," mail order advertising, banks, trust departments, and similar agencies
9. Group Legal Services.

Chairman's Corner, 3 LAW NOTES 1 (July 1967). One wonders whether the foregoing is the actual situation. Lawyer referral plans and certain federal defender systems, for instance, would seem to aid the general practitioner, or at least not harm him; and some form of prepaid legal insurance also ought to be very useful for the non-specialist as well as the specialist. But for more of this same attitude, see Randall, *Specialization*, 3 DOCKET CALL 1 (Mar. 1968). *Group Legal Services, Development of the Para-Professionals, & Certification of Legal Specialists*, 5 LAW NOTES 2 (Jan. 1969).

states want to be free to join or not to join the organized bar, then is the American Bar Association ready to follow the American Medical Association in certifying and regulating specialists?"¹⁷

The first thing to note about specialization in the legal profession is that it already exists.¹⁸ Thus the question which the bar faces is not *what* if anything the bar is going to do about the existence and growth of specialized legal practice but *whether* or not the organized bar is going to do anything *now* about recognizing and regulating legal specialization on a national scale. The issue is also not merely deciding whether or not certification of specialists is "ethical," although the issue is often couched in such language.¹⁹

Since part of the problem underlying specialization concerns the question of who is going to train and certify the specialists and how that ought to be done, the discussion about specialization raises very important questions about legal education.²⁰ The major objection to the recognition of specialization is a

¹⁷ Niles, *Ethical Prerequisites to Certification of Special Proficiency*, 49 A.B.A.J. 85 (1963).

¹⁸ Even though many lawyers still at least pay lip service to the concept that a lawyer can be a jack of all legal trades, the committee finds that in fact modern lawyers cannot be fully proficient and efficient in every field of law, and that most lawyers now clearly accept that fact by self-imposed restrictions on their own practice.

TENT. REP. 8 (1968).

A recent survey conducted by a Committee on Specialization of the California State Bar has indicated a high degree of 'specialization' within the legal profession. The Committee's Preliminary Report reveals that, in the sense that they concentrate their practice in one or a relatively few fields of law, two out of the three attorneys now specialize in fact, without certification. . . . The survey showed that the degree of specialization is not confined to urban areas, although urban lawyers do tend to specialize more. Specialization is closely correlated to firm size.

15 PRAC. LAW. 47 (May 1969).

See also E. SMIGEL, *THE WALL STREET LAWYER* (1964); Yegge, *Time for Specialization*, 3 TRIAL 62 (Aug.-Sept. 1967); Bracken, *Specialization in the Law: A Fact and Not a Theory*, 53 A.B.A.J. 325 (1967).

¹⁹ See note 16 *supra* where the chairman of the American Bar Association's section on General Practice refers to legal aid clinics, lawyer referral plans and so on as "alleged (and I repeat 'alleged') attempts of encroachments that have been made upon the Canons of Ethics by various persons, agencies, associations, corporations and political parties during the past twenty or thirty years." *Chairman's Corner*, 3 LAW NOTES 1 (July 1967).

²⁰ The fact of specialization raises important questions for the law schools, for an essential ingredient of specialization is education. At present, such education can come from three sources — or a combination of them: (1) the law schools themselves, (2) continuing legal education programs operated by the bar, or (3) from experience in practice. The law schools, speaking generally and therefore excepting such programs as New York University's graduate federal taxation course and Southern Methodist University's summertime short course in Oil and Gas Law, have contented themselves with the traditional two or three day institute, not markedly different in quality or content from bar sponsored institutes. We doubt, however, that this legal equivalent of the war time courses for "ninety-day wonders" will suffice to meet the needs of the bar, and beyond that, of society The law schools would be both remiss in their duty and neglectful of an op-

concern that such recognition will seriously affect the economic status of the general practitioner.²¹ Another aspect of the problem of specialization is the economic condition of the bar, and, insofar as this situation is affected by the number of attorneys in the country, the discussion about specialization raises important questions about the number and quality of law schools now in existence and the present value of bar admission procedures.²² Finally, the controversy about the recognition and certification of legal specialties comes at a time when the bar is full of ferment about many other important problem areas, such as group legal services, legal insurance, the unauthorized practice of law, the use of so-called para-professionals and the corporate practice of law, which problems are themselves interwoven more or less with the matter of specialization.²³ Thus the controversy about specialization has involved the organized bar in a discussion with itself about improving the quality of legal practice and the income of the profession at a time when there is also a searching and critical review of many other major problem areas in the profession.²⁴

In considering the relationship between specialization, the quality of legal services and the income of the profession — in other words, in trying to come to grips with some of the underlying problems involved in the matter of specialization — one can assert as an initial proposition that while there is little doubt that the practice of law is in some ways more intellectually

portunity if they should turn their backs on this phase of legal education.

ASSOCIATION OF AMERICAN LAW SCHOOLS, 1968 ANNUAL MEETING, PART ONE: REPORTS OF COMMITTEES AND PROJECTS, §2 at 14-15.

²¹ "The most frequently voiced objection to regulation of specialization presented to our committee was its supposed harmful effect upon the sole practitioner and the small partnership in rural areas." TENT. REP. 20.

²² "To take the bar examination, you grind and you grind, you learn a lot of hornbook black letter law, and you pass the examination the first, second or third time. Does it have anything to do with your competence to really practice?" *Panel Discussion on Specialization in the Law*, 22 TAX LAW. 78 (1968), 8 Dean Williard Pedrick speaking.

²³ The controversy about group legal services has been the most acute. The section on the subject in the preliminary draft of the CODE OF PROFESSIONAL RESPONSIBILITY (Jan. 15, 1969) evoked the most responses from the bar and that section has now been amended in the final draft of the CODE (July 1, 1969). See 14 AM. B. NEWS 1 (July 1969). Almost every recent issue of the *American Bar Association Journal* has contained an article on group legal services.

²⁴ Change is of course taking place.

The first experiment in prepaid legal insurance has begun in Clackamas County, Oregon. 50 CHI. B. REC. 111 (1968). For an excellent article on this topic see Stolz, *Insurance for Legal Services: A Preliminary Study of Feasibility*, 35 U. CHI. L. REV. 417 (1968). See also Christensen, *Aids in Meeting Legal Expenses*, 35 FORDHAM L. REV. 383 (1969). The American Bar Association has also just created a Special Committee on Lay Assistants for Lawyers, 14 AM. B. NEWS 15 (Jan. 1969). Dean Yegge sees clearly that specialization will entail a change in law teaching, a change in bar admission procedures and a willingness to use more para-professionals for routine tasks. Yegge, *Time for Specialization*, 3 TRIAL 62 (Aug.-Sept. 1967).

demanding than the practice of medicine, there is even less doubt that the formal education of lawyers is rather inadequate, especially in comparison with the training of a board certified medical specialist.²⁵ It has also been a fact for some time now that lawyers have been making less money than doctors, particularly in the early years of practice.²⁶ This discrepancy in income, however, is no doubt tied to a discrepancy in training, since it is also a fact that a man who has completed four years of medical school plus an internship and then an additional three or more years of a residency to become a board certified specialist is an efficient and capable professional, whereas a person who has finished only three years of law school in a course of studies which is for all practical purposes totally divorced from the actual practice of law, is not competent to do very much of anything in the law except perhaps some research.²⁷ Thus, there is

²⁵ These comments [about specialization] are the product of a series of shocking experiences met by the writer after twenty years' practice devoted primarily to trust and estate matters with a large metropolitan law firm. About twenty months ago I moved to 'the other side of the table,' taking a position as an officer of a substantial New York City trust institution. Here, I met in a month more members of the probate bar than I formerly encountered in a year. It has been a source of deep concern to find how few of these attorneys discharge adequately the responsibilities laid on them by their clients.

Anonymous comment by a reader in 107 TR. & E. 892 (1968). Note also the following comment:

The actual situation [concerning admission to the practice of law] is that neither the tests of the state nor those of the law schools serve to prevent incompetents from flooding the profession. . . . [T]here can be little question but that, in spite of all recent efforts to raise bar examination standards, more incompetents are to-day admitted to the bar than when, under laxer formal requirements for admission and a far smaller development of good law schools than we now possess, the generality of actual applicants nevertheless received a sound training in the office of an old-fashioned practitioner.

A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 59 (1921) [hereinafter cited as REED]. One of the many persons who received this "sound training in the office of an old-fashioned practitioner" was John Adams, a quiet under-appreciated founding father. See 1 L. KINVIN WROTH & H. ZOBEL, LEGAL PAPERS OF JOHN ADAMS lii-xciv (1965). See also E. LEVI, 4 TALKS ON LEGAL EDUCATION (1952); Luhnnow, *Legal G.P.'s or Professionals?* 106 TR. & E. 984 (1967); Mueller, *The Movement for Law Centers*, 39 J. AM. JUD. SOC'Y 134 (1956); Allen, *Is Legal Education Relevant to the New World*, 12 LAW QUADRANGLE NOTES 13 (1968).

²⁶ "The income of lawyers on the whole, has been so depressed for so many years that there has been little need for a bar association that seeks economic improvement of the profession to draw well-defined income targets." Cantor, *Economic Targets for Lawyers*, 52 A.B.A.J. 754 (1966). See also B. BETHEL REPORT OF THE 1964 ECONOMIC SURVEY OF THE LEGAL PROFESSION IN ILLINOIS (1964). Physicians and surgeons practicing alone averaged \$22,370 in 1965 and \$23,922 in 1966 while those who were in partnerships averaged \$30,337 in 1965 and \$31,380 in 1966. Lawyers who were sole practitioners averaged \$10,378 in 1965 and \$10,750 in 1966 whereas lawyers in partnership averaged \$22,213 in 1965 and \$23,124 in 1966. TAX COORDINATOR, Dec. 5, 1968. But see Katzman, *Economically Speaking . . . Is Legal Education Worth the Price?* 54 A.B.A.J. 979 (1968) and Utley, *Rising Starting Salaries: Bane or Blessing*, 55 A.B.A.J. 660 (1969).

²⁷ The failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly . . . [T]here is nothing in American

clearly a need, which is being slowly recognized and more slowly filled, for more legal training of a specialized and practical nature after the present three year law school course, both to improve the quality of legal work and to increase the income of the legal profession. In other words, there is an urgent need for legal specialization.

At this point in the public discussion about specialization, one would think that a few propositions would be now almost beyond dispute, such as the following:

1. A properly regulated program of specialization will improve the quality of legal services available to the public²⁸ and may well reduce the cost of such services, while also increasing the specialist's income.²⁹
2. Even though the entire field of law cannot today be broken down into special groups and programs set up to train people therein, there are some specialties which are reasonably clear and which could be cer-

legal education that corresponds in any way with the elaborate clinical facilities or shop work provided by modern medical and engineering schools. Nor, so far as the writer is aware, is there any foreign country in which education for the practice of the law is so largely theoretical as it is in America.

REED, *supra* note 25, at 281. But see REED, ch. 24 for an excellent discussion of why American law schools need not be as practical as the English and why the clinical approach may not be applicable to legal education.

[I]t is undeniable that the need of practical training in the application of one's theoretical acquirements is not so absolutely imperative in law as, for instance, in medicine. Except possibly in murder trials, young lawyers at least do not kill their clients by their mistakes The need for quick decisions, without opportunity to consult authorities, arises less often.

Id. at 281-82. See also Voorhees, *Law Office Training: Introduction to Specialized Practice*, 14 PRAC. LAW. 49 (Mar. 1968) for a discussion of how a law firm can do its own training of specialists. The American Bar Association section of Judicial Administration has proposed a model rule to permit law students to practice under proper safeguards in connection with clients who are unable to pay, which rule is also "to encourage law schools to provide clinical instruction in trial work of varying kinds." 50 CHI. B. REC. 171 (1969). On May 27, 1969 the Illinois Supreme Court adopted new rule 711 which will permit senior law students to perform certain legal services under supervision in a legal aid bureau, a public defender office or a state or municipal law office. 57 ILL. B. J. 882 (1969).

²⁸ "The only really remarkable thing about this aspect of the subject is the continued refusal of some lawyers to acknowledge that better quality legal services can be made available to the public through specialized practice than can be provided by general practice." SPECIALIZATION 4.

²⁹ "According to one commentator, statistics for a recent 15-year period — a period characterized by tremendous growth in specialized medical practice — reveal that while doctors' real incomes increased substantially, the prices of doctors' services actually fell relative to the general price level." DeForest, *Do Doctors Have the Answers to Lawyers' Economic Problems?* 48 A.B.A.J. 443 (1962). Critics of the English system of specialization by means of a divided profession say that this system increases the cost of legal services by forcing much duplication of work — once by the solicitor and then again by the barrister, as he goes over the material the solicitor gives him. Q. JOHNSTONE & D. HOPSON, *LAWYERS AND THEIR WORK* 391-92 (1967) [hereinafter cited as JOHNSTONE & HOPSON].

tified on a national basis, such as

- a. Taxation
 - b. Civil litigation
 - c. Patent law
 - d. Matrimonial or family law
 - e. Criminal law
 - f. Probate or estate planning
 - g. Real property.³⁰
3. Certification of specialties ought to be on a national basis.³¹
 4. Specialization should not be on a self-selective basis.³²
 5. Assuming it to be a fact that certification of specialties will take business away from non-specialists, when one balances the good to the public and to the profession which certification will bring against the injury to the non-specialists which may result, the good of the public and of the profession as a whole surely ought to predominate.³³

³⁰While some people try to tell us that lawyers themselves do not think specialty areas can be designated, other evidence indicates that lawyers think and act in terms of specialty areas. Thus Dean Pedrick has said: "At the round table discussion [of the A.B.A. Annual Meeting, section of Taxation on August 6, 1968], one of the propositions to which there was general agreement was that the tax field cuts across too many other substantive fields to be regarded as a specialty in the conventional sense." Pedrick, *Collapsible Specialists*, 55 A.B.A.J. 325 n. 7 (1969). However, in a recent survey of California lawyers "[m]ost of the attorneys responding concentrated their practice in one or more of six broad areas of law, in roughly the following order: (1) negligence; (2) business and corporate matters; (3) estate planings, probate, and trusts; (4) family law; (5) real estate; and (6) criminal law." 15 PRAC. LAW. 47 (May 1969). The Virginia Bar recently prepared a plan which would recognize eleven specialties, although the state supreme court has not yet passed on the matter. 4 TRIAL 4 (Oct.-Nov. 1968).

³¹State certification would cut down the mobility of lawyers at a time when the population is increasingly mobile, and we are in an era of uniform legislation anyway. "On balance . . . it would appear that nationwide uniformity of standards is desirable as a final objective." SPECIALIZATION 37.

³²Surely the public cannot rely upon each person's judgment of his own expertise. Here, however, the English system suggests that self-evaluation may work if it is coupled with selection of the self-styled expert (the barrister) by another professional (the solicitor). While the preliminary draft of the proposed CODE OF PROFESSIONAL RESPONSIBILITY (Jan. 15, 1969) allowed self-certification (§2-105) the final draft of the code has dropped that section.

³³Mr. Christensen states the proposition a bit more gently:

Specialization may threaten the presently existing economic interests and expectations of some lawyers. At the same time, it offers opportunity for economic benefit to others. Furthermore, by equipping the bar to serve the public more effectively, specialization promises to contribute to the future economic well-being of the entire profession and thus to the economic interests of future generations of lawyers. And, most importantly, it offers significant benefits to the public. To what extent, then, is economic self-interest acceptable as a justification for lawyers to continue to practice in ways that do not best serve the public interest and for the bar to protect them in such practice? Does the bar have the right to deny to the public — or to itself — the benefits of specializa-

If the legal profession would at least begin to recognize some specialties, the profession then would be better able to serve the public and be better paid in the bargain.³⁴ The question still remains: what should be the structure of specialization?

III

American lawyers should take a lesson in efficiency from our English legal brothers who maintain a dichotomy between solicitors and barristers. Although to a certain extent we imitate them now, in the future we shall imitate them even more.³⁵

Whenever there is a need to reform an institution it is sometimes useful to look about in space and in time for examples to follow or pitfalls to avoid. Does the English legal profession offer the American bar at this point in its development any useful insights? Since the English experience is so rich and diverse, the better way to state the question is: are there any features of the English legal profession which offer the American bar guideposts at this time as to what developments to encourage and what ones to avoid? And specifically, does the solicitor-barrister system offer the American bar an example to follow, as Dean Yegge has suggested in the quotation at the beginning of this section.

The main point to note is that there are really two legal professions in England not just one as in the United States. These two English legal professions are of course the barristers and the solicitors. The barristers, among other things:

1. have the exclusive right of audience in the high courts of England and are therefore litigation or advocacy specialists;³⁶
2. are also consulting specialists in non-litigation matters;³⁷

tion simply to protect the economic interests of lawyers who cannot and will not adapt their practices to the needs of the times? SPECIALIZATION 12.

³⁴ See REED at 282, 283 & 86.

³⁵ Yegge, *Time for Specialization*, 3 TRIAL 62 (Aug.-Sept. 1967).

³⁶ Lund, *The Legal Profession in England and Wales*, 35 J. AM. JUD. Soc'y. 136 (1952) [hereinafter cited as LUND].

³⁷ Of course the actual situation is not quite so precise. Note the following:

In 1965, the structure of the English legal profession followed no precise logical pattern. Barristers could be specialists or advocates, both or neither. Some solicitors could qualify under either or both of these categories. Even the notion of consultancy did not strictly divide the two branches of the profession, for some solicitors acted in a consulting capacity. There was not even a clear definition of specialization — for among barristers there were some who claimed to be specialists because they were advocates and others who claimed to be specialists because

3. also are not liable for professional negligence;³⁸
4. do not deal directly with a client in any matter at any time except in certain limited criminal defenses;³⁹
5. do not sue clients for fees;⁴⁰
6. do not form partnerships;⁴¹
7. have different training, admission and discipline procedures from solicitors;⁴² and
8. still probably come from a social class different from solicitors.⁴³

The solicitors, on the other hand,

1. have rights of audience only in the county and magistrate courts;⁴⁴
2. handle most of the business which an American lawyer would classify as legal work;⁴⁵
3. are also not liable for professional negligence if they consult a barrister;⁴⁶
4. apparently do not lose their clients to barristers;⁴⁷
5. have training, admission and discipline procedures different from barristers;⁴⁸ and
6. probably still come from a class different from that of the barristers.⁴⁹

Thus, to simplify the facts, one can say that the English legal profession provides a primary attorney (the solicitor) who sees clients, handles the bulk of legal work and has available to him a small group of legal specialists (the barristers) who do not see the general public directly and whom the solicitor thus

their work was concentrated in one particular branch of substantive law.

ABEL-SMITH & STEVENS, *LAWYERS AND THE COURTS* 435 (1967) [hereinafter cited as ABEL-SMITH & STEVENS].

³⁸ *Rondel v. Worsley*, [1967] 1 Q.B. 443 (Ct. of App.).

³⁹ The exception is the so-called "dock defense." B. HOLLANDER, *THE ENGLISH BAR* 51 (1964) [hereinafter cited as HOLLANDER]. A barrister may deal with and agree to represent a person charged of crime if the request and agreement are made in court where the barrister and defendant first meet.

⁴⁰ LUND 136, 138.

⁴¹ HOLLANDER 30.

⁴² See P. ALLSOP, *THE LEGAL PROFESSION* (5th ed. 1960).

⁴³ See generally ALLSOP, *supra* note 42.

⁴⁴ LUND 136.

⁴⁵ See ABEL-SMITH & STEVENS 435.

⁴⁶ "On a matter where there is a reasonable doubt and no want of ordinary care on the part of the solicitor, and he acts under the advice of counsel (i.e., a barrister), the solicitor is not liable in negligence to the client." HOLLANDER 51.

⁴⁷ *Id.* at 22.

⁴⁸ See ALLSOP, *supra* note 42, at 24 and REED, *supra* note 25, at 18. It has been suggested that today the legal training and the requirements for admission of a solicitor are more comprehensive and demanding than are those required of a barrister. JOHNSTONE & HOPSON, *supra* note 29, at 378-81.

⁴⁹ See generally ALLSOP, *supra* note 42.

feels quite free to use since he does not fear the loss of his clients to them. There is no formal certification of specialists. The barristers and solicitors are self-regulating and largely self-educating bodies. Both branches of the profession have deep historic roots, which may not be subject to transplanting, or better said, to grafting.

Keeping in mind the fact that the term solicitor is now used instead of the word "attorney," the English distinction between the barrister and the solicitor (attorney) has its roots in the very early notions that while a party to a law suit must appear in person and can not send a substitute, the party may nevertheless bring with him to court a person or persons who will help him to plead correctly.⁵⁰

Thus pleaders or advocates (*i.e.*, barristers) were recognized at an early date⁵¹ whereas the substitute or attorney (*i.e.*, solicitor) only slowly appeared, at first to act exclusively for the King who would not be able to be at different places at the same time to conduct litigation, then for other parties if the King permitted, but only after formal appointment by a court in a particular case with specific duties in that case and in that case only.⁵² Eventually the authority to appoint an attorney became a matter of right.⁵³ Thus the distinction between a man who appears *for* another (the attorney or solicitor) and a man who comes *with* another and assists him in his law suit (the barrister) is a very old one and is one important explanation for the present-day dual English legal profession, and perhaps *the* most important explanation. Would it then be feasible for the American legal profession to move toward a kind of dual profession along the British lines?

Even granting for the moment that the particular grouping which the British have developed for providing legal services were a sensible way of meeting the legal needs of the United

⁵⁰ F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW*, 211 (2d ed. 1903) [hereinafter cited as POLLOCK & MAITLAND].

⁵¹ "These pleaders [in the King's courts] are referred to in 1235; and from the last half of the thirteenth century there are many evidences of their existence." II W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 313 (3d ed. 1923) [hereinafter cited as HOLDSWORTH]. See also POLLOCK & MAITLAND 215-16; T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 221 (5th ed. 1956).

⁵² But this principle that every suitor may appear in court by attorney is one that has grown up by slow degrees, and, like so many other principles which may seem to us principles of "natural justice," it first appears as a royal prerogative; the King can empower a man to appoint an attorney.

F. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 24 (1954). See also POLLOCK & MAITLAND 212-13; II HOLDSWORTH 315-16; HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 170 (1966). We still use the word "attorney" today in the sense of "substitute" when we speak, for instance of someone who has a power of attorney.

⁵³ Probably during the fourteenth century. VI HOLDSWORTH 432-33.

States today, (or of England for that matter)⁵⁴ there seems at first consideration little chance that the American bar at this date would ever imitate the English profession and establish two groups of legal practitioners. Such imitation is unlikely today because the English dual system has its roots as far back as the thirteenth century and perhaps the dual system continues to exist in England today primarily for that reason alone and not because it is the best method for organizing and providing legal services for the English society.⁵⁵ Indeed there has been a movement for some time in England to merge the English barristers and solicitors into one profession, without, however, much success.⁵⁶ There is also a division of respectable opinion about the efficiency of the dual English system. One observer enthusiastically tells us:

From the writer's unusually long activity as a member of the New York Bar, and in association with barristers and solicitors, he is impelled to put forward his own view that the heat engendered by the client, because of proximity, is communicated to the solicitor, who becomes, quite understandably, a partisan, whereas the interposition of a barrister between the partisan and the judges helps produce that cool and calm climate in which the Court pronounces judgment of "Justice at the highest."⁵⁷

On the other hand the two authors of a recent sociological study of the English legal system concluded, among other things, that:

There has been an almost continuous dissatisfaction with the courts as a means of settling disputes, registered by businessmen over a period of more than a century. The costs, delays, formalities and publicity of court proceedings, and also the personal antagonisms engendered by the English approach to litigation, have led a large segment of the industrial and commercial community to abandon the courts and establish their own tribunals for settling disputes.⁵⁸

It is more important for our discussion, however, to note that the English dual system existed in some measure in colonial America, and one suspects that the same forces that destroyed it then are still at work today so that it is unlikely now that the American bar is going to fashion itself on the English system and take that path toward the growth of a specialized bar.⁵⁹

⁵⁴ See note 55 *infra*.

⁵⁵ There is considerable examination and criticism of the English legal system now going on. See generally ABEL-SMITH & STEVENS, *supra* note 37; JOHNSTONE & HOPSON, *supra* note 29.

⁵⁶ See JOHNSTONE & HOPSON, *supra* note 29, at 385; ABEL-SMITH & STEVEN, *supra* note 37, at ch. 26.

⁵⁷ HOLLANDER 70.

⁵⁸ ABEL-SMITH & STEVENS, *supra* note 37, at 459.

⁵⁹ Christensen suggests, quoting from Roscoe Pound, that the force at work was the power of an expanding democracy which, between 1870 and 1876 "saw the legislative decimation of requirements for admission to law practice. By 1860 thirty of the thirty-nine states had eliminated all requirements for a definite period of preparation for law practice, and requirements had been substantially relaxed in the other nine." SPECIALIZATION 14. "We must concede that our Bar is very large, stubbornly democratic, and only partially organized, and, in some areas, laxly disciplined." Niles,

IV

Religion, law and physic, were designed
 [b]y Heaven the greatest blessing on mankind;
 But priests, and lawyers and physicians made
 These general goods to each a private trade,
 With each they rob, with each they fill their purses,
 And turn our benefits into our curses.⁶⁰

Does the English experience then offer the American bar any insights concerning the structure which specialization might take here? A number of tentative points can be made.

1. Perhaps the American legal profession does not need to do anything at all about the recognition and certification of specialists. The barristers are really all more or less specialists but without having been certified as such and the solicitors know who they are and use them.⁶¹ Thus, the English system indicates to us that one can have a degree of legal specialization without officially recognizing and certifying specialties, while the American experience already indicates that specialization will occur in a fused profession as well as in a divided one. Indeed one argument that is made in England in favor of the fusion of the two legal professions is that fusion would encourage solicitors to specialize more, and would permit barristers, by having direct access to clients, to specialize not just along lines of certain tasks such as advocacy, and in certain areas of legal doctrine such as admiralty but would also permit specialization in particular businesses and client institutions.⁶² The combined English and American experience thus indicates that a divided profession is not absolutely necessary in order to develop real legal specialization, and a division in the profession may indeed impede it. The English experience quite strongly indicates, however, that specialization will not work unless there are some institutional safeguards against loss of the referred client and the American experience confirms this fact in abundance. Thus the American Bar Association's Special Committee on Specialization has reported that any plan of specialization ought to contain, among other things, a rule that:

A certified specialist should not retain the referred

Ethical Prerequisites to Certification of Special Proficiency, 49 A.B.A.J. 83, 84 (1963). But see Professor Chroust's explanation of why the barrister-solicitor division did not take root in America. I A.-H. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* xviii (1965).

⁶⁰ H. FIELDING, PASQUIN, quoted by R. ROBSON in *THE ATTORNEY IN EIGHTEENTH CENTURY ENGLAND* 134 (1959).

⁶¹ ALLSOP 21; HOLLANDER 22. See also G. RADCLIFFE & G. CROSS, *THE ENGLISH LEGAL SYSTEM* 373-74 (1946). There is also some specialization among solicitors. ALLSOP, *supra* note 42, at 29; ABEL-SMITH & STEVENS, *supra* note 37, at 463.

⁶² ABEL-SMITH & STEVENS 435.

client upon completion of the referred matter. He should not again represent the client without the consent of the client's lawyer.⁶³

A minority of the committee disagreed with this proposed rule and suggested that it ought to be that,

A certified specialist should, recognizing that a client has been referred to him for a specific purpose, not take advantage of his position to enlarge the scope of his representation.⁶⁴

It is probably incorrect to think, however, that a mere rule is going to regulate conduct in this area. It is possible that an old and settled custom might control the practice, but there is none in the United States.

In England the institutional safeguard is provided by the long-established custom that barristers cannot have lay clients, and that their only real clients are other professionals (*i.e.*, the solicitor). And one suspects that there are other factors at work in England, too, perhaps a more selective bar along with more economic and social status.⁶⁵ In the United States, however, there will not be any agreement on specialization until some structural safeguard against the loss of the referred client can be developed.⁶⁶

2. The English experience also ought to loosen up our thinking about what a lawyer ought to do, that is to say, what are the things which only lawyers ought to do. The English legal profession today and throughout history has been less

⁶³ TENT. REP. 16.

⁶⁴ *Id.*

⁶⁵ Hopefully some of these matters will be studied further. It has been suggested that the client-loss danger is overrated, although one suspects that the problem in the United States' form of practice could be serious. Note the following: "[T]he client-stealing danger has not prevented provincial solicitors, and increasingly even those in London, from using fellow solicitors as London agents for litigation and other specialized purposes." ABEL-SMITH & STEVENS 435.

⁶⁶ No one would seriously urge, at this point, that the American bar be divided into two branches, with specialists denied all access to clients except by referral from other lawyers. Indeed, the public interest would seem to be best served by preservation and improvement of direct public access to specialists. At the same time, it also appears that full acceptance and effective use of specialization by the American bar will not be possible unless some way is found to assure lawyers that clients they refer to specialists will not be lost as clients.

It is doubtful that lawyers will have any real assurance that clients referred to specialists will not be lost as clients, however, unless specialists are prohibited from accepting other employment from referred clients. Such a restriction limits the client's freedom of choice, of course, and thus is tolerable only if it furthers some public interest of compelling importance. It may nevertheless be that the encouragement of referrals to specialists, thus fostering the growth of specialization, is of sufficient value to the public to justify such a limitation.

SPECIALIZATION 43-44.

concerned about laymen doing so-called legal tasks than we are.⁶⁷ In the United States, for instance in our concentration on controlling the so-called unauthorized practice of law, we may be expending energy on the wrong cause. We have not put our efforts so much toward improving the selection and training of attorneys as we have sometimes worked at attacking, without much real success, our competitors. However, if the number of the bar were less and if the quality of its training through specialization were higher, and if then its economic and social position were improved, the problem of unauthorized practice might be minimized.⁶⁸

3. We come back to the point made earlier, namely that the discussion about specialization quickly involves one in an examination of the nature of the legal profession. A cursory look at the way the English provide for those functions which we refer to as "legal" may lead us to conclude that we need to adopt some significant changes in the way we provide for such services. And perhaps Dean Yegge is correct after all.⁶⁹ Pos-

⁶⁷ For instance, at one time there were men who performed legal functions under supervision of the barristers, the so-called practitioners under the bar. VI HOLDSWORTH 444. Johnstone and Hopson comment that:

Except for the current solicitor concern over public criticism of conveyancing costs, with its suggestions of government or business substitutes for at least some solicitor functions in this field, English lawyers show little worry over competition from outside the profession. One explanation we were given for this was that solicitors are making too much money doing conveyancing to worry about competition in other fields, and the bar has too little outside competition to ever be much concerned about the problem.

JOHNSTONE & HOPSON 489. Of course the English seem to take a much narrower view of what a lawyer ought to do, than the Americans. As we have noted earlier the American bar is slowly moving toward the use of senior students and lay assistants and toward other innovations. For the use of senior students under a new Illinois rule of court see Pinkerton, *Senior Law Student Practice*, 57 ILL. B. J. 882 (1969); on the use of lay assistants, note the following: "In the April, 1969 issue of *Legal Economics News* of the American Bar Association, Bernard Ryan, a member of the ABA Special Committee on Lay Assistants for Lawyers, reported on the widespread use of lay assistants in large law firms and corporate legal departments on the East Coast." Nordberg, *Footnotes & Dicta*, 50 CHI. B. REC. 381 (May 1969). The lay assistants are used for example in office management, the administration of trusts and estates, preparation for litigation and in the preparation of tax returns. *Id.* at 382.

⁶⁸ Christensen has this to say about what we can learn from the English: Perhaps the most obvious conclusion to be drawn from this — and maybe the most significant as well — is that the English legal profession and the American bar face many of the same problems and are now in the midst of much the same kind of transition. Furthermore, the growing tendency of English solicitors to become specialists themselves and to join together in firms of sufficient size to make specialized practice productive would seem to indicate that the parallel development in American law practice is sound. Beyond these two conclusions, the English experience provides two other relevant ideas: (1) if specialists are isolated from the public, generalists may be encouraged to refer difficult matters to specialists; and (2) the job of selecting a specialist may be done effectively by informed generalists. It remains to be seen whether these ideas can be applied to American law practice.

SPECIALIZATION 35.

⁶⁹ See text at note 35 *supra*.

sibly we ought to consider creating a substantially divided profession with a general or primary attorney closely tied to seeing clients and dealing with their broad range of everyday legal affairs and with certified specialists who would have the primary attorney as their clients and be paid by him rather than by his client.

At the level of the primary attorney the bar might want to consider relaxing its notions about partnerships with or among non-attorneys so that the primary attorney could combine with the other professionals who are now providing legal services to the middle and lower classes and therefore improve his competitive position vis-a-vis these men. What might develop would be clusters of general practitioners, accountants, real estate brokers, insurance agents and investment advisers who would group themselves in whatever business form would be most suitable for their needs.⁷⁰

At the level of the specialist we might go one step further than the English have gone and provide a graded system of specialist training. It could be done with the cooperation of the bar, the law schools and those institutions which now provide highly specialized legal services, for example banks, title companies, insurance companies, the large law firms and the various governmental agencies. Is there any reason why they should not see clients? Perhaps at first they should restrict their clients to persons referred to them by primary attorneys, following the English experience.⁷¹ But eventually the bar might also have to consider relaxing its notion that corporations cannot practice law, a notion about which the bar has recently softened its position anyway under the pressure of attorneys who wish to practice in the corporate form in order to gain the tax benefits thereof.⁷²

At any rate the bar needs to think boldly about itself and to do whatever is necessary to make competent legal services available to the public and at the same time to create a bar which fairly shares in the prestige and affluence of the society. We might then be able to avoid Fielding's rebuke!

⁷⁰ The new Code of Professional Responsibility has not moved away from the traditional view in this area, namely that there shall be no partnerships with non-lawyers. Preliminary draft (Jan. 15, 1969) §3-103 and final draft (July 1, 1969) §DR3-103.

⁷¹ It might be easier to enforce such a rule against the institutions than it would be against individuals.

⁷² The final draft (July 1, 1969) of the proposed CODE OF PROFESSIONAL RESPONSIBILITY recognizes and permits the practice of law in the form of a professional association or corporation. §DR2-102 (B) & §EC2-11. The Illinois Supreme Court has just approved the practice of law under the Illinois Professional Association Act; Colorado and Florida also permit such practice and the California Supreme Court gave such approval on November 29, 1968. Nordberg, *Footnotes & Dicta*, 50 CHI. B. REC. 219-20 (1969).

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